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FEDERAL DECISIONS.

14

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports;
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

VOL. XII.

CRIMES—CUTTING TIMBER.

ST. LOUIS, MO.:
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DAVID ATWOOD,
PRINTER AND STEREOTYPEN,
MADISON, WIS.

EXPLANATORY.

1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, *DOE v. ROE*.* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

CERTIFICATE OF APPROVAL.

AVONDALE, NEW JERSEY, September, 1883.

I have examined all the cases on **CRIMES AND CRIMINAL PROCEDURE** which the general editor of "Federal Decisions" has digested, instead of printing them in full under this title. I am quite satisfied that none of these rejected cases require to be printed *in extenso*, either under this title or any other. The complete abstract made of every case sufficiently answers the requirements of this work; and the best judgment has been everywhere exercised by the editor in the selection of cases to be published in full, and digested, respectively.

JOHN D. LAWSON.*

* Author of "Defenses to Crime," "Expert and Opinion Evidence," "Presumptive Evidence," "Usages and Customs," "Leading Cases Simplified," and "Contracts of Carriers."

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ABBREVIATIONS.

| | | | |
|--------------------------------|-----------------|---|------------------|
| Abbott's Admiralty | Abb. Adm. | Lowell | Low. |
| Abbott's U. S. | Abb. | McAllister..... | McAl. |
| Albany Law Journal | Alb. L. J. | McCahon..... | McCahon. |
| American Law Register... .. | Am. L. Reg. | McCrury | McC. |
| Baldwin | Bald. | McLean | McL. |
| Bee..... | Bee. | MacArthur | MacArth. |
| Benedict | Ben. | Marshall..... | Marsh. |
| Bissell | Biss. | Martin..... | Martin (N. C.). |
| Black..... | Black. | Mason | Mason. |
| Blatchford..... | Blatch. | Montana Territory | Mont. T'y. |
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| Blatchford & Howland.... | Bl. & How. | National Bankruptcy Regis- ter | N. B. R. |
| Bond | Bond. | Olcott | Olc. |
| Brewster | Brewster. | Opinions of Attorneys-Gen- eral..... | Opp. Att'y Genl. |
| Brockenbrough | Marsh. | Oregon | Oreg. |
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| Call | Call (Va.). | Overton | Overton (Tenn.). |
| Central Law Journal..... | Cent. L. J. | Paine | Paine. |
| Chase's Decisions | Chase's Dec. | Peters | Pet. |
| Chicago Legal News | Ch. Leg. N. | Peters' Admiralty | Pet. Adm. |
| Clifford | Cliff. | Peters' Circuit Court | Pet. C. C. |
| Colorado Territory..... | Colo. T'y. | Philadelphia Reports | Phil. |
| Connecticut Reports..... | Conn. | Pittsburgh Reports | Pittsb. R. |
| Cooke | Cooke (Tenn.). | Sawyer | Saw. |
| Court of Claims..... | Ct. Cl. | Smith | Smith (N. H.). |
| Crabbe | Crabbe. | Sprague | Spr. |
| Cranch | Cr. | Story | Story. |
| Cranch's Circuit Court.... | Cr. C. C. | Sumner..... | Sumn. |
| Curtis | Curt. | Taney | Taney. |
| Dakota Territory..... | Dak. T'y. | Utah Territory | Utah T'y. |
| Dallas | Dal. | Vermont Reports | Vt. |
| Daveis..... | Dav. | Wallace | Wall. |
| Day | Day (Conn.). | Wallace's Circuit Court | Wall. C. C. |
| Deady | Deady. | Wallace, Jr | Wall. Jr. |
| Dillon | Dill. | Ware | Ware. |
| Federal Reporter..... | Fed. R. | Washington..... | Wash. |
| Fisher's Patent Cases..... | Fish. Pat. Cas. | Washington Territory..... | Wash. T'y. |
| Flippin | Flip. | Wheaton | Wheat. |
| Gallison | Gall. | Wheeler's Criminal Cases .. | Wheeler. |
| Gilpin | Gilp. | Woods..... | Woods. |
| Hempstead | Hemp. | Woodbury & Minot | Woodb. & M. |
| Hoffman | Hoff. | Woolworth | Woolw. |
| Holmes | Holmes. | Wyoming Territory | Wyom. T'y. |
| Howard | How. | Van Ness | Van Ness. |
| Hughes | Hughes. | | |
| Law and Equity Reporter.. | Law & Eq. Rep. | | |
| Legal Gazette Reports | Leg. Gaz. R. | | |

FEDERAL DECISIONS.

CRIMES AND CRIMINAL PROCEDURE.

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- I. GENERAL PRINCIPLES, §§ 1-151.
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- XV. RECEIVING STOLEN PROPERTY, §§ 1102-1117.
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- XVIII. MISCELLANEOUS OFFENSES, §§ 1238-1474.
- XIX. ARREST, §§ 1475-1495.
- XX. PRELIMINARY EXAMINATION, §§ 1496-1509.
- XXI. BAIL, §§ 1510-1597.
- XXII. JURISDICTION, §§ 1598-1758.

- XXIII. TWICE IN JEOPARDY, §§ 1759-1809.
- XXIV. GRAND JURY, §§ 1810-1911.
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 - 1. *In General*, §§ 2045-2209.
 - 2. *Joinder*, §§ 2210-2253.
 - 3. *Conspiracy*, §§ 2253-2313.
 - 4. *Counterfeiting and Forgery*, §§ 2314-2372.
 - 5. *Violation of Internal Revenue Laws*, §§ 2373-2436.
 - 6. *Violation of the Postoffice Laws*, §§ 2437-2506.
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- XXXV. EXTRADITION, §§ 3364-3646.
 - 1. *Foreign*, §§ 3364-3593.
 - 2. *Interstate*, §§ 3594-3646.

I. GENERAL PRINCIPLES.

SUMMARY—*Criminal intent*, § 1.—*Act not an offense at the time it is committed*, § 2.—*Offenses against the United States*, § 3.—*Marital coercion*, §§ 4, 5.—*Married woman indicted as a single woman; plea in abatement*, § 5.

§ 1. The criminal intent necessary to the commission of a public offense must exist when the act complained of is done; it cannot be imputed to a party by a subsequent independent transaction. *United States v. Fox*, §§ 6-8. See § 67.

§ 2. So, though a person obtains goods under false pretenses within a certain time before bankruptcy, he cannot be punished therefor as for an act in fraud of the bankrupt law. *Ibid.*

§ 3. An act committed within a state, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it have some relation to the execution of a power of congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which states alone can legislate. So, though a person obtains goods under false pretenses within a certain time before bankruptcy, he cannot be punished therefor as for an act in fraud of the bankrupt law. *Ibid.*

§ 4. It is doubted by the court whether the defense of marital coercion as a protection to women engaged in the commission of crime has any place in the criminal jurisprudence of the United States. *United States v. De Quilfeldt*, §§ 9-18.

§ 5. Although it may be proper that a woman indicted as a single woman should, if she relies on her coverture, plead in abatement the wrong addition, the failure to so plead it does not preclude her from taking advantage of the defense under the general issue, and she may therefore give evidence, under the general issue, of the fact of marriage, and the other facts necessary to make out marital coercion. *Ibid.*

[NOTES.—See §§ 14-151.]

UNITED STATES *v.* FOX.

(5 Otto, 670-673. 1877.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—Fox was indicted for obtaining goods upon false pretenses within three months before he filed a petition in bankruptcy. He was convicted in the district court, but in the circuit court, upon a motion in arrest of judgment, the judges were divided in opinion as to whether, if a person does a thing which at the time is no offense against the laws of the United States, he is liable to punishment for it by reason of subsequent proceedings in bankruptcy.

§ 6. *What is necessary to constitute an offense against the law.*

Opinion by MR. JUSTICE FIELD.

The question presented by the certificate of division does not appear to us difficult of solution. Upon principle, an act which is not an offense at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection. By the clause in question, the obtaining of goods on credit upon false pretenses is made an offense against the United States, upon the happening of a subsequent event not perhaps in the contemplation of the party, and which may be brought about against his will by the agency of another. The criminal intent essential to the commission of a public offense must exist when the act complained of is done; it cannot be imputed to a party from a subsequent independent transaction. There are cases, it is true, where a series of acts are necessary to constitute an offense, one act being auxiliary to another in carrying out the criminal design. But the present is not a case of that kind. Here an act which may have no relation to proceedings in bankruptcy becomes criminal, according as such proceedings may or may not be subsequently taken, either by the party or by another.

§ 7. *The power of congress to enforce by suitable penalties any of its legislation.*

There is no doubt of the competency of congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of powers with which it is intrusted. And as it is authorized "to establish uniform laws on the subject of bankruptcies throughout the United States," it may embrace within its legislation whatever may be deemed important to a

complete and effective bankrupt system. The object of such a system is to secure a ratable distribution of the bankrupt's estate among his creditors, when he is unable to discharge his obligations in full, and at the same time to relieve the honest debtor from legal proceedings for his debts upon a surrender of his property. The distribution of the property is the principal object to be attained. The discharge of the debtor is merely incidental, and is granted only where his conduct has been free from fraud in the creation of his indebtedness or the disposition of his property. To legislate for the prevention of frauds in either of these particulars, when committed in contemplation of bankruptcy, would seem to be within the competency of congress. Any act committed with a view of evading the legislation of congress, passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States. But an act committed within a state, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States unless it have some relation to the execution of a power of congress or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the state can alone legislate.

§ 8. *Congress has no power to punish an act which, though an offense against the laws of the state, does not appear by the act to be an offense against the laws of the United States.*

The act described in the ninth subdivision of section 5132 of the Revised Statutes is one which concerns only the state in which it is committed; it does not concern the United States. It is quite possible that the framers of the statute intended it to apply only to acts committed in contemplation of bankruptcy; but it does not say so, and we cannot supply qualifications which the legislature has failed to express.

Our answer to the questions certified must be in the negative, and it will be so returned to the circuit court.

UNITED STATES v. DE QUILFELDT.

(Circuit Court for Tennessee: 5 Federal Reporter, 276-286. 1881.)

Opinion by HAMMOND, D. J.

STATEMENT OF FACTS.—The defendant, being arraigned upon an information charging her with counterfeiting coins, pleaded not guilty, and was put upon her trial. She is described in the information simply as "Annie De Quilfeldt, otherwise known as Annie Egbert;" all addition, such as "wife of A. B.," "widow," or "spinster," being omitted. On the trial, a witness, the detective who arrested her, was asked whether she was not living with Charles G. De Quilfeldt, who had just been convicted of counterfeiting, as his wife; whether they, at the time of arrest, called and recognized each other as such, and whether they were not reported to be man and wife among their neighbors. This testimony was, on objection of the district attorney, excluded. There was proof tending to show that, when the defendant was caught in the act of moulding the coins, this man, De Quilfeldt, was either present, or so nearly connected with the act as to shield her under the doctrine of marital coercion, if she be in fact his wife. He was proved to have been engaged in counterfeiting at his house, where this defendant lived with him. The testimony was excluded, as will appear hereafter, on the ground that by pleading over the defendant had waived the defense of coverture. But the court sought to pro-

tect her against the effect of the ruling by offering to allow her to withdraw a juror, enter a mistrial, and then to withdraw the plea of not guilty and plead the want of a proper addition, describing her as married or single, in abatement. Upon being informed that a plea in abatement must be verified by affidavit, her counsel, upon consultation with her, declined to take this course, and she was convicted. She now moves for a new trial for error committed by the court in excluding testimony tending to show that she was married to De Quilfeldt, and raising the presumption in her favor of coercion by her husband.

§ 9. *The defense of marital coercion as a protection to women is not a favored one.*

Before entering upon the consideration of the question whether the testimony was properly rejected, it may be proper to say that this defense of marital coercion as a protection to women engaged in the commission of crime is not a favored one, and, at least in modern times, has almost lost all solid foundation for its existence. It has been abrogated by statute in some states, and might well be in all. 1 Benn. & Heard, Lead. Cr. Cas. (2d ed.), 81, and notes; Steph. Dig. Cr. L. (St. Louis ed., 1878), art. 30, p. 20, and note 2, p. 362. It is almost an absurdity in this day to pretend that husbands can or do coerce their wives into the commission of crimes, and, where coercion appears as a fact, the court or jury would always allow it to mitigate punishment, or it might well be a recommendation to executive clemency; but to hold it to be presumed as a fact, in all cases where the husband is present, is the relic of a belief in the ignorance and pusillanimity of women which is not, and perhaps never was, well founded, and does them no credit. I have had serious doubts whether this common law fiction has a place in the criminal jurisprudence of the United States. Our offenses are purely statutory, and we do not look to the common law, or the law of the states, to furnish us any element or characteristic of an offense. *United States v. Coppersmith*, 4 Fed. R., 198; *United States v. Walsh*, 5 Dill., 58 (§§ 2279-82, *infra*).

This statute against counterfeiting says "every person who falsely makes, forges or counterfeits any coin," etc., shall be punished. It makes no exception in favor of married women, and it may well be doubted if the courts can engraft an exception on the statute. *Commonwealth v. Lewis*, 1 Metc., 151, 153. I am inclined to believe it is the logical result of the doctrine that our crimes are statutory, and that we have no common law of crimes, except so far as the statutes have adopted it, in matters of evidence and practice, that no exemption exists unless congress defines and declares it. The presumption of coercion may be a rule of evidence, but the exemption of the wife on account of it is a rule of law that congress has not declared. I have not found the point discussed, nor any case recognizing this doctrine of marital coercion, in the federal courts. There are cases recognizing insanity and perhaps infancy as a defense, but, generally, the cases are those of common law crimes on the high seas or elsewhere, of which these courts have jurisdiction, and which are defined not by statute, but by the adoption by congress of the common law in its fullest scope. Insanity was recognized as a defense to statutory offenses in *United States v. Shults*, 6 McL., 121, and *United States v. Lancaster*, 7 Biss., 440, and there may be other cases. I am not willing, however, without consultation with my brother judges on this bench, to exclude this defense on that theory, and shall, therefore, for the purposes of this motion, assume that we are to be governed by the common law principle that a wife committing an

offense in the presence of her husband is *prima facie* presumed to act by his command, and is, therefore, not guilty unless it can be shown that she was in fact not governed by him.

The testimony was excluded on the authority of the statement that "if a *feme covert* be indicted as a *feme sole*, her proper course is to plead the misnomer in abatement, for, if she pleads over, she cannot take advantage of it. She must aver her marriage in her plea, and prove it affirmatively." 3 Whart. Cr. L. (7th ed.), § 70. If, as is now argued, this means to apply only to the plea of *misnomer*, the paragraph is misleading, for the mere erroneous statement of the defendant's *name* in an indictment or information must be corrected by plea in abatement, whether the defendant be man or woman, married or single, and the *status* of the woman, as regards her being married or single, is, it seems to me, wholly immaterial, except as a matter of evidence on the plea. *Id.*, §§ 536, 537.

I think the author—and I say this with the utmost diffidence of one so eminent and learned in this department of the law—has confused somewhat two analogous but distinct things, namely, pleading a *misnomer* and pleading a wrong *addition* of estate, mystery or place. Advantage is to be taken of either in the same way, but the failure to plead in abatement does not, perhaps, have the same effect; at least, not as to this matter of the addition describing a woman as married or single. The failure to plead a misnomer in abatement cures the defect if the defendant pleads not guilty, and for the purposes of that case the prisoner has the *name* given in the indictment. 3 Whart. Cr. L., *supra*; 1 Whart. Cr. L., § 233; 1 Bish. Cr. Proc. (2d ed.), § 791; *State v. Thompson*, Cheeves' R., 31; *People v. Smith*, 1 Park. Cr. Cas., 329; *State v. Hughes*, 1 Swan, 261; *Lewis v. State*, 1 Head., 329.

§ 10. *The rule as to addition of estate, degree, etc.*

The addition of estate, or degree, or mystery, required by statute 1 Henry V., c. 5, if omitted or wrongly stated, should also be corrected by motion to quash, or plea in abatement. 1 Whart. Cr. L., §§ 243, 248; Whart. Prec. (ed. 1849), 7, note *e*; 1 Bish. Cr. Proc., §§ 671, 675, 772. By statute 7 Geo. IV., c. 64, and 14 and 15 Vict., c. 100, no indictment shall be now abated by reason of any plea of misnomer, or for want of or imperfection in the addition of the defendant. *Id.*; 1 Archb. Cr. Pl. (by Waterman, 6th ed.), 78, 110, 111. I do not find that we have any such statutes in Tennessee, but I am informed by my brother Horrigan, of the criminal court of this city, a very learned judge, that while it is customary to add "yeoman" as an addition, it is wholly unnecessary under our practice. Now, as to indictments against men, there can be no two opinions as to the utter uselessness of any addition such as "esquire," "gentleman," "yeoman," or the like; but when women are indicted it seems to be a matter of more importance, and quite necessary that they should be described according to the fact, as "wife of A. B.," "widow," "spinster," or "single woman," especially in view of this very doctrine of marital coercion being a defense; and the neglect to do it in this case has caused the trouble we have with this trial. If a woman be indicted as a wife, that, being an admission on the record that she is so, will be sufficient proof of it, and perhaps conclusive on the government. Otherwise, if she set up her coverture as a defense she must prove it. And proof merely of cohabitation with the man, and passing by his name, does not seem to be sufficient proof of this, although, on the other hand, actual evidence of the marriage would not, perhaps, be required. 1 Archb. Cr. Pl., *supra*, 8; Whart. Prec., *supra*, 7.

§ 11. *A woman indicted without addition of wife, widow or spinster should plead her coverture in abatement; but she can prove it under the plea of not guilty.*

I have examined the cases cited in the text-books, so far as they are accessible to me,—and I regret that some of the most important of them are not to be found in the library, and also that I have not the newer editions of the text-books themselves,—and must say that I am not able to determine with satisfaction just how a woman must or may “set up her coverture as a defense” when she is indicted separate and apart from her husband, and as a single woman. Here the defendant is not described as either married or single, and but for the feminine name of “Annie” attached to her surname, and the *alias dictum*, we would never know from the face of the information that she was a woman at all. I am of opinion that she could have moved to quash the information for want of a proper addition, or pleaded in abatement the omission, disclosing, of course, how the fact was, and upon proof of her marriage to De Quilfeldt the government would be compelled to amend the information by describing her as his wife. This would have settled the fact of marriage, perhaps conclusively, certainly *prima facie*, in her favor. On the other hand, if she were described as a single woman, or not described as married, which, I take it, is the same thing, and she ignores the defect and pleads not guilty, the *prima facie* presumption is that she is single; but if the fact be otherwise, she may prove it on the trial and under her plea of not guilty. The mistake made at the trial of this case was in holding that this *prima facie* presumption was *conclusive* against her because of her failure to plead in abatement.

The case of *Rex v. Jones*, Kel., 37, I have not been able to see, but is abstracted in 1 Russ. Cr. (8th ed.), 24, and it there appears that it was a joint indictment against Thomas Wharton and Jane Jones. The woman pleaded (*how* it does not appear) that she was married to Wharton, and would not plead to the name of Jones. The grand jury were called in, and the court, in their presence, amended the indictment by inserting the name of Jane Wharton, otherwise called Jones, not calling her the wife of Thomas Wharton, but giving her the addition of “*spinster*,” upon which she pleaded. The court told her, however, that if she could prove that she was married to Wharton before the burglary she should have the advantage of it, but she could not, and was convicted. In *Quin's Case*, 1 Levin, C. C., 1 (which, also, I have not seen), cited also by Russell, it was ruled that if a woman be indicted as a single woman, and pleads to the felony, that is *prima facie* evidence that she is not a *feme covert*, but is not conclusive of the fact. 1 Russ., 24. Judge Sharswood, in this edition of Russell, makes in his notes a *quære* “whether the proper course for a woman so indicted is not to plead the wrong *addition* on arraignment, as by pleading to the felony she answers by the *name* (*sic*) by which she is indicted.” The authorities do not satisfactorily answer this *quære*, as any one may see who examines them. Mr. Russell states that if the woman pretends to be the man's wife the *onus* is on her to prove it; but where the indictment states the woman to be the wife of the man with whom she is jointly indicted, no evidence is necessary to show that she is the wife. 1 Russ. Cr., 24. The cases cited, however, are all cases where they were indicted jointly, and not precisely like this. *Rex v. Hassall*, 2 C. & P., 434; S. C., 12 E. C. L., 660; *Reg v. Woodward*, 8 C. & P., 561; S. C., 34 E. C. L., 891; *Rex v. Atkinson*, cited 1 Russ. Cr. L., *supra*; *Reg v. McGinnis*, 11 Cox, 391, cited 3 Jac. Fish. Dig., 3114; *Rex v. Knight*, 1 C. & P., 116; S. C., 11 E. C. L., 335. It suffi-

ciently appears, however, from these authorities, that, although it may be proper that a woman indicted as a single woman should, if she relies on her coverture, plead in abatement the wrong addition, the failure to so plead it does not preclude her from taking advantage of the defense under the general issue, and she may therefore give evidence of the fact of marriage, and the other facts necessary to make out marital coercion. It was, therefore, error to exclude the evidence offered in this case.

§ 12. *Simulated defense; motion for new trial.*

I am quite satisfied, however, from the occurrences at the trial, that this is a simulated defense; yet I cannot say that, upon full investigation of the facts, the jury would have so found, and it was certainly a question for the jury to try, and not for the court to now determine upon a motion for a new trial. The defendant, on the proof, was clearly guilty. I am convinced, from her refusal to make affidavit of her marriage, that she was not the wife in fact of her partner in crime, and this conviction has inclined me to accede to the suggestion of the district attorney and overrule this motion, notwithstanding any error committed in refusing proof intended only to sustain a false pretense of marriage, upon the ground that she has not been injured by the ruling. And it has occurred to me to say to the defendant now that if she will make affidavit of her marriage in fact to De Quilfeldt, or by proof show the court that there would be sufficient testimony to raise a reasonable doubt in the minds of the jury of her guilt, taking into consideration the defense of coverture, that I would grant a new trial, exercising my discretion in the matter without regard to the technical question as to the proper mode of making the defense, or her right to make it under the plea of not guilty. Mr. Baron Garrow said in *Rex v. Hassall*, 2 C. & P., 434; S. C., 12 E. C. L., 207, where a woman was convicted upon insufficient evidence of marriage, that "if the parties, however, be really married, and will make a proper application to the secretary of state, supported by proof of the marriage, they will sustain no injury by the want of evidence of marriage before me." This implies, I take it, that he would recommend her pardon, and seems to be some support for sustaining a conviction, unless the judge is satisfied some injury has been done. But in that case the jury had passed on the question of marriage, and the very kind of proof the defendant offered in this case was received, although pronounced insufficient by the jury and the court to prove the marriage. It is not, therefore, an authority to uphold the verdict in this case, where the testimony was rejected. The proof offered might not have been sufficient to prove the marriage; but of that the jury was the proper judge, not the court. It was competent evidence, as the case of *Rex v. Hassall*, *supra*, adjudicates, it being there said "that though, in cases of this kind, it is not absolutely necessary to give direct proof of actual marriage, yet such evidence must be adduced as to satisfy the jury that the parties are in fact husband and wife, in the same way as to convince them of any other fact that they are to find." The barrenness of such proof to establish the marriage is well shown, but the court permitted the jury to pass on it, nevertheless, and that, too, under a plea of not guilty, though, unlike this case, it was a joint indictment against the man and woman, she being described as a single woman. The real question in this branch of the case is whether the court will grant a new trial where it appears that the evidence rejected was competent and tended to prove the issue, but was insufficient for that purpose. In the case at bar I cannot say that the proof rejected was all

the proof of which the case was susceptible, nor all the defendant would offer. She was precluded by the ruling made from offering this or any proof of marriage, on the ground that she had pleaded over and thereby waived the defense.

§ 13. *If incompetent evidence be admitted in criminal cases, a new trial will be granted.*

In *Peek v. State*, 2 Humph., 78, it was held that if incompetent evidence be admitted in *criminal* cases, that might have influenced the jury, a new trial will be awarded, although the court may think there was enough, independently of such evidence, to convict the prisoner. 1 Bish. Cr. Proc. (2d ed.), § 1103; 3 Whart. Cr. L. (7th ed.), § 3258, note *u*. It was also held in *Com. v. McGowan*, 2 Pars. Sel. Cas., 347, cited 3 Whart., *supra*, that after a court has rejected competent and material testimony offered by a defendant charged with crime, the court will not refuse relief on the assumption that the rejected evidence would not have availed the accused if it had been received. Both the above-cited authors seem to doubt if this be the general rule, though they put Tennessee down as holding to it on the authority of *Peek's case*, *supra*. That was a case where incompetent evidence was admitted, and not where that which was competent and material was rejected; but I think, on principle, the rule should be the same in either case. Besides, I am of opinion that the adjudications in Tennessee establish the principle that a new trial must be granted for the improper rejection of testimony, as well as its improper admission, without reference to the opinion of the court as to its probable effect on the verdict. In *Workman v. State*, 4 Sneed, 425, the wife of one jointly indicted with another was rejected as a witness, and the supreme court granted a new trial, saying: "Whether a reversal on this point will ultimately result in any advantage to the defendant is not for us to judge; for, no matter how clear his guilt may be, or how deeply he may be stained with blood, it is our duty to see that he has the benefit of the law under which his punishment is demanded." Page 428. Other cases support the rule. *Stokes v. State*, 4 Bax., 47; *Hagan v. State*, 5 Bax., 615; *State v. Turner*, 6 Bax., 201. *Hagan's case* is also applicable on another point: that, after this testimony was rejected, it would have been improper to offer any other proof of the marriage, wherefore the meagerness of that offered should not be accounted against the defendant on this motion. Perhaps this rule of the state courts is not binding on us here to govern our discretion in granting new trials. *Railroad Co. v. Horst*, 93 U. S., 291. But that is immaterial, for I am satisfied with it as the sound rule on the subject, whatever other courts may hold. For the same reason that it would be usurping the functions of the jury, and a practical denial of the defendant's right of trial by jury of all the facts entering as an element into her defense of marital coercion, I cannot now, I think, on this motion for a new trial, put her to the proof, by her own affidavit or otherwise, of the fact of marriage as a condition precedent to the grant of her motion. This might save the cost of another trial, and confirm my own suspicions of the falsity of her defense; but, after all, these suspicions are based on her refusal to plead in abatement her marriage, and she might well decline to be coerced by the court into filing a special plea, if she had a legal right to make the defense under the general issue. I am too strongly impressed with the necessity of preserving the right of trial by jury to assume its duties, even in a case like this, where I feel almost certain the defense is a false one.

Notwithstanding, then, the unfavorable character of the defense, and an

almost certain conviction that the alleged marriage is a false pretense, I feel constrained, by the considerations I have mentioned, to grant a new trial; and it is so ordered.

§ 14. Powers of congress.—It is competent for congress to enforce, by suitable penalties, all legislation necessary and proper to the execution of powers with which it is intrusted, and any act committed with a view of evading such legislation, or fraudulently securing its benefits, may be made an offense against the United States. *United States v. Hall*, 8 Otto, 357.

§ 15. An act of congress simply making a town a port of entry does not authorize punishment for obstructing the harbor, or confer jurisdiction on the federal courts to punish the act. *United States v. New Bedford Bridge*, 1 Woodb. & M., 493.

§ 16. Congress has power under the constitution to prohibit the importation and circulation of counterfeit coin. *United States v. Marigold*, 9 How., 566.

§ 17. Congress has power to provide for the punishment of guardians who, having charge and custody of the pensions of their wards, shall embezzle such pensions in violation of their trust, or fraudulently convert the same to their own use. Such a law is not invalid as being in conflict with state law and the legitimate and proper powers of the state courts. *United States v. Hall*, 8 Otto, 347.

§ 18. Congress has the power to provide for the punishment of offenses committed in territory occupied by Indians, if it is not within the boundaries of a state. *United States v. Rogers*, 4 How., 571.

§ 19. Congress has no power to pass a law providing for the punishment of the crime of murder, and other such crimes, when committed by one white man upon another white man, within the Indian territory within the limits and jurisdiction of a state. *United States v. Bailey*, 1 McL., 234.

§ 20. Under the constitutional provision that congress shall have power to exercise "exclusive legislation" in all "cases whatsoever" over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings, when the purchase of land for any of these purposes is made by the national government, and the state legislature has given its consent to the purchase, the land so purchased by the terms of the constitution falls within the legislation of congress, and the state jurisdiction is ousted. A proviso in the act authorizing such a purchase, that all civil and criminal processes issued under authority of the state, or any officer thereof, may be executed on the lands so ceded, and within the fortifications which may be erected thereon, in the same way and manner as if such lands had not been so ceded, does not render the jurisdiction concurrent. *United States v. Cornell*, *2 Mason, 60.

§ 21. Section 15 of the act of April 30, 1790, declaring it to be a crime "if any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with an intent to steal and purloin, the personal goods of another," does not authorize jurisdiction of the crime, when committed on board of a ship, belonging to citizens of the United States, while lying in a harbor, within the *faucēs terræ*, within the jurisdiction of a foreign country. The fact that the goods were afterwards brought by the offender upon the high seas will not give our courts jurisdiction. *United States v. Morel*, *13 Am. Jur., 279.

§ 22. Common law jurisdiction.—The federal courts have no common law jurisdiction in criminal cases. *United States v. Ramsay*, *Hemp., 481; *United States v. Coolidge*, *1 Wheat., 415; *United States v. Jacobi*, *14 Int. Rev. Rec., 45; *The Steamboat Magnolia*, 20 How., 305; *United States v. Sa-coo-da-cot*, 1 Abb., 383; 1 Dill., 277; *United States v. Watkins*, *3 Cr. C., 448. Hence a libel on the government is not maintainable therein. *United States v. Hudson*, *7 Cr., 32. See XXII, *infra*.

§ 23. The federal government can exercise no criminal jurisdiction which is not given by statute, nor punish any act criminally except as the statute provides. *United States v. Lancaster*, 2 McL., 481 (§§ 2474-79).

§ 24. An indictment cannot be sustained in the courts of the United States unless the act charged is made a crime by the laws of the United States, and the court is given jurisdiction over it. *United States v. New Bedford Bridge*, 1 Woodb. & M., 406; *United States v. Scott*, 4 Biss., 29 (§§ 2222-27).

§ 25. The courts of the United States cannot resort to the common law as a source of criminal jurisdiction. However that body of jurisprudence may furnish the federal courts with rules of procedure, definition, and construction, those tribunals have no power to try any offenses, except such as are, in some form, prohibited by the constitution, or by act of congress. *United States v. Barney*, *5 Blatch., 204.

§ 26. Although the courts of the United States may, in the absence of statutory provision, look to the common law for rules to guide them in the exercise of their powers in criminal as well as in civil cases, yet it is to the statutes of the United States alone, enacted in pursuance of the constitution, that these courts must resort to determine what constitutes an offense against the United States, whether committed upon land or upon the high seas. *United States v. Terrel,* Hemp., 411.*

§ 27. There are no common law offenses against the United States; therefore no crime against the United States exists by force of the common law, but only when the legislation of congress has first made the doing or omission of a particular act a crime. *United States v. Jacobi,* 14 Int. Rev. Rec., 45.*

§ 28. Congress must in all cases make an act criminal and define the offense before either the district or circuit courts can take cognizance of an indictment charging the act as an offense against the authority of the United States. (Per CLIFFORD, J., dissenting.) *Tennessee v. Davis, 10 Otto, 274.*

§ 29. Before the federal courts can take cognizance of an offense it must be declared such by act of congress. It is not competent for congress to enact a criminal code punishing offenses generally, but those only which relate to the general government, or which are committed by or upon citizens or inhabitants of the United States upon the high seas, or within the national domain beyond the limits of any state, or in places over which congress has exclusive jurisdiction. *United States v. Sa-coo-da-cot, 1 Abb., 383; S. C., United States v. Yellow Sun, 1 Dill., 277.*

§ 30. There are no common law offenses against the United States except those committed on the high seas and within forts, arsenals, and other places exclusively within the jurisdiction of the United States, and except high treason. There are therefore no felonies against the United States except those declared to be such by act of congress. *United States v. Shepherd,* 1 Hughes, 520.*

§ 31. The judicial act of September 24, 1789, gives to the circuit court jurisdiction of all offenses cognizable under the authority of the United States. This means all offenses against the United States. This jurisdiction is not limited to crimes and offenses specially created and defined by statute, but includes all offenses to which the judicial power extends. What those offenses are depends on the common law applied to the sovereignty and authorities confided to the United States, and they embrace all offenses against the sovereignty, the public rights, the public justice, the public peace, the public trade and the police power of the United States, whether such offenses are defined and punished by statute or not. The circuit court having cognizance of all offenses against the United States, may punish them by fine and imprisonment, where no punishment is specially provided by statute. All offenses within the admiralty jurisdiction are also cognizable by the circuit court, and in the absence of positive law are punishable by fine and imprisonment. *United States v. Coolidge,* 1 Gall., 498.* This ruling was reversed in *United States v. Coolidge,* 1 Wheat., 415*, on a certificate of division, the court declining to disturb its ruling in *United States v. Hudson,* 7 Cr., 32.*

§ 32. Reference to common law.—In criminal matters the common law of England, at the time of the making of the constitution, must be looked to to determine the character of offenses which are described in the language of the common law. *United States v. Butler,* 4 Hughes, 512; United States v. Coppersmith, 2 Flip., 546 (§§ 1920-24); United States v. Durkee, 1 McAl., 196 (§§ 559-562); United States v. Palmer, 3 Wheat., 610 (§§ 535-541); United States v. Armstrong, 2 Curt., 446 (§§ 665-669).*

§ 33. Jurisdiction of offenses committed in a foreign country.—It is held that if the commandant of the island of Amelia (he being an officer of Spain) were arrested in the United States at the public prosecution of a state or of the United States, it would be proper for our executive to interfere to dismiss the suit. The twentieth article of the treaty does not extend the jurisdiction of our courts to offenses committed in Spain, or *vice versa*, and at common law the commandant is not liable to any prosecution before any of our courts for his transactions in the province of Florida. *Territorial Rights,* 1 Op. Att'y Gen'l, 68.* See XXII, *infra*.

§ 34. Adoption of state laws.—The third section of the act of congress of March 3, 1825, adopted only the laws of the several states then in force, and not those subsequently enacted. *United States v. Paul,* 6 Pet., 141.*

§ 35. Offenses against both state and federal governments.—The same act may be an offense against the United States, and against the state in which it is committed, and may be punished under the laws of each. *Moore v. People of Illinois, 14 How., 19; United States v. Wills,* 11 Am. L. Reg. (N. S.), 424.*

§ 36. Effect of state laws.—The United States and the several states are distinct sovereignties, each having its own system of criminal law, which it administers in its own tribunals;

and the criminal laws of a state can in no way affect those of the United States. Charge to the Grand Jury, 2 Curt., 637.

§ 37. State may punish offenses against United States.—A state may make offenses against the laws of the United States punishable in its own courts, by ingrafting those laws into its own code. And hence the act of the legislature of Pennsylvania, of March 28, 1814, which declares that every non-commissioned officer and private in the militia, who shall refuse to serve when called into actual service by the president, shall be liable to the penalties defined in the act of congress of February 28, 1795, is valid. *Houston v. Moore*, 5 Wheat., 1 (Constr., §§ 161-190).

§ 38. The burden of proof does not shift in criminal cases. It is on the prosecution throughout to establish the defendant's guilt by evidence, and in criminal cases the defendant, not being permitted to testify, cannot be called upon to explain or produce any proof until the prosecution, by evidence it actually produces, establishes the defendant's guilt beyond a reasonable doubt. *United States v. Babcock*,* 3 Dill., 621.

§ 39. A criminal case is not to be decided upon the preponderance of evidence. The presumption of innocence remains with and protects the accused until the government, by the whole evidence, satisfies the jury beyond a reasonable doubt that he is guilty in the manner and form as charged in the indictment. *United States v. Buchanan*,* 4 Hughes, 497; *United States v. McGlue*, 1 Curt., 1 (§§ 3145-54); *United States v. Montgomery*, 3 Saw., 544 (§§ 1103-17).

§ 40. In all cases where a party stands accused of an offense, the burden of proof of the offense charged in the indictment rests upon the government, unless a different provision is made by some statute. *United States v. Gooding*, 12 Wheat., 460.

§ 41. Reasonable doubt.—The reasonable doubt on which the jury are to acquit a defendant must not arise from sympathy, but from a deliberate consideration of the evidence. *United States v. Foulke*,* 6 McL., 349.

§ 42. The minds of the jury must be clear as to the guilt of the accused, before they can convict him; not that clearness which excludes all doubt, but a rational conviction of guilt. *United States v. Brown*,* 4 McL., 142.

§ 43. The reasonable doubt which will justify a jury in acquitting a prisoner must be a real and honest doubt concerning his participation in the crime as charged, and not doubts about the policy, justice, or binding power of the law, or in any way growing out of the degree of punishment which must follow conviction. *United States v. Wilson*,* 1 Bald., 78.

§ 44. A reasonable doubt is not a mere caprice, whim or possibility, but a doubt arising from the circumstances of the case, and founded upon a substantial reason. It is not required that the proof should amount to absolute certainty. Moral certainty is sufficient to authorize a verdict of guilty, and a jury is not to acquit a defendant because of some possibility or other that he may not be guilty. *United States v. Dodge*,* Deady, 186.

§ 45. By reasonable doubt is meant a state of mind hesitating in coming to a conclusion as to the guilt or innocence of the accused. If a jury have such a doubt arising from the facts and circumstances of the case, they should acquit, otherwise convict. *United States v. Bittinger*,* 21 Int. Rev. Rec., 342.

§ 46. The jury are not to decide upon the guilt of the accused upon the preponderance of testimony; and if they have a reasonable doubt founded on the testimony,—not a caprice, or a notion, or a theory, but a reasonable doubt,—the defendant is entitled to the benefit of it, and to an acquittal. *United States v. Blaisdell*,* 3 Ben., 132.

§ 47. A reasonable doubt is something more than a captious doubt, a mere vague notion that possibly the accused may be innocent. It must be a doubt for which a reason can be assigned, not necessarily a reason sufficient to convince another, but such as may properly influence the mind of an honest juror. *United States v. Butler*,* 1 Hughes, 457.

§ 48. The reasonable doubt to the benefit of which the defendant in a criminal case is entitled is the reasonable doubt of an intelligent man upon the evidence. *United States v. Allen*,* 7 Int. Rev. Rec., 163.

§ 49. A jury should not find a defendant guilty unless convinced beyond a reasonable doubt. But it is not every possible doubt, however slight or however founded, which should prevent a verdict of guilty. The doubt, to have that effect, must be a reasonable one; that is, it must be founded on something growing out of the testimony which leaves a rational uncertainty as to the defendant's guilt which nothing in the testimony removes. The degree of conviction in the minds of the jury of the guilt of the prisoner should be something more than a bare preponderance of belief, something more than the probability of guilt merely outweighing the probability of innocence. The mind should be able to rest reasonably satisfied of the guilt of the accused before a verdict of guilty can be given. Mere possibilities of innocence, or the doubts which beset some minds on all occasions, should not prevent such a verdict. *United States v. Gleason*,* Woolw., 128.

§ 50. A reasonable doubt is a substantial one— not a mere whim, caprice or speculation.

It arises out of the case from some defect or insufficiency in the evidence which makes a juror hesitate and feel that he is not satisfied. *United States v. Montgomery*, 8 Saw., 544 (§§ 1109-17).

§ 51. By reasonable doubt is meant an actual substantial doubt that arises and rests in the mind as testimony is weighed and considered, and results after the exercise of judgment and reason when applied fairly and candidly to an investigation of the evidence. *United States v. Goldberg*, 7 Biss., 175 (§§ 183-194).

§ 52. A reasonable doubt is a sincere doubt whether the prisoner has been proved guilty. It is not a doubt whether the party may not possibly be innocent, in the face of strong proof of his guilt. *Guiteau's Case*, 10 Fed. R., 161 (§§ 3124-44).

§ 53. A reasonable doubt is not a remote, far-fetched, or fanciful doubt, but it must be suggested by the evidence, and of such strength as would influence a reasonable man in the conduct of his own affairs. *United States v. Carr*, 1 Woods, 480 (§§ 643-653).

§ 54. A reasonable doubt is that which relates to the character or the force of the testimony. A mere suggestion of merciful conjecture is not a reasonable doubt. *United States v. Darton*,* 6 McL., 46.

§ 55. An instruction, in a criminal case, given in behalf of the people, that a reasonable doubt must be founded on irreconcilable evidence, is erroneous, as a reasonable doubt may be founded on harmonious evidence which is of doubtful sufficiency to convict. *Mackey v. The People*,* 2 Colo. Ty, 13.

§ 56. The defendant in a criminal prosecution should not be convicted till he is proved guilty beyond a reasonable doubt, which means that the evidence of his guilt, as charged, must be clear, positive and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient to justify a verdict of guilty, that there may be strong suspicions, or even probabilities of guilt, nor, as in civil cases, a preponderance of evidence in favor of the truth of the charge against the defendant; but what the law requires is proof, by legal and credible evidence, of such a nature that when it is all considered by the jury, giving it its natural effect, they feel, when they have weighed and considered it, a clear, undoubting, and entirely satisfactory conviction of the defendant's guilt. This, and this only, is required; but this much is required, and if not thus proved the jury should acquit. *United States v. Babcock*,* 3 Dill., 621.

§ 57. The rule is, in criminal cases, that the jury must be reasonably satisfied in order to convict; and it is not the rule that the jury should acquit because it is possible that some other hypothesis than the prisoner's guilt may be true or consistent with the evidence. In criminal and capital cases they must act on strong probabilities. Upon an indictment, therefore, for burning a ship, contrary to the act of 1804, the mere possibility that the fire might have been occasioned by spontaneous combustion, or might have been set by accident, is no answer to strong evidence making it probable that a particular person did it. *United States v. Lockman*,* 11 Law Rep., 151.

§ 58. Presumption of innocence.—Every man is presumed innocent until the contrary is proved; and if the evidence in a case leaves any reasonable doubt in the mind of the jury as to the guilt of the accused, he is entitled to the benefit thereof, and the jury should find not guilty. *United States v. Lee*,* 12 Fed. R., 816; *United States v. Nicholson*,* 3 Woods, 215; *Georgia v. O'Grady*, 8 Woods, 499.

§ 59. If evidence is susceptible of two constructions, the one pointing to guilt, and the other to innocence, it is the duty of the jury to give it that construction which is compatible with the innocence of the defendant. *United States v. Lee*,* 12 Fed. R., 816.

§ 60. In order that a jury may find a defendant guilty the proof must satisfy their minds of the truth of the charges of the indictment, so that they rest easy upon the truth of that conclusion, otherwise the verdict must be not guilty. *United States v. Dobbs*,* 15 Int. Rev. Rec., 9.

§ 61. The word "wilfully" when used in a criminal statute implies an evil intent without justifiable cause. An act done wilfully means that it is done wrongfully, in bad faith, with evil intent; that it is done with a bad purpose, and that it is an act which a person of reasonable knowledge and ability must know to be contrary to duty. *United States v. McDonald*, 8 Biss., 489 (§§ 1122-27).

§ 62. A prohibited act cannot be said to have been done wilfully when it was done without improper motive, and ignorantly. *United States v. Three Railroad Cars*, 1 Abb., 196 (§§ 2059-64).

§ 63. Verdict sustained.—An appellate court will not disturb a verdict of conviction where it finds from the record that there is evidence upon which the jury could have based their verdict. *Phillips v. Territory of Wyoming*,* 1 Wyom. Ty, 82; *United States v. Upham*,* 2 Mont. Ty, 170.

§ 64. An appellate court will not reverse a judgment in a criminal case because they think

that the verdict was found upon evidence not very conclusive. *Fein v. Wyoming Territory*,* 1 Wyom. T'y, 376.

§ 65. *Malice*, in law, means a wilful departure from a known duty. *United States v. Cutler*,* 1 Curt., 501.

§ 66. When the crime is clearly proven, sufficiently to imply malice, an instruction that the jury may infer malice, unless the defendant proves the contrary to their satisfaction, is not erroneous. *Fein v. Wyoming Territory*,* 1 Wyom. T'y, 376.

§ 67. *Criminal intent*.—Acts without criminal intent, or criminal intent without acts, are insufficient to constitute a crime. *United States v. Libby*, 1 Woodb. & M., 229. See § 1.

§ 68. Where an act is a crime and capitally punished, courts and juries must require a very decisive participation in the act with a guilty intent in order to convict. *Ibid.*

§ 69. In all criminal cases, and especially in cases depending on circumstantial evidence, an inquiry into the motives actuating the accused is always important, because human experience shows that men do not commit crime without motive therefor. *United States v. Babcock*,* 3 Dill., 589.

§ 70. Where the proof shows that an unlawful act was done, the law presumes the intent, and the proof of the act, that being in itself a violation of the law, is proof of the intent. There must be an intent to commit a crime; but it is not correct to say that that intent must be to violate the law. The question is, did the accused intend to do the thing he did do, and was that thing a violation of law? *United States v. Baldrige*,* 11 Fed. R., 552.

§ 71. Guilty intent is conclusively shown by proof of the act done, where the nature of the act is such that a general guilty intent is so clearly manifested thereby as to admit of no question. *United States v. Taintor*,* 11 Blatch., 374.

§ 72. Where an act done by the defendant was unlawful, he is precluded from denying that he knew it was so. *Ibid.*

§ 73. When the law infers or presumes a fact or an intention as resulting from evidence, a jury may and ought to find it as if it was in direct proof before them. *United States v. Shellmire*,* Bald., 370. When intent is material in a criminal case, it must be shown by the government; and this is to be done by proving the acts of the defendant from which the intention can be implied. *United States v. Sander*, 6 McL., 598 (§§ 894-897).

§ 74. The presumption of guilty intent raised by the commission of a criminal offense cannot be rebutted by evidence of declarations made by the defendant subsequent to the commission of such offense. *United States v. Imsand*, 1 Woods, 581 (§§ 2407-2409).

§ 75. Though at common law a felonious intent is essential to the commission of a felony, this rule does not apply to offenses created by law, and consequently not to offenses in the federal courts. *United States v. Ulrici*, 3 Dill., 532 (§§ 2422-28).

§ 76. Where a person wilfully and designedly performs a prohibited act, he will not be heard to say that he did it without criminal intent. The law presumes that every man intends the legitimate consequences of his acts. It will not do for a man knowingly to commit an unlawful act, and then assert that he did it with an innocent intent. *United States v. Lee*,* 12 Fed. R., 816.

§ 77. What is criminal intent depends upon the nature of the crime with which the accused is charged. *United States v. Buntin*,* 10 Fed. R., 730.

§ 78. In cases where the question of criminal intent becomes material it is *prima facie* shown by proof of the forbidden acts, as every person is presumed to intend the consequences of his own acts; and such presumption must be rebutted. *United States v. Nicholson*,* 3 Woods, 215.

§ 79. In a prosecution involving the question of criminal intent, if it is shown that the defendant, before doing the act complained of, in good faith took legal advice and was advised that it would be proper for him to do as he did, and followed the advice in good faith, the presumption of criminal intent is rebutted. *Ibid.*

§ 80. Where the statute prohibits an act not *malum in se*, it is not necessary to show that it was done with criminal intent unless the statute requires that it should be done knowingly. Every person is bound to know the law and obey it at his peril. *United States v. Leathers*, 6 Saw., 27.

§ 81. Where a statute requires that an offense, in order to be criminal, be done with intent to injure and defraud any person or persons, it is not necessary that any malice or ill will should subsist against the person who is so injured. *United States v. Taintor*,* 11 Blatch., 374.

§ 82. Congress may provide that such acts as embezzlement may be punished without allegation or proof of criminal intent, and if such provision is clear the courts must enforce it. *United States v. Voorhees*,* 9 Fed. R., 143.

§ 83. The falsification of records, either by interlineations or erasures, with reference to a matter in which the party making such falsification is suspected or charged, or liable to be

suspected or charged, with neglect or wrong doing, is strong presumptive evidence of guilt. *United States v. Randall*,* *Deady*, 524.

§ 84. In criminal cases, where much is to be allowed in favor of liberty, it is unsafe to rely on a mere matter of punctuation in the statute creating the offense. So where a statute declares that "every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association; . . . and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section,— shall be deemed guilty," etc., the intent to defraud is held to be a necessary element of each of the offenses created by the act, although the punctuation would indicate that the intent belonged only to the last two offenses defined. *United States v. Voorhees*,* 9 Fed. R., 143.

§ 85. *Mode of prosecution.*— Where a statute creating an offense has prescribed a mode of prosecution, no other can be sustained. *United States v. Rounsavel*, 2 Cr. C. C., 133. See *XXIX, infra*.

§ 86. It is a general and sound rule of criminal law that whenever the legislative power has declared an act or omission of an act to be punishable by fine or imprisonment, that act done or omitted wilfully is a crime, and may be punished by indictment. *United States v. Jacobi*, 1 Flip., 111; 14 Int. Rev. Rec., 45.

§ 87. An uncontested order by the register in bankruptcy is the order of the court, to which disobedience is a contempt of court, and proceedings to punish the contempt may be instituted by the court directly upon a neglect to comply with the order. *In re Allen*, 18 Blatch., 274.

§ 88. A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding is by indictment or information, by which the nuisance may be abated and the person who caused it punished. *City of Georgetown v. Alexandria Canal Co.*, 12 Pet., 91.

§ 89. Where a statute either prohibits a matter of public grievance, or commands a matter of public convenience, every disobedience thereof is indictable. The statutes forbidding the issue of certain instruments unless stamped provided "all penalties, etc., shall and may be sued for and recovered, etc., in the name of the United States, in any proper form of action." *Held*, that the offender might be proceeded against by indictment, and that that was a proper form of action. The offense was a fraud on the government, and a misdemeanor for which an indictment will lie. *United States v. Moore*, 11 Fed. R., 248.

§ 90. Under an act punishing the offense of keeping a faro bank by a fine of \$150, "to be recovered in any court of record by any person who will sue for the same," it is held that the offense is not indictable. *United States v. Gadsby*, 1 Cr. C. C., 55.

§ 91. The tax for a special privilege cannot be collected by indictment. A civil remedy is the only action. *The Territory v. Reyburn*,* *McCahon*, 141.

§ 92. The internal revenue laws provide that for a certain omission a person "shall be liable to pay a penalty of \$100, . . . and shall be liable to imprisonment," etc. *Held*, that it was not necessary for the United States to proceed by indictment to collect the penalty, but that they might proceed by declaration in debt. *United States v. Foster*, 2 Biss., 455.

§ 93. It seems that where the punishment prescribed by the internal revenue laws is a fine only, and the exact amount of it is not fixed by the act, but is left to the discretion of the court trying the case—as where the language is that the party shall be fined in any sum not exceeding a certain amount,—there the action of debt will not lie, nor can any other civil action be the "appropriate" remedy, but the prosecution must be by indictment. *United States v. Ebner*, 4 Biss., 119.

§ 94. It seems that in all cases of the violation of revenue laws, where it is provided that imprisonment either may or must be a part of the punishment, then no civil action will lie, and the only remedy is by indictment. *Ibid*.

§ 95. By an act of the legislature of Virginia, a certain penalty was imposed on any person who should permit certain games, enumerated in the act, to be played in the house of which he was the proprietor. The penalty was given to any person who would sue for the same. After congress assumed the government of the District of Columbia, it enacted that the laws of Virginia should remain in force in that part of the District which had been ceded by that state. Subsequently congress passed another act, providing that the criminal law of Virginia should remain in force in the Virginia part of the District, that all indictments should run in the name of the United States, and all fines, penalties and forfeitures accruing under the laws of Virginia should be recovered with costs. It was held that an indictment, under the

above-mentioned act of Virginia, in the name of the United States to recover the penalty, could not be sustained. *United States v. Simms*, 1 Cr., 232.

§ 96. Where the word "punishable" is used in a statute forbidding a given act, and the amount of the fine is left discretionary, the intention is that the act shall be punished as a crime and not by a mere penalty to be enforced by a civil action. *In re Jackson*, 14 Blatch., 245 (§§ 983-990).

§ 97. Although the statute imposes a fine only as punishment for a crime, yet a person may be arrested and held and imprisoned pending his trial in default of bail. *Ibid.*

§ 98. Repeal of law.—If a statute create an offense, and is then repealed, no prosecution can be instituted for any offense committed against the statute previous to its repeal. *Anonymous*,* 1 Wash., 84; *In re Callicot*, 8 Blatch., 98; *United States v. Finlay*,* 1 Abb., 364.

§ 99. An offense against a temporary act cannot be punished after the expiration of the act, unless a particular provision be made by law for that purpose. A proviso in an act repealing the temporary act, that persons having offended against the act may be prosecuted and punished as if the same were not repealed, will not sustain a conviction and punishment after the time when the temporary act would have expired by its own limitation. *The Irresistible*, 7 Wheat., 551.

§ 100. No conviction can be had in a criminal case where the statute creating the offense has been repealed by another by implication, where there exists no statutory saving clause. *United States v. Bennett*, 12 Blatch., 345 (§§ 1025, 1026).

§ 101. The words "penalty, forfeiture, or liability," used in the thirteenth section of the Revised Statutes, which provides that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under the statute, unless the repealing act shall expressly so provide, include all forms of punishment for crime; and this section changes the common law rule that a statute modifying the punishment of a crime prescribed by a prior law operates as a repeal of the law. *United States v. Ulrici*, 3 Dill., 532 (§§ 2422-28).

§ 102. Section 13 of the Revised Statutes having provided that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability," one having committed the offense of having in his possession counterfeit coin, knowing it to be false and counterfeit, contrary to section 5457, Revised Statutes, may be punished for the offense, notwithstanding that since its commission the act of January 16, 1877, has declared that this section "be and the same is hereby amended so as to read as follows,"—making the section to read so that the having of counterfeit coin in possession with knowledge of its character is not a crime unless such possession is also accompanied "with an intent to defraud." *United States v. Barr*,* 4 Saw., 254.

§ 103. Mitigation or excuse.—Bad or low education cannot in any manner justify, mitigate or extenuate a crime. *United States v. Cornell*, 2 Mason, 91.

§ 104. That fear which the law recognizes as an excuse for the perpetration of an offense must proceed from an immediate and actual danger, threatening the very life of the person. Apprehension of loss of property, or even the apprehension of slight or remote injury to person, will furnish no excuse. *United States v. Vigol*, 2 Dal., 346.

§ 105. Passion is no justification of an offense, and cannot go far in extenuation of it. *United States v. Duane*, Wall. C. C., 197.

§ 106. Matters alleged must be punishable.—If the matters alleged in an indictment are not punishable by law, the indictment will be quashed. *United States v. O'Sullivan*,* 9 N. Y. Leg. Obs., 257.

§ 107. Whether or not an act charged in an indictment is a crime under the law which the court administers is a question within its jurisdiction and which it is competent to decide. *Ex parte Parks*, 8 Otto, 20.

§ 108. As a general rule, where a case meets the definition of the offense as described by act of congress, that is all that is necessary to find a verdict of guilty. *United States v. Benner*,* Bald., 234.

§ 109. Validity of statutes.—Whatever may have been the attendant circumstances, and however they may have qualified the moral complexion of the transaction, the person indicted can only be tried for doing the thing which the statute prohibits; and unless this of itself, isolated from all its concomitants, can be competently made a crime by congress, the statute is nugatory. *United States v. Curtis*,* 12 Fed. R., 824.

§ 110. Construction of statutes.—It is a rule in the construction of penal statutes, that, if the case of the accused is clearly within the letter of a statute in his favor, the court will

rarely, if ever, take his case out of it, upon the ground that it is not within its spirit and intent. *United States v. Ragsdale*, Hemp., 497. See CONSTITUTION AND LAWS, XIII, 5.

§ 111. The conjunction *and* will be inserted in a criminal statute, if necessary to render the language effective. *United States v. Pelletreau*, * 14 Blatch., 126.

§ 112. In construing statutes creating crimes courts must closely regard and cling to the language which the legislature has selected to express its purpose. Where words are not technical, or words of art, the presumption is a reasonable and strong one that they were used by the legislature in their ordinary popular or general signification. The legitimate function of the courts is to interpret the legislative will, not to supplement or supply it. Legislative intent is to be found in the enactment itself, and statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms. Under the English and American law there can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute, and if there is any doubt it is to be resolved in favor of the accused. *United States v. Clayton*, 2 Dill., 219 (§§ 344-348); *In re Buell*, 3 Dill., 123 (§§ 3183-87).

§ 113. Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, the doubt is to be resolved in favor of the accused. *United States v. Whittier*, 5 Dill., 35 (§§ 1005-1009).

§ 114. The phrase "offenses not here enumerated," as used in section 185 of the criminal laws of Montana territory, providing that "all offenses recognized by the common law as crimes, and not here enumerated, shall be punished," etc., refers to the acts and conduct which criminal laws declare to be crimes, and not to the term "crimes" itself. *Territory v. Ye Wau*, * 2 Mont. T'y, 478.

§ 115. Jury not to consider amount of punishment.—In passing upon the guilt or innocence of the defendant in a criminal prosecution, the jury have no right to take into account the punishment prescribed for the offense further than that the seriousness of the result of their verdict should make their deliberations proportionately careful and serious. *United States v. Mayer*, * *Deady*, 127.

§ 116. Employment of detectives.—Where persons are suspected of being engaged in the violation of criminal laws, or of intending to commit an offense, it is allowable to resort to detective measures to procure evidence of such fact or intention. It is no objection to conviction, when the act has been done, that it was discovered by means of letters specially prepared and mailed by officers of the government, and addressed to a person who had no actual existence. *United States v. Whittier*, 5 Dill., 35 (§§ 1005-1009).

§ 117. No court, even to detect a supposed offender, should lend its countenance to a violation of a positive law, or to contrivances for inducing a person to commit a crime. Although a violation of law by one person, in order to detect an offender, will not excuse the latter or be available to him as a defense, yet resort to unlawful means is not to be encouraged. It is only when the guilty intent to commit the crime has been formed, that any one may properly furnish opportunities, or lend assistance for the purpose of exposing and punishing him. (Per *TREAT, J.*, concurring.) *Ibid*.

§ 118. Circumstantial evidence.—When the prosecution in a criminal case rely upon circumstantial evidence; that is, upon proof of the facts and circumstances which are to be used as a means of arriving at the principal fact in question, it is a rule that these facts or circumstances must be proved in order to lay the basis for the presumption that is sought to be established. Every circumstance essential to the conclusion must be proved to the same extent as if the whole issue rested upon the proof of such essential circumstance, and not only must the hypothesis of guilt flow naturally from the facts proved and be consistent with them all, but the evidence must be such as to exclude every reasonable hypothesis but that of guilt. The facts proved must all be consistent with and point to guilt only, and must be inconsistent with innocence. *United States v. Goldberg*, 7 Biss., 175 (§§ 183-194).

§ 119. Joint offenders.—Where parties are jointly indicted for one offense, it is essential, in order to convict them all, that it be shown that the offense committed arose wholly from the joint act of all. All cannot be convicted unless each and all of them were parties to the commission of one and the same offense; but if the offense is shown to have been committed by one or more acting jointly, and not by the others, then those thus committing it must be convicted. If it is shown that all of the defendants, acting separately, have committed the offense, either alone or acting with a part of the defendants only, then the indictment fails and there can be no conviction. *United States v. McDonald*, 8 Biss., 439 (§§ 1122-27).

§ 120. Liability of citizens in foreign service—Twice in jeopardy.—American citizens are not exempt from the operation of the laws of the United States even though in foreign service. Their subjection to those laws follows them everywhere; in their own courts they are secured by the constitution from being twice put in jeopardy of life or member, and if

they are amenable to the laws of another state, it is the result of their own act in subjecting themselves to those laws. *United States v. Pirates*, 5 Wheat., 184 (§§ 542-551).

§ 121. **Must prove offense charged.**—A person charged with a crime is entitled to be acquitted, no matter how great a criminal he may be shown to be, if he is not guilty of the specific crime charged. *United States v. Durkee*, 1 McAl., 196 (§§ 559-562).

§ 122. **The word "person,"** used in a criminal act in enumerating the persons against whom the crime may be directed, includes corporations as well as private individuals. *United States v. Amedy*,* 11 Wheat., 392.

§ 123. **Civil suit no bar.**—Under the act of congress prohibiting the distilling of coal oil without a license from the government, and punishing the violation of its provisions with imprisonment, and also a penalty to be recovered by a *qui tam* action, and declaring that the United States may proceed for either or both, suit brought for the penalty is no bar to an indictment for the same act. *United States v. Trobe*,* 3 Pittsb. R., 6.

§ 124. **Power of secretary of treasury to dismiss.**—Although the secretary of the treasury may compromise civil suits for violations of the revenue laws, yet he has no authority to compromise and dismiss criminal prosecutions. *In re Webster*,* 9 Int. Rev. Rec., 137.

§ 125. **Witness declaring himself guilty of offense charged.**—A person who declares himself on the stand to be guilty of the crime charged stands in such a relation to the case as to render it unsafe to convict upon his testimony alone, unless confirmed upon material points by evidence to which no suspicion attaches. *United States v. Whalen*,* 7 Int. Rev. Rec., 161.

§ 126. **Power of the executive to interfere in prosecutions.**—Although not so declared by any law, it has been regarded as proper that the president should, upon considerations of public policy, at least in such public prosecutions as affect the domestic tranquillity or foreign relations of the United States, interfere in criminal cases, and cause their abandonment. But this right is never exercised to change the proceedings or place of trial. *United States v. Corrie*,* 23 Law Rep., 145.

§ 127. **Power of judge to investigate charge.**—The unwillingness or refusal of the district attorney to institute a criminal prosecution will not debar judges or magistrates investigating such charges which come before them properly authenticated, nor will it control them in the exercise of full discretion in the matter. But it is said that a magistrate will rarely feel bound to investigate charges which have been made known to the district attorney, and which he has declined to prosecute or countenance. *United States v. McKenzie*,* 1 N. Y. Leg. Obs., 227.

§ 128. **Contempt.**—To refuse to answer proper questions before a grand jury, and insolent behavior and threats to them, constituted contempt of court for which a party was fined and required to give security for his good behavior. *United States v. Caton*, 1 Cr. C. C., 150. See § 3081; COURTS.

§ 129. **The disobedience of a lawful order of a federal court is a contempt of court, and a crime against the United States.** Conviction by a court for contempt is an adjudication that the offense has been committed, and commitment thereon is execution. *In re Mullee*, 7 Blatch., 24, 26.

§ 130. **A wilful contempt of court is a crime, both at common law and under the thirty-third section of the judiciary act, and may be punished by indictment after arrest and examination.** *United States v. Jacobi*, 1 Flip., 119; 14 Int. Rev. Rec., 45.

§ 131. **Criminal proceeding.**—A proceeding by indictment against a railroad company, under a New Hampshire statute which declares that "if the life of any person not in their employment shall be lost by reason of the negligence or carelessness of the proprietors of any railroad, or by the unfitness or gross negligence or carelessness of their servants or agents in this state, such proprietors shall be fined not exceeding \$5,000, nor less than \$500, and one-half of such fine shall go to the widow, and the other half to the children of the deceased," is a criminal proceeding. *New Hampshire v. Grand Trunk R'y*,* 3 Fed. R., 887.

§ 132. **Proceedings taken under a law which provides that property may be seized and detained and adjudged forfeited if the owner or keeper fail to appear, and if he do appear, that he shall be fined or imprisoned if found guilty, is a criminal proceeding both against the owner and against the property.** *Greene v. Briggs*, 1 Curt., 328.

§ 133. **Investigation by heads of departments.**—Pending an investigation by a regularly organized court of inquiry instituted by the secretary of the navy, of an alleged murder committed on the high seas, a United States district judge will not issue a warrant for the arrest of the persons accused, except in cases of most imperious exigency. *United States v. McKenzie*,* 1 N. Y. Leg. Obs., 227.

§ 134. **Offense not complete without future legislation.**—Where parties conspire together to defraud the government, and the contemplated fraud depends upon prospective legislation

by congress, and is impossible without it, they cannot be indicted therefor in the federal courts. *United States v. Crafton*,* 4 Dill., 145. See § 2.

§ 185. Thus where it was alleged that a conspiracy was entered into and certain steps taken to recover from the United States for services alleged to have been rendered by a certain company of Missouri militia, and it appeared that the debt, if any existed, was owing by the state of Missouri, and could not be recovered from the United States unless assumed by congress, a demurrer to the indictment was sustained. *Ibid*.

§ 186. Single act punished separately.—A single act which is an element in a transaction which is made criminal by statute may be punished separately from the offense of which it forms a part, even though the act, as a separate offense, is a felony, while the whole transaction is only punishable as a misdemeanor. *United States v. Lawrence*,* 13 Blatch., 211.

§ 187. Presence at commission of offense.—If a number of persons associate to do an unlawful act, and proceed to its execution, it will be no excuse to one of them who was present that he did not individually do the act. But if the thing to be accomplished be lawful, and all but one of the party commit felony, though in the presence of that one, but without his participation, he is not guilty of their crime. *United States v. Jones*,* 3 Wash., 209. See II, *infra*.

§ 188. Affray.—A warrant is not necessary to enable a peace officer to suppress an affray. *United States v. Pignel*,* 1 Cr. C. C., 310.

§ 189. Limitations.—The act of April 30, 1790, limiting the time within which prosecutions are to be brought, applies as well to offenses created after as before the act. *United States v. Ballard*,* 3 McL., 469.

§ 140. Where a *nolle prosequi* is entered on a first indictment, a second indictment must be brought within the time limited by statute. *Ibid*.

§ 141. Offenses against law of nations.—It is an offense against the law of nations for any persons, whether citizens or foreigners, inhabiting within the limits of the United States, to go into the territory of Spain with intent to recover their property by their own strength, or in any other manner than its laws authorize and permit. Such offenders may be apprehended, tried and punished in the territory of Spain and according to its laws. *Territorial Rights*,* 1 Op. Att'y Gen'l, 69.

§ 142. Power to reduce felony to misdemeanor.—Congress has power to reduce a pre-existing felony to the proportion of a misdemeanor, in all cases where the penalty is not fixed by the constitution. It is equally clear that they have power to reduce a crime from the grade of infamy to misdemeanor, in all cases where the constitution does not prescribe the punishment and pronounce the infamy. *United States v. Cross*,* 1 MacArth., 149.

§ 143. Nuisance.—Under a statute in Montana territory, declaring that "all offenses recognized by the common law as crimes, and not here enumerated, shall be punished," etc., it is held that all acts constituting a nuisance at common law are still a nuisance, unless enumerated in that act. *Territory v. Ye Wau*,* 2 Mont. Ty, 478.

§ 144. Use of military in Alaska.—Section 1 of the Alaska act of July 27, 1868, having been amended by the act of March 3, 1878, so as to extend over the territory of Alaska sections 20 and 21 of the Intercourse Act of 1834, said territory, so far as the introduction and disposition of spirituous liquors is concerned, became what is known as "Indian country," and the military force of the United States may, by virtue of the twenty-third section of the Intercourse Act, be employed by the president for the arrest of persons found therein violating either of said sections. To accomplish this, it was not necessary for congress to extend section 23, by name, over Alaska, since this section, by force of its own terms, applies to any territory of the United States declared by congress, either in terms or effect, to be "Indian country." *In re Carr*,* 3 Saw., 310.

§ 145. The directions of the attorney-general to a district attorney in respect to his official action in regard to indictments found by the grand jury, and presented by them to the court for its action thereon, do not control the court. The fact that the defendant was sought to be put upon his trial without having been afforded an opportunity to place himself beyond the jurisdiction of the court, instructions to give him such an opportunity having been given the district attorney by the attorney-general, will not justify the court in denying the motion of the district attorney to proceed with the trial. *United States v. Davis*,* 6 Blatch., 464.

§ 146. Merger.—There is no merger in crimes of equal rank, such as misdemeanors; and it is competent for the government to put defendants on trial under a charge under section 5440, Revised Statutes, for conspiracy to commit the offense created by section 5443, Revised Statutes, where they have never been called in question for the same act by a charge under the latter section. *United States v. De Grieff*, 16 Blatch., 20 (§§ 2305-2307). See § 250.

§ 147. Though misdemeanors may be merged in felonies, yet there can be no merger of

misdemeanors among themselves, even though one is more severely punished than the other. *United States v. McDonald*, * 3 Dill., 543.

§ 148. **Dangerous weapon.**—A pistol is a dangerous weapon, and it is a use of it to point it at another accompanied with words which denote an intention of injury, or without words, if it is shown and so held as to plainly indicate a design to injure in case of resistance or refusal to consent to the objects intended to be effected by its production and display. The display of a pistol, with threats of shooting, raises the presumption that it is loaded. *United States v. Wilson*, * Bald., 78.

§ 149. **Miscellaneous.**—It seems that a state cannot punish as a crime an act authorized by it by a constitutional law. *United States v. New Bedford Bridge*, 1 Woodb. & M., 415.

§ 150. Where the evidence shows that one of two defendants is guilty, but does not show which one, both must be acquitted. *United States v. Dodd*, * 15 Int. Rev. Rec., 9.

§ 151. In the District of Columbia, a person convicted of crime in the criminal court may have an appeal to the general term. *United States v. Wood*, * 1 MacArth., 242.

II. CONSPIRACY.

[See XXVI, 3, *infra*.]

SUMMARY—*Conspiracy defined*, §§ 152-153.—*To defraud the government*, § 154.—*To prevent free exercise of rights*, § 156.—*Each liable for acts of all*, §§ 157, 165.—*Motive in joining a conspiracy immaterial*, § 158.—*Meeting and formal agreement not necessary*, § 159.—*A conspiracy is formed, when*, §§ 159-162, 165.—*Proof as to time of formation of conspiracy*, § 163.—*Circumstantial evidence*, §§ 164, 176.—*Overt act*, §§ 165, 166, 176.—*Proof of guilty connection*, § 167.—*Parties performing different acts*, §§ 168, 171.—*Proof by statements, letters and telegrams*, § 169.—*Abandonment of design*, § 170.—*Need not originate with persons charged*, § 172.—*Under section 30, act of March 2, 1867*, §§ 173, 178.—*Not necessary to prove express agreement on the part of all*, § 174.—*Two conspirators enough*, § 175.—*Common design the essence of the charge*, § 176.—*Removal of spirits*, §§ 177-179.

§ 152. A conspiracy is an agreement between two or more persons to do an unlawful thing, or to do a lawful thing by unlawful means. The conspiracy is a crime, if nothing be done in pursuance of it. *United States v. Mitchell*, §§ 180-182. See § 215.

§ 153. A conspiracy is formed when two or more persons agree together to do an unlawful act; that is, when they combine to accomplish, by their united action, a criminal or unlawful purpose. The statutory offense of conspiracy under the laws of the United States is complete when such agreement is made, or such combination is entered into, and one or more of the parties do any act to effect the object of the conspiracy. *United States v. Goldberg*, §§ 182-194.

§ 154. A conspiracy is an agreement or combination between two or more persons to effect an unlawful purpose. The statutory offense, under the laws of the United States, which provide "that if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," is not complete until an act is done by some of the parties to carry into execution the fraud. The agreement or combination is the offense, but some act in furtherance of the agreement is necessary to render the offense indictable under the statute. *United States v. Sacia*, §§ 195-199. See § 237.

§ 155. A conspiracy is where two or more persons combine, confederate or agree to do any unlawful act. It may be proved by direct testimony of witnesses having positive knowledge of its existence, or it may be legally presumed from facts and circumstances leading with reasonable certainty to the conclusion of its existence. *United States v. Smith*, §§ 207-214.

§ 156. Upon the trial of an indictment for conspiring to violate the first section of the act of May 31, 1870, by unlawfully hindering and preventing a certain class of persons named therein from the future exercise of the right to vote at an election, the jury were instructed that if they found that there was a conspiracy, and that the defendant was a member of it, and that one of its purposes was that set forth in the indictment, the defendant was guilty, although the conspiracy had other objects also. But if the purpose of the conspiracy set forth in the indictment was not amongst the purposes of the conspiracy, if one existed, or the defendant was not engaged in it, or there was no conspiracy at all, the defendant was not guilty. *United States v. Mitchell*, §§ 180-182. See §§ 234, 235.

§ 157. Each member of a conspiracy is responsible personally for every act of the conspiracy, and for the acts of each member thereof, done by common consent, in furtherance

of its illegal purposes; and also for such acts done in furtherance of the conspiracy not consented to beforehand, if assented to subsequently to their perpetration, and that whether the person charged was himself actually present or not when the acts were done. *Ibid.* See § 224.

§ 158. It is immaterial that the motive of a person in joining a conspiracy was not illegal at the time, if he remains a member of, and participates in, the conspiracy after he is aware or has reason to know that the conspiracy is unlawful. *Ibid.*

§ 159. It is not necessary to constitute a conspiracy that the persons charged should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly by words or in writing state what the unlawful scheme is to be and the details of the plan or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. *United States v. Goldberg.* §§ 183-194.

§ 160. A mere discussion between parties about entering into a conspiracy, or as to the means to be adopted for the performance of the unlawful act, does not constitute a conspiracy, unless the scheme or some proposed scheme is assented to — concurred in by the parties in some manner so that their minds meet for the accomplishment of the proposed act. *Ibid.*

§ 161. A mere agreement or combination to effect an unlawful purpose, not followed by any act done by either of the parties to carry into execution the object of the conspiracy, does not constitute the offense under the statutes of the United States. There must be both the corrupt agreement or combination and an act or acts of the parties to effect the illegal object. *Ibid.*

§ 162. Where there is an attempted attainment of an unlawful end by two or more persons, who are actuated by a common design of accomplishing that end, and who in any way, and from any motive, or upon any consideration, work together in furtherance of the unlawful scheme, each one of the persons becomes a member of the conspiracy. *Ibid.*

§ 163. On an indictment for conspiracy it is not essential that the alleged conspiracy be shown to have been formed at the precise time or times stated in the indictment. It is sufficient, so far as time is concerned, that it be shown that about the time or times charged a conspiracy was in existence. *Ibid.*

§ 164. It is as competent to prove an alleged conspiracy by circumstances as by direct proof. *Ibid.*

§ 165. Where a conspiracy has been formed, and an act has been done by any one of the conspirators in pursuance of the conspiracy, that completes the offense as to all, and the act of the one becomes the act of all. *Ibid.* See §§ 224, 231, 249.

§ 166. The overt act which it is necessary to prove in order to convict persons charged with a conspiracy must not be an act which is a part of the agreeing or conspiring together, but it must be a subsequent independent act following a completed conspiracy and done to carry into effect the object of the original combination. *Ibid.* See §§ 231, 249.

§ 167. Guilty connection with a conspiracy may be established by showing association by the persons named with others, in and for the prosecution of the guilty object. Each party must be actuated by an intent to promote the common design, but each may perform separate acts or hold distinct relations in forwarding the design. *Ibid.* See § 248.

§ 168. If two persons pursue by their acts the same object, one performing one act or a part of an act, and the other performing an act or another part of the same act, so as to complete it with a view to the attainment of the object they are pursuing, a jury is at liberty to draw the conclusion that they have been engaged in a conspiracy to effect the object. *Ibid.*

§ 169. Statements, letters and telegrams of persons indicted for conspiracy are admissible as bearing on the question of the nature and existence of the alleged conspiracy and the connection of the alleged conspirators with it; but to establish the connection of any particular defendant with it, such connection must be shown by facts and circumstances independent of the declarations of others. When, however, such connection is shown by independent evidence, then a defendant is bound by the acts, declarations and statements of his co-conspirators, because in that event each is deemed to assent to or command what is done by any other in furtherance of the common object. *Ibid.*

§ 170. Even though a combination was actually formed to do an illegal act, still if the design was abandoned before any act was done in furtherance of it, then no declaration or statement of one of the parties to the combination, made after such abandonment, will affect either of the others. *Ibid.*

§ 171. The existence of a conspiracy is proved, when it is proved that any two or more of the parties charged aimed, by their acts, to accomplish the same unlawful purpose, one performing one part, and another performing another part, although they never met together to concert the plan. *United States v. Sacia,* §§ 195-199.

§ 172. It is not necessary that a conspiracy should originate with the persons charged. Every one coming into a conspiracy at any stage of the proceedings, with knowledge of its existence, is regarded in law as a party to all the acts done by any of the other parties, before or afterwards, in furtherance of the common design. *Ibid.*

§ 173. A conspiracy under section 30 of the act of March 2, 1837, is an agreement or combination between two or more persons to effect the purpose declared by the act to be illegal. The gist of the offense is the conspiracy to do the illegal act, and the particular means employed, or to be employed, is immaterial. *United States v. Rindskopf*, §§ 290-296.

§ 174. In order to maintain the charge of conspiracy it is not necessary to prove an express agreement between all the parties charged to do the illegal act. It is enough that all had the same illegal purpose, and that each acted a certain part tending or intended to accomplish it. It is not necessary to show that the parties had a previous acquaintance, or that each knew the part the others were to perform. *Ibid.*

§ 175. On an indictment for conspiracy, if one of the persons against whom it is charged becomes a witness for the government, he counts as one of the conspirators, and the indictment is sustained if it is proved as to him and one other. *Ibid.* See § 233.

§ 176. Upon a charge of conspiracy, an overt act which is itself criminal may be proved to show the existence of the conspiracy alleged. The common design is the essence of the charge, and may be shown by circumstances and the acts performed by the different alleged conspirators, and the fact that the several acts constitute separate criminal offenses does not exonerate the parties from conspiracy or bar a prosecution therefor. *Ibid.* See §§ 231, 249.

§ 177. On an indictment for a conspiracy to defraud the government, where the act charged is the fraudulent removal of spirits from a distillery without payment of the tax, the government is not bound to prove exactly the averments as to the dates and the quantity of spirits removed. *United States v. Smith*, §§ 207-214.

§ 178. On an indictment for a conspiracy to defraud the United States, under section 30 of the act of congress of March 2, 1867, it is necessary not only to prove the conspiracy but the overt act charged as being done in furtherance thereof. *Ibid.*

§ 179. Where the indictment charges a conspiracy to defraud the government, and the overt act charged is the removal of certain spirits from a bonded warehouse with intent to defraud the government, the prosecution is not obliged strictly to prove the ownership of the rectifying establishment to which it is charged they were removed. *Ibid.*

[NOTES.— See §§ 215-252.]

UNITED STATES v. MITCHELL.

(Circuit Court for South Carolina: 1 Hughes, 433-447. 1871.)

STATEMENT OF FACTS.—Indictment for a conspiracy with the object of maltreating and intimidating colored republicans, the conspiracy charged being that of the notorious Ku Klux Klan. The evidence consisted of proof of the murder of one person and cruel maltreatment of others, and of the system upon which the Klan conducted its operations.

§ 180. *What is a conspiracy.* •

Charge by BOND, J.

You have listened with patience to the recital of the evidence in this cause, and without commenting upon *that* the court proposes to state to you the law applicable to the evidence which must guide you in making up your verdict. The indictment, gentlemen, is for a conspiracy, which is an agreement by two or more persons to do an unlawful thing, or to do a lawful thing by unlawful means. The thing to be punished is the unlawful conspiracy, and not the particular acts done in pursuance of it. The conspiracy is a crime, if nothing be done in pursuance of it.

The indictment, gentlemen, contains two counts. The first charges the defendant and others, jointly indicted with him, with having conspired to violate the first section of the act of May 31, 1870, by unlawfully hindering, preventing and restraining a certain class of persons therein named from the future exercise of the right to vote at an election to take place in October, 1872, on account of their race, color or previous condition of servitude. And the sec-

ond count charges that he, with others, did conspire to injure, because of his color, James Williams, because he had exercised the right to vote previously. It is to these counts that you are to refer the evidence, and to apply the law which the court gives you.

§ 181. *Where it appears that there was a conspiracy in which the defendant took part, and its purpose was to effect one of the purposes charged in the indictment, it is sufficient for conviction.*

If you find from the evidence that there was no such conspiracy as that described in the first count, or if there was a conspiracy the object of which and its purpose were different from that set forth in the count, and that the object and purpose set forth in the count was not one of its purposes and objects, then the party charged is not guilty under the first count, though he may have been engaged in the conspiracy. But it is not necessary, if the jury find there was a conspiracy, and that the party was engaged in it, that they should find its purpose to have been single. If they find that one of its purposes was that set forth in the first count, to prevent citizens from the exercise of the right to vote because of their color, it is sufficient. An association having such a purpose is an unlawful conspiracy, and a party engaged in it may be punished under the first count.

§ 182. *Liability of each member of an unlawful association.*

Each member of such an association is a conspirator, and is responsible, personally, for every act of the conspiracy, and for the acts of each member thereof, done by common consent, in furtherance of its illegal purposes, and also for such acts done in furtherance of the conspiracy not consented to beforehand, if assented to subsequently to their perpetration, and that whether the party charged was himself actually present or not when such act was done. And if the jury believe from the evidence that the various Klans spoken of by the witnesses were but parts of one general conspiracy, this rule applies not only to the members of the same Klan, but to the acts and conduct of the members of the different Klans done in furtherance of the conspiracy. And it makes no difference in guilt if you find from the evidence that the motive of a party who joined the conspiracy was not illegal when he did join it, if you also find that, after he became a member, he was aware of the fact, or had reason to know, that the true object of the conspiracy was to prevent or hinder the free exercise of the elective franchise by intimidation or violence, as aforesaid, on account of color, and that he still remained a member and participated in its meetings, and that, though you may also find he never himself actually used the force, intimidation or violence, and was not present when it was used.

And now, if the jury find from the evidence that the party charged did so conspire to prevent the citizens described from exercising their right to vote on account of their color at a future election, specified to be the election to take place on the third Wednesday of October, 1872, then the party charged is guilty under the first count of the indictment. And if the jury find from the evidence that they did so conspire, and for the same reason, to injure and oppress, on account of his color, one Jim Rainey, *alias* Jim Williams, because he had antecedently, on the third Wednesday of October, 1870, exercised his right to vote, then he is guilty on the second count. But if the jury find from the evidence that no such conspiracy existed, or that, if it existed, the intimidation or injury of voters, because of their exercise of the suffrage, or to prevent its exercise, formed no part of its purpose, or that, if that were its purpose, the defendant was not engaged in it, then the defendant is not guilty.

But the jury is not bound to believe the sole purpose of the conspiracy to be that set out in the first count; if they find it to be one of the purposes, it is sufficient. Nor if they find that the beatings and intimidation spoken of by the witnesses took place or existed, are the jury bound to believe that the reasons given at the time by the conspirators, if they find reasons were given, were the true reasons for such conduct, but the jury may determine, from all the evidence in the cause, what the true reasons were for such violence. If the jury find from the evidence, as we said before, that the conspiracy set forth in the first and second counts of the indictment existed, and the defendant engaged in it there, he is guilty on both counts. If there existed no such conspiracy at the time set out in the indictment, or, if existing, it had another object, which did not include that set out in the indictment, or, if existing and having the illegal purpose, the defendant took no part in it, then he is not guilty. The jury are at liberty to find one of three verdicts: They may find the party guilty generally, or not guilty generally, or they may find him guilty on one count and not guilty on the other. (Verdict, guilty on the second count.)

UNITED STATES *v.* GOLDBERG.

(Circuit Court for Wisconsin: 7 Bissell, 175-193. 1876.)

Charge by DYER, J.

STATEMENT OF FACTS.—Gentlemen: It is charged in the first count of the indictment that on the 24th day of July, 1875, the defendants Philip Goldberg, Julius Jonas and A. M. Crosby conspired together to wilfully take and carry away, with intent to steal and destroy, certain papers, documents and records known as "Returns of Gaugers of Spirits," form 59, and as "Rectifier's Notice of Intention to Rectify," form 122, and other papers and documents then filed and deposited with John M. Hedrick, a supervisor of internal revenue of the United States.

As acts to effect the object of this alleged conspiracy it is charged in this count that, on the 25th of July, 1875, the defendants Philip Goldberg and Julius Jonas, at Milwaukee, asked and demanded from Leopold Wirth, Henry Schanfield, Louis Rindskopf, William Bergenthal, Samuel Rindskopf and Robert Kiewert, \$50,000 with which to hire and induce certain persons to steal, take and carry away the said papers, documents and records; and that, on the 26th of July, 1875, the defendants Philip Goldberg and Julius Jonas, at Milwaukee, did meet, consult and confer together, and with Leopold Wirth, Louis Rindskopf, William Bergenthal, and other persons, to devise plans and means to steal, take and destroy said papers, documents and records, and traveled from Milwaukee to Chicago, and on the 29th of July, 1875, returned from Chicago to Milwaukee, and on that day at Milwaukee consulted and conferred with Samuel Rindskopf as to the means to be adopted to take and carry away from the possession of John M. Hedrick said papers, documents and records.

The second count charges a conspiracy formed July 23, 1875, to wilfully take and carry away, with intent to steal and destroy, certain papers, documents and records in form required by regulations prescribed by the commissioner of internal revenue, and filed and deposited in the office of the collector of internal revenue for this district, which papers and documents were known as "Rectifier's Notice of Intention to Rectify," designated as form 122, a large number of which were given and made to the collector by Aaron Schoenfeld, as a rectifier, and a large number of which were given and made by Samuel,

Elias, Jacob and Max Rindskopf, as rectifiers of distilled spirits, to the collector.

As overt acts to effect the object of the alleged conspiracy it is charged in this count that on the 23th of July, 1875, at Milwaukee, the defendants met, conferred and consulted with Samuel Rindskopf, Leopold Wirth, Henry Schanfield, William Bergenthal, and Louis Rindskopf, as to the mode and manner in which the papers, documents and records could be taken and carried away; and asked and demanded from those parties \$50,000 as a reward for taking and carrying away the papers, documents and records, and proceeded to Chicago for the purpose of meeting and consulting with Louis Rindskopf, Leopold Wirth and Robert Kiewert, as to the means to be adopted; and at Chicago did meet and confer with those parties, and there devised opportunities and means to take and carry away the papers, documents and records, and on the 29th of July, 1875, proceeded from Chicago to Milwaukee for the purpose of taking and carrying the same away.

The third count charges a similar conspiracy, as formed July 28, 1875, to take and carry away, with intent to steal and destroy, papers, documents and records, which were deposited with John M. Hedrick, supervisor of internal revenue, and which purported to be returns of spirits gauged by William H. Roddis in April, 1875, and in form required by regulation prescribed by the commissioner of internal revenue, and designated as form 59; also other papers, documents and records deposited with John M. Hedrick, supervisor, relating to the business of Simon Meyer, Aaron Schœnfeld, and of Samuel, Elias, Jacob and Max Rindskopf, as rectifiers, and to the business of other persons who were rectifiers in this collection district; also other papers, documents and records filed and deposited in the office of the collector of internal revenue, purporting to be returns of gaugers of spirits, designated as form 59, and filed and deposited in said office by John E. Fitzgerald, John S. Taft and William H. Roddis, as internal revenue gaugers, and other papers, documents and records deposited in the collector's office, and all of which were required by law and regulation to be there filed and deposited, and related to the business of certain persons who carried on the business of rectifiers of distilled spirits in the first collection district, in the months of March and April, 1875.

As acts to effect the object of the conspiracy, it is alleged in this count that on the 29th of July, 1875, at Milwaukee, the defendants asked and demanded from Leopold Wirth, Henry Schanfield, Louis Rindskopf, William Bergenthal, Samuel Rindskopf, and Robert Kiewert, the sum of \$50,000, with which to hire and induce certain persons to steal, take and carry away said papers, documents and records. It is also charged that on the 30th of July, 1875, the defendants at Milwaukee met, consulted and conferred together, and with Leopold Wirth, Louis Rindskopf, William Bergenthal and other persons, to devise plans and means to accomplish the object of the alleged conspiracy, and traveled from Milwaukee to Chicago and returned from Chicago to Milwaukee, and there consulted and conferred with Samuel Rindskopf, as to the means to be adopted to take and carry away the said papers, documents and records. This is the substance of the several counts of this indictment, and I have thus particularly called your attention to the allegations of each count, because it is important that they be borne in mind by you in considering the evidence.

By section 5403 of the statutes of the United States it is made an offense for any person to wilfully destroy, or attempt to destroy, or, with intent to steal or destroy, to wilfully take and carry away any paper, document or record

filed or deposited in any public office, or with any public officer. Section 5440 of the statutes provides that if two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to certain punishment.

The charge in this indictment, then, is the formation of such a conspiracy as is made punishable by section 5440, namely, a conspiracy to commit an offense against the United States, which offense is that named in section 5403. The question, therefore, to be determined in this case is, was the alleged conspiracy formed by any two of the defendants to wilfully take and carry away, with intent to steal or destroy, the papers, documents and records mentioned in the indictment, or any of them; and if such conspiracy was formed, did any or either of the parties thereto, to effect the object of the conspiracy, do either or any of such of the acts charged in the indictment as constitute acts to carry into effect such object?

This indictment is against three defendants. The present trial, however, does not, and your verdict will not, include the defendant Crosby. The defendants Philip Goldberg and Julius Jonas only are now upon trial. As I have stated, the charge is one of conspiracy; that the defendants conspired to commit a certain offense against the United States. The questions, therefore, requiring your attention, to state them more explicitly, and in proper order, are these: 1. Was there such a conspiracy as is alleged in any or either of these three counts, and if there was, were the defendants Goldberg and Jonas, or either of them, connected with the conspiracy? 2. If such a conspiracy was formed and existed, were any or either of such of the acts charged in the indictment as constitute acts to carry into effect the object of the conspiracy, committed as alleged?

§ 153. *What are the requisites necessary to constitute a conspiracy.*

I direct your attention, first, to what is essential to constitute a conspiracy. A conspiracy is formed when two or more persons agree together to do an unlawful act — in other words, when they combine to accomplish, by their united action, a criminal or unlawful purpose; and the statutory offense is consummated when such agreement is made, or such combination is entered into, and one or more of the parties do any act to effect the object of such conspiracy. If two or more persons agree together that they will commit a certain offense against the United States, as that they will enter a public office of the United States, and take and carry away papers and records there deposited, with intent to steal or destroy them, and one or more of the persons so agreeing do any act to effect the object of such agreement, they are guilty of the offense of conspiracy.

It is not necessary, to constitute a conspiracy, that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme is to be, and the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. *United States v. Babcock*, 3 Cent. L. J., 144. Of course, a mere discussion between parties about entering into a conspiracy, or as to the means to be adopted for the performance of an unlawful act, does not constitute a conspiracy, unless the scheme, or some proposed scheme, is in fact assented to — concurred in by

the parties in some manner, so that their minds meet for the accomplishment of the proposed unlawful act.

§ 184. — *besides the intention to commit the unlawful act there must be some one or more acts done to effect the illegal object or design agreed upon.*

As I shall have occasion hereafter more fully to state to you, a mere agreement or combination to effect an unlawful purpose, not followed by any act done by either of the parties to carry into execution the object of the conspiracy, does not constitute the offense. There must be both the corrupt agreement or combination, and an act or acts done by one or more of the parties to effect the illegal object or design agreed upon, to make the punishable offense under the statute. Where there is an attempted attainment of an unlawful end by two or more persons, who are actuated by a common design of accomplishing that end, and who in any way, and from any motive, or upon any consideration, work together in furtherance of the unlawful scheme, each one of the persons becomes a member of the conspiracy. To establish the guilt of the defendants on trial you must be convinced upon the testimony that a conspiracy was formed, as alleged, to commit the offense against the United States, which is particularly described in the indictment; that these defendants, Goldberg and Jonas, were parties to that conspiracy, if any; and that to effect the object of such conspiracy, one or more of the parties thereto did one or more of such of the acts alleged in the indictment as constitute an act or acts to effect the object.

§ 185. *It is not necessary to prove that the conspiracy took place at the exact time mentioned in the indictment.*

It is not essential that the alleged conspiracy be shown to have been formed at the precise time or times stated in the several counts of this indictment. It is sufficient, so far as time is concerned, if it be shown that at about the time or times charged there was a conspiracy between any two or more of the persons who are alleged to have conspired together to wilfully take and carry away, with intent to steal or destroy, any of the papers, documents or records mentioned in the indictment.

§ 186. *The existence of a conspiracy may be established by indirect or circumstantial evidence.*

To establish a conspiracy, it is not, as I have already said, necessary that there should be "an explicit or formal agreement for an unlawful scheme" between the parties, nor is it essential that direct proof be made of an express agreement to do the act forbidden by the law. It is as competent to prove an alleged conspiracy by circumstances as by direct evidence. In prosecutions for criminal conspiracies, the proof of the combination charged must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. 1 Whart. Cr. L., § 235.

The understanding, combination or agreement between the parties in the given case, to effect the unlawful purpose charged, must be proved, because without the corrupt agreement or understanding there is no conspiracy, but, as I have just said, circumstantial evidence may be resorted to, to show the agreement or conspiracy. The acts of parties in the particular case, the nature of those acts, their declarations and statements, whether verbal or in writing, and the character of the transactions or series of transactions with the accompanying circumstances, as the evidence may disclose them, should be investigated and considered, as sources from which evidence may be derived of the existence or non-existence of an agreement, which may be express or im-

plied, to do the alleged unlawful act. The government here affirms the formation and existence of a conspiracy to commit a particular offense against the United States, and that these defendants were parties to such conspiracy. The burden is therefore upon the government to prove what it thus affirms, by legal and competent evidence, in order to ask a verdict in its favor.

§ 187. *The conspiracy not complete, so as to be punishable, until an act has been performed to carry it into effect.*

Now I have said to you that, to constitute the offense which is made punishable by the statute, there must be not only the conspiring together by the parties, but the formation of the conspiracy must be followed by an act done by one or more of the parties to the conspiracy to effect its object. At common law it was an offense for two or more persons to merely confederate and combine together by concerted means to do that which is unlawful or criminal. But in settling the criminal liability of these parties, we have to be governed by the statute; and as, in order to convict, the statutory offense must be proved, it is not sufficient to show merely that a conspiracy was formed. Persons may conspire together to commit an offense against the United States; the conspiring together may be complete, yet if the proceeding stops with the mere agreement, and no act is done to carry into effect the object of the agreement or conspiracy, no criminal offense has been committed. Acts and deeds are the subject of human laws, not mere thoughts and intents, unless accompanied by acts, and the theory of the law is, that when persons merely form a conspiracy and there pause in their proceeding, and do no act to effect its object, they are to be regarded as having repented of the act of conspiring, and are not to be punished for that alone. But the moment any act is done to effect the object of a conspiracy, that moment criminal liability is fixed; and this act to effect the object, though it be done by only one of the parties, binds each and all the parties to the conspiracy and completes the offense as to all, for in that case the act of one becomes the act of both or all. So, gentlemen, if you should find that the defendants conspired together, as charged in the indictment, to wilfully take and carry away these papers, records and documents, with intent to steal or destroy the same, you will then inquire whether the defendants, or either of them, did any or either of such of the acts charged in the indictment as constitute acts to effect the object of the conspiracy.

§ 188. — *such act must not be one of the series constituting the illegal conspiring; but one which carries into effect the object of the unlawful combination.*

The act must be one, you will observe, to effect the object of the conspiracy. That must be the character of the act. It must not be an act which is part of the conspiracy — it must not be one of a series of acts constituting the agreement or conspiring together, but it must be a subsequent, independent act following a completed conspiracy, and done to carry into effect the object of the original combination. To illustrate, two persons conspire to take the life of another. It is agreed that it shall be done. The conspiracy is complete, but there is yet wanting the act to effect the object of the conspiracy. One of the parties purchases or procures the weapon with which to do the deed; there you have an act to effect the object, and the punishable offense is fully committed. So if the parties subsequent to the formation of a complete conspiracy, following it up and as independent acts, hold consultations between themselves and others as to the means to be employed to carry the conspiracy into effect, or go from place to place and confer about and arrange as to the particular means or

instrumentalities that shall be used or employed to effect the object of the conspiracy, these constitute acts to effect such object.

Now, if there was this alleged conspiracy, there must be proved such acts to effect its object as are alleged. Some one or more of the overt acts charged in the indictment must be proven, in order to sustain a conviction, and the acts as proven, if any, must be acts to effect the object of the conspiracy. There are three general classes of overt acts charged: 1. Demands of money with which to hire and induce certain persons to take, carry away and steal the papers and records in question, and as a reward for taking and carrying the same away. 2. Journeys from Chicago to Milwaukee and from Milwaukee to Chicago for the purpose of holding conferences and consultations with parties named in the indictment, to devise means and opportunities to take and carry away the papers, records, etc.; and in the second count, there is an allegation of a journey from Chicago to Milwaukee for the purpose of taking and carrying away the papers. 3. Consultations and conferences with the persons named in the indictment as to the mode and manner in which and to devise means and opportunities by which the papers, documents and records could be taken and carried away.

The simple question upon this branch of the case is, were any or either of these acts done by any or either of the defendants, and if so, were they acts independent of and to carry into effect a completed conspiracy formed by the defendants to take and carry away, with intent to steal or destroy, the papers, documents and records in question? Upon all the evidence and upon all the circumstances as disclosed to you, you are to determine the question.

§ 189. *The offense charged must be proved.*

I have stated to you, gentlemen, the general rules and principles upon the subject of conspiracy and overt acts, applicable to this case. There are some more particular considerations, to which I now direct your attention. The offense charged is a conspiracy to take and carry away, with intent to steal or destroy, the papers, records and documents mentioned. It is this conspiracy, therefore, that it is incumbent upon the prosecution to prove. Proof of a combination for any other purpose is not sufficient. Proof of a scheme to obtain, by consent of a public officer having them in his custody, access to and inspection of the papers, documents and records, would not meet the requirements of this indictment, unless there was the purpose to take and carry away, with intent to steal or destroy, such papers and records. It is claimed by the prosecution that the alleged conspiracy was formed by and between the three defendants Goldberg, Jonas and Crosby; that it was not a conspiracy between those defendants and the Milwaukee parties, but that first the conspiracy was formed between those defendants, and then that what transpired between them or any of them and the Milwaukee parties were acts to effect the object of a previously formed conspiracy.

§ 190. *Overt acts; intention to form a conspiracy.*

It is claimed on the part of the defense that there was no such previously formed and completed conspiracy, and that what took place between the defendants and the Milwaukee parties were not acts to carry into effect any such conspiracy; that whatever was said or transpired between the defendants and the Milwaukee parties was but part and parcel of an incomplete, unperfected transaction between the defendants and persons in Milwaukee, and before completed was wholly abandoned. On this subject I charge you that if you find from the evidence that the alleged demands of money, conferences,

consultations and journeys, if made and had, were part and parcel of an uncompleted transaction, combination or arrangement between the defendants and the Milwaukee parties, and were not preceded by such a perfected conspiracy between the defendants as is alleged, then such demands, conferences, consultations and journeys, if any, did not, nor did either of them, have the necessary character of overt acts, and the offense charged is in that event not established. Further, if you find from the evidence that up to the time of the alleged meeting of one or more of the defendants with the Milwaukee parties, no conspiracy had been formed as alleged between the defendants, and you find that the defendants had one or more consultations with some or any of the Milwaukee parties, wherein the project of stealing or destroying the papers and documents described in the indictment was talked over with a view to forming such conspiracy, but that the scheme was for any cause then abandoned, and no agreement, combination or understanding was made or concluded by and between the defendants or any two of them, to take and carry away said papers and documents, with intent to steal or destroy the same, then and in that case no conspiracy is proven, and your verdict should be for defendants. A mere intention to form a conspiracy, or a mere solicitation to others to unite in a projected conspiracy, when as yet no conspiracy has been formed, does not meet the requirements of the law. But if the defendants, or any two of them, formed a conspiracy to take and carry away these papers, documents and records, with intent to steal or destroy the same, and if upon the complete formation of such a conspiracy by and between themselves, either of the defendants made the journeys or demands of money, or held the consultations and conferences alleged, as acts to effect the object of a previously formed conspiracy, then the offense as charged was committed.

§ 191. *As to what constitutes participation in a conspiracy.*

As the defendants on trial are indicted for conspiracy with another person named in the indictment to take and carry away the papers and records in question, with intent to steal and destroy the same, it is clear that the charge implies that they knew there was such a conspiracy, and with such knowledge became parties to the unlawful scheme, and the alleged guilty participation must be proved by the government. Guilty connection with a conspiracy may be established by showing association by the person accused, with others, in and for the purpose of the prosecution of the illegal object. Each party must be actuated by an intent to promote the common design; but each may perform separate acts or hold distinct relations in forwarding that design.

If two persons pursue by their acts the same object, one performing one act or part of an act, and the other another act, or another part of the same act, so as to complete it with a view to the attainment of the object they are pursuing, the jury are at liberty to draw the conclusion that they have been engaged in a conspiracy to effect the object. 3 Archb. Cr. Pr., 622. Co-operation in some form must be shown. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose. If parties in any manner work together to advance the unlawful scheme, having its promotion in view, and "actuated by the common purpose of accomplishing the unlawful end," they are conspirators. If a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a view to forwarding the enterprise or scheme, assists in its prosecution, he becomes a conspirator. Upon this subject I charge you in substance as asked by the defendants' counsel as to the defendant Jonas, that if you find

from the evidence that a conspiracy was formed, as alleged, between the other defendants, but that the prosecution has failed to prove that the defendant Jonas intentionally participated in the transaction, knowing it to be such conspiracy, and with a view to the advancement of the common design, then your verdict as to him should be not guilty. As to both defendants on trial, it must be shown by the evidence (beyond reasonable doubt) that they knowingly and designedly assented to and united in the unlawful combination charged, if any such existed, in order to make them parties thereto; and the fact upon this branch of the case you must determine upon all the evidence before you.

§ 192. *Acts, declarations and other circumstances to prove conspiracy.*

Now I have said that in determining the question of the formation or existence of a conspiracy, the acts and declarations of the persons accused may, among other circumstances, be looked to and considered by the jury. Statements of one and in some instances of two of the defendants, in the absence of the other defendant, and conversations with some of the witnesses, on the part of one or more of the defendants in the absence of the other, have been given in evidence. The individual letters and telegrams of the different defendants have also been introduced. It is proper that I should say to you that this evidence was admitted as bearing upon the question of the existence of a conspiracy and its nature, if any there was, and as shedding light upon the relation of the person so speaking to the transaction. These declarations, statements and communications were and are admissible as bearing upon the question of the existence of the alleged conspiracy, and as touching the alleged connection of the persons making the same therewith. If a conspiracy be shown to exist, the question then follows, were the defendants on trial, or either of them, connected with that conspiracy as parties thereto? To establish the connection of either of the defendants therewith, such connection must be shown, by facts or circumstances, independent of the declarations of others, or by his own acts, conduct or declarations. And until this fact is thus established, he is not to be bound by the declarations or statements of others. The principle of law and rule of evidence is that when once a conspiracy or combination is established, and a defendant's connection therewith is shown by independent evidence, then he is bound by the acts, declarations and statements of his co-conspirators, because in that event each is deemed to assent to or to command what is done by any other in furtherance of the common object. 1 Whart., 702.

So in considering the testimony given as to the acts, declarations and statements of either one of the defendants when the other defendant or defendants was or were not present, you are to understand that that testimony was submitted to you for the purpose of showing in the first instance that there was a conspiracy formed and existing, and that the person or persons making the declarations, statements and communications were parties to it; that the alleged connection of any one of the defendants with the alleged conspiracy, if any existed, must be shown by facts or circumstances independent of statements of other defendants in his absence, and that when once that connection be thus shown, then he becomes affected and bound by the declarations and acts of other parties to the conspiracy, if any, made and done in the course of the prosecution of or pending the enterprise and during his connection therewith.

If you should believe from the evidence that any project was discussed or even a combination was formed by the defendants or any two of them to take and carry away, with intent to steal or destroy, the papers and records described

in the indictment, and that such project or combination was wholly abandoned by the defendants before any act done to effect its object, then you should disregard and should not consider any statement, declaration or act of any one of the defendants as affecting either of the others made or done after such abandonment. So, too, if you should find as a fact such abandonment under the circumstances just stated, and that thereafter Samuel Rindskopf individually employed the defendant Crosby to procure abstracts of evidence, or releases of property seized, or to do other acts as an employee for said Rindskopf or for Rindskopf Bros., and if you should find that any portion of the correspondence in evidence, between Crosby and Rindskopf, was subsequent to such abandonment, and that it related to such employment and business pertaining thereto, and that the defendants Goldberg and Jonas were not parties to and had no connection with such employment or arrangement between Crosby and Rindskopf, then that portion of such correspondence should not be considered by you as evidence against the defendants on trial.

Further, if you should find that there never was a conspiracy between the defendants to take and carry away, with intent to steal or destroy, the papers and records in question, but that the defendants Goldberg and Jonas understood that the acts to be accomplished by them and Crosby were to procure abstracts of evidence in the supervisor's and collector's offices in a lawful way, and to furnish an attorney to defend the Milwaukee parties and to procure a release of goods seized by the government, or to procure a settlement or compromise with the government, and that Crosby, without the knowledge, direction or procurement of Goldberg or Jonas, said to the Milwaukee parties that he would or could get some one else to steal or destroy the papers or records, then, and in such case, the defendants Goldberg and Jonas should not be bound by such declarations of Crosby in that regard. If, however, the alleged conspiracy be shown and the defendants' connection therewith be established, then each party is bound by the declarations of the other made while the conspiracy is pending or is being prosecuted.

I have said that to establish a conspiracy, or the connection of a party therewith, direct proof is not indispensable, and that it may be shown by circumstances. Where the prosecution in a criminal case rely upon circumstantial evidence, that is, upon proof of the facts or circumstances which are to be used as a means of arriving at the principal fact in question, it is a rule that these facts or circumstances must be proved in order to lay the basis for the presumption which is sought to be established. Each circumstance essential to the conclusion must be proved to the same extent as if the whole issue rested upon the proof of such essential circumstance. When the facts and circumstances depended upon to establish the principal fact are thus proved, the circumstantial evidence thus produced may generally be relied upon with safety in arriving at a conclusion as to the guilt or innocence of the person accused. The burden of proof throughout is upon the prosecution to prove the guilt of the defendants. To what I have thus far stated it is proper to add, that, in a case depending upon circumstantial evidence, the rule is that, first, "the hypothesis of delinquency or guilt of the offense charged in the indictment should flow naturally from the facts proved and be consistent with them all, and second, the evidence must be such as to exclude every reasonable hypothesis but that of his guilt of the offense imputed to him; or in other words, the facts proved must all be consistent with and point to guilt only, and must be inconsistent with innocence." *People v. Bennett*, 49 N. Y., 137.

§ 193. *Testimony of accomplices, though competent, must be received with caution and scrutinized with care by the jury.*

Witnesses have been called in the course of the trial who testify to their own participation in fraudulent and criminal practices, and some of whom are under indictment for such practices in this court, and have pleaded guilty to the charges presented against them. There has been much criticism of their testimony, and considerable discussion of the question as to the weight to which their testimony is entitled. The court instructs you, upon this subject, that it is the settled rule in this country that even accomplices in the commission of crime are competent witnesses, and that the government has the right to use them as witnesses. It is the duty of the court to admit their testimony, and that of the jury to consider it. The testimony of accomplices is, however, always to be received with caution, and weighed and scrutinized with great care by the jury, who should not rely upon it unsupported, unless it produces in their minds the most positive conviction of its truth. It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in material respects. But this is not absolutely essential, provided the testimony of such witness produces in the minds of the jury full and complete conviction of its truth.

§ 194. *Amount of evidence necessary to establish the existence of a conspiracy and the participation therein of a defendant.*

You must be convinced beyond reasonable doubt that the defendants on trial have committed the offense or offenses charged, in order to convict them. Each and every fact necessary to constitute the offense must be so proved — that is, beyond reasonable doubt. Until guilt is proven there is an absolute presumption of innocence. The law does not permit the defendants to testify, and this presumption of innocence stands in their favor, until by competent testimony it is overthrown and guilt established beyond reasonable doubt. It is the settled rule in criminal cases that a conviction cannot be secured upon strong suspicion or probabilities of guilt, nor, as in civil cases, upon a mere preponderance of evidence, though the weight and character of the evidence are to be passed upon by you in determining whether the charge or charges are proven beyond reasonable doubt. By reasonable doubt is meant an actual, substantial doubt that arises and rests in the mind as testimony is weighed and considered — that results after the exercise of judgment and reason when fairly and candidly applied to an investigation of the evidence.

If the evidence convinces you beyond reasonable doubt that the defendants on trial are, or that either of them is, guilty as charged in the counts of this indictment, or either of them, then you should so find. If all the facts essential to constitute the offense or offenses charged are not established, and guilt is not proven beyond reasonable doubt, then the government cannot rightfully ask a conviction, and it would be your duty to acquit. The indictment charges that the three defendants, Goldberg, Jonas and Crosby, conspired together to commit the offense named. If you find that a conspiracy was formed by any two of the defendants named in the indictment, but that one only of the defendants on trial was a party to that conspiracy, and that the other was not, you should acquit the defendant so found not to be a party to it, and should convict the other if found guilty. (Verdict, not guilty.)

UNITED STATES *v.* SACIA.

(District Court for New Jersey: 2 Federal Reporter, 754-763. 1880.)

Charge by NIXON, D. J.

STATEMENT OF FACTS.—The indictment in this case is found under section 5440 of the Revised Statutes of the United States. That section provides "that if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc.

§ 195. *What constitutes a conspiracy to defraud the government.*

The offense, you perceive, consists in two or more persons conspiring to defraud the government in any manner whatever, in a case where one or more parties to the conspiracy shall do any act to effect the object — that is, to effect the fraud. It need not be successful. It may fall short of the actual commission of the fraud. Merely agreeing or combining together to commit the fraud is sufficient to constitute the offense, without any loss to the government, if any one of the parties has taken a step towards its execution. The section is very sweeping in its terms, and was doubtless intended to meet the party to the fraud against the government on the very threshold of the perpetration of his crime, and to render him liable to its penalties before the consummation of the fraud.

In the present case the indictment has been found against nine defendants, to wit: Jane H. Lewis, Andrew J. Park, Marcus T. Sacia, Frank Allison, *alias* Ward, Henry T. Bassford, George R. Bradford, George W. Westbrook, Mary T. Russell and Frances Helen Peabody. Five of them only are now on trial, to wit: Andrew J. Park, Marcus T. Sacia, Frank Allison, Henry T. Bassford and George R. Bradford. The general charge against them is that they combined and confederated together to defraud the United States, and that one or more acts were performed by one or more of the parties to give effect to the fraud.

The indictment specifically sets forth that the nine defendants named therein entered into a conspiracy to defraud the United States in the following manner: By depriving the United States of the benefit and advantage of the provisions of a certain last will and testament, made on the 1st day of October, 1873, by one Joseph L. Lewis, whereby he devised and bequeathed, after making certain legacies, all the rest of his property, amounting in value to more than \$1,000,000, as follows: "I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, and of every kind whatsoever, of which I may die seized and possessed, and to which, at my death, I may be entitled, unto my executors, in trust, to expend and apply in reducing the national debt of the United States of America, contracted in the cause of the rebellion in 1861," which said will was duly made and executed by said Joseph L. Lewis, who afterwards, on March 5, 1877, at Hoboken, in said district, departed this life, leaving the same unrevoked, and was duly presented for probate to the ordinary of the state of New Jersey; and further, by preventing the said residuary bequest from being applied by the said executors to the use of the United States, as provided in said will, by falsely and fraudulently opposing the lawful probate of said will, and falsely pretending that the said Jennie Holbrook was, in fact, the widow of the said testator, and that the said will was invalid and of no effect, and that she, as said widow, was entitled to a large share of

the said estate bequeathed as aforesaid for the benefit of the United States, and fraudulently, and by false testimony, preventing the said will from being proved before the ordinary, and thereby preventing the said bequest from taking effect and being applied to the use of the United States in manner aforesaid.

The jury is thus brought to the consideration of three questions, and the court suggests that when you retire to deliberate upon your verdict you should consider them separately, in the order stated: (1) Has the government proved the existence of such a conspiracy as is described in the indictment? (2) Were any of the alleged acts performed by one or more of the parties to give effect to the fraud? (3) If such a conspiracy existed, were any of the defendants members of it?

§ 196. *Conspiracy defined.*

1. Has a conspiracy to defraud the United States been entered into? The general definition of a conspiracy is an agreement or combination between two or more persons to effect an unlawful purpose. The statutory offense, under the laws of the United States, is not complete, however, until an act is done by some of the parties to carry into execution the fraud. The agreement or combination is the offense, but the performance of the alleged act to effectuate it is necessary to make it indictable in this court; and such an offense is rarely provable by direct testimony. All the text books agree that the evidence in proof of the conspiracy may be, and from the nature of the case generally must be, circumstantial. All concerted action to violate the law or to commit a fraud is secret, and is ordinarily shown by separate independent acts, tending to exhibit a common design. The common design is the essence of the charge, and to prove it it is not necessary to prove that the parties came together and actually agreed in terms to have that design, and to pursue it by common means.

§ 197. *Evidence necessary to establish a conspiracy.*

The jury will be justified in inferring the existence of a conspiracy when the government satisfies you beyond a reasonable doubt, by the testimony of credible witnesses, that any two or more of the parties charged aimed, by their acts, to accomplish the same unlawful purpose or object, one performing one part, and another another part of the same, so as to complete it, although they never met together to concert the means, or to give effect to the design. Nor is it necessary that the conspiracy should originate with the persons charged. Every one coming into a conspiracy at any stage of the proceedings, with knowledge of its existence, is regarded in law as a party to all the acts done by any of the other parties, before or afterwards, in furtherance of the common design. 3 Gr. Ev., § 93.

In determining the question of conspiracy it will be safe for you to reckon Mrs. Lewis as one of the parties. She confesses in her testimony, and by her plea of guilty to this indictment, that she was one, and however much you may be disposed to weigh or sift or doubt her evidence as to others, you are authorized to accept it as altogether true as to herself. Did she stand alone in her attempt to defraud the government, or were others implicated with her? If one other, then you will find that a conspiracy was formed, because only two are necessary to complete the offense. She states that one of the defendants, Park, originated the scheme for her to personate the widow of Joseph L. Lewis, in order to defraud the United States, and that his motive in doing so was to share with her the fruits, to wit, the money to be obtained from the estate of Lewis.

§ 198. *Weight due to the testimony of a co-conspirator.*

Much has been said as to the weight which the jury ought to give to the testimony of co-conspirators, and here is perhaps the proper place for me to submit to you a few observations on that subject. The fact that a witness is a co-conspirator doubtless operates, and ought to operate, largely against the credibility of his testimony, but the jury is not bound to reject it on that account. Whilst it would be unsafe, in ordinary cases, to convict any one upon the uncorroborated testimony of accomplices in the crime, the rule of law undoubtedly is that they are competent witnesses, and it is your duty to consider their evidence. You are to weigh it and scrutinize it with great care. You are to test its truth by inquiring into the probable motive which prompted it. You are to look into the testimony of other witnesses for corroborating facts. Where it is supported in material respects you are bound to credit it, but where it is unsupported you are not to rely upon it, unless, after the exercise of extreme caution, it produces in your minds the most positive conviction of its truth.

Applying these well known principles of law to the case in hand, it will be your duty to inquire whether any other of the alleged conspirators were concerned with Mrs. Lewis in the attempt to defraud. One is sufficient, as I have already said, to make the offense complete. If her testimony, standing alone, produces in your minds absolute conviction of its truth, then you are at liberty to say, without looking further, that Dr. Park was in the conspiracy. If the testimony of Elijah Caldwell, another of the confessed conspirators, is accepted by you as true, you must also reach the conclusion that Sacia, Allison and Bassford were parties to the fraud. But if, in consequence of the previous misconduct of Mrs. Lewis and Mr. Caldwell, or if, in consequence of the revelations made in regard to their character during these proceedings, you are not willing to accept their individual testimony as true, then you should carefully inquire whether she or he has been corroborated in any material particulars; you will ascertain how far the testimony of Mr. and Mrs. Benson, the detective Julian, Mrs. Echorn, Judge Fullerton and Mr. Whetlock, taken in connection with Dr. Park's own evidence, supports or fails to support Mrs. Lewis in regard to the defendant Park, and how far the testimony of O'Keefe, Julian, Mrs. Echorn, Mr. Lyons and young Caldwell supports or fails to support Elijah Caldwell. If, in either case, you find such corroboration, that you have no reasonable doubt about the connection of some of these parties with Mrs. Lewis in her attempt to defraud, you should not refuse to say so, because the direct testimony against them comes from the mouths of co-conspirators — the only source from which direct testimony usually comes in cases of this sort.

If, however, the government has failed to convince you that any one of the defendants on trial was a party to the conspiracy at any stage of the proceedings, the case ends, and these persons are entitled to a verdict of acquittal.

§ 199. *Overt acts necessary; all liable for the acts of one.*

2. If you come to the conclusion, as probably you will, that a conspiracy existed, your next inquiry will be, were any of the alleged acts done by one or more of the parties to give effect to the fraud? The importance of this inquiry grows out of two facts: *First*, if none were performed the indictment cannot be sustained; *second*, if any one act was done by any one of the conspirators in furtherance of the fraud, every conspirator is chargeable in law with doing it, and is responsible for it and all the consequences which primarily flow from it. Remembering this peculiar feature of the law in regard to con-

spiracy, you will have no trouble here. It is admitted, for instance, that Mrs. Lewis falsely personated the widow of Joseph L. Lewis, and it is hardly to be disputed that she obstructed the probate of the will and payment of the legacy to the United States by filing a *caveat*. Every one of the defendants who are concerned with her in the conspiracy is to be treated as if he performed the act which she admits. Or, to take another illustration, Dr. Park went to Judge Fullerton to employ him as additional counsel to aid Mrs. Lewis in proving that she was the widow of Joseph L. Lewis. If he knew she was not the widow, he and every other defendant here charged, who are shown to be parties to the fraudulent combination, are to be held responsible for the act. You will hence perceive, gentlemen, that it is not necessary that I should occupy your time with this inquiry.

I proceed to the consideration of the third inquiry, which will doubtless give you more difficulty. 3. Finding that the conspiracy existed, and that some act was done to give it effect, the last inquiry is, were any of the defendants members of it?

* * * * *

(The court then instructed the jury as to the proper consideration of the evidence, charging them, incidentally, that they might accept a portion of the testimony of a witness and reject a portion.)

UNITED STATES v. RINDSKOPF.

(District Court, Western District of Wisconsin: 6 Bissell, 259-268. 1874.)

STATEMENT OF FACTS.—Proceedings had upon the indictment of defendants Rogers, Rindskopf, Mueller and Bull for conspiracy, under section 30, act of March 2, 1867.

It appeared from the testimony of Rogers, one of the defendants in whose case a *nolle prosequi* was entered, that he went into the business of distilling for the sole purpose of distilling illicit spirits; that he entered into a conspiracy with Rindskopf, Mueller and Bull to defraud the government out of the tax upon large quantities of spirits which he was to manufacture, and Rindskopf to sell; that Mueller superintended the work of distillation, and that Bull, who was the store-keeper in the distillery, had full knowledge of the fraud which was being practiced, and allowed him, Rogers, to use what material he wanted, and take the spirits from the warehouse without paying the tax, for the doing of which he received \$100 per month.

Other witnesses were examined, whose testimony sustained and corroborated these general facts.

§ 200. *What constitutes a conspiracy, under section 30 of the act of March 2, 1867.*

Charge by HOPKINS, J.

The defendants were indicted under section 30 of the act of March 2, 1867, United States Revenue Laws, for a conspiracy; this section reads as follows: "If two or more persons conspire, either to commit any offense against the laws of the United States or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a penalty of not less than \$1,000, and not more than \$10,000, and to imprisonment not exceeding two years." 14 U. S. Stats. at Large, 484.

The act declares what illegal purposes constitute a conspiracy. But in construing it, it becomes necessary to ascertain what is meant in this act by conspiracy. It may be defined as an agreement or combination between two or more persons to effect the purpose declared by the act to be illegal—to do one of the things prohibited in the act. The indictment here, in substance, charges the conspiracy to be to defraud the United States out of the tax upon certain spirits to be distilled at the distillery of Alexander L. Rogers, in Middleton.

In the first count the charge of an agreement to manufacture illicit spirits at that place is expressly alleged. In other parts it is also alleged that the agreement was to do so by breaking seals and stamps placed upon certain tubs, and to use them unlawfully for the purpose of manufacturing illicit spirits. I have ruled during the trial that the gist of the offense was the illegal conspiracy to manufacture, and that the particular manner in which it was done, or to be done, was not the material question in the case; that the question to be determined under this count was whether there was a conspiracy between the parties to manufacture and remove spirits so manufactured without the payment of the lawful tax, to defraud the United States. Now the question is, did the parties, or any two of them, enter into a scheme to illegally manufacture spirits, with intent to defraud the government out of the tax by law imposed thereon? If they did, it constituted a conspiracy within the meaning of the act above mentioned, and on that question it is immaterial whether a seal or stamp was broken or not.

§ 201. — *proof of an express agreement between all the parties not necessary.*

In order to charge the parties as conspirators, I do not think it necessary to prove an express agreement between all the parties to do the illegal act. It would be enough if you should find that all of them had the same illegal purpose in view and each acted a certain part to accomplish or tending to accomplish it. But you must be satisfied that each had the same common design and acted to carry such design into effect. In other words, if you should find that Rogers' purpose was to unlawfully manufacture spirits and remove the same from his distillery, and place them upon the market without paying the tax thereon, and that, as a part of such corrupt purpose, he induced the store-keeper, Bull, to abstain from doing his official duties, so that he could obtain the material contrary to law, to use for such purpose, and employed Mueller, his distiller, to secretly manufacture the same into spirits, and, to assist him in his unlawful purpose aforesaid, employed Lacher to receive and conceal such spirits in the rectifying establishment of said Rogers, and by an agreement with the defendant Rindskopf, and at his suggestion, Lacher and the government ganger were employed to place said spirits into other barrels and gauge them as whisky and other articles of less proof, and then ship them under such false and fraudulent stamps to the defendant, or to the house of which the defendant was a partner, and that said defendant personally knew of their receipt under such false labels and stamps, and concealed or aided in concealing such facts, to defraud the government, and for the purpose of enabling the said Rogers to defraud the government, out of the legal tax thereon and share the proceeds with him,—you might be at liberty to infer from these facts that the parties acting for the common purpose were all guilty of conspiracy.

§ 202. *It is not necessary to show that each of the parties to a conspiracy knew the exact part the other was to perform.*

It would not, in such a case, be necessary to show that the parties had any

previous acquaintance, or, with the exception of Rogers, knew of the exact part the other was to perform. In such a case, each might be considered a co-conspirator with Rogers, and being so, would be responsible for his acts in carrying out the illegal purposes. And if you should find such acts to have been done in the carrying out of such illegal purpose, and that the illegal purpose was common to all, you would be authorized to find that the conspiracy was established as to all. If they knew the intention of Rogers, in procuring them to do such acts, to be to defraud the government, and that their acts respectively aided and assisted him to carry into effect such illegal purpose, and that they did the several acts to them assigned, on purpose to enable Rogers to successfully carry out his illegal designs, it would be a conspiracy as to all of such parties, if their overt acts are satisfactorily proven.

§ 203. *Conviction of one where the conspiracy is proved.*

In determining the question of conspiracy, Rogers may be reckoned as one, so that if either of the others conspired with him to do the acts alleged in the indictment, although you might find that the other defendants did not conspire with them, you might find that one guilty under this indictment, provided the overt act to effect it is satisfactorily proven. (Verdict, guilty.)

MOTION FOR NEW TRIAL AND IN ARREST OF JUDGMENT.

Opinion by HOPKINS, J.

The defendants having been convicted by the jury of the conspiracy charged against them, now move the court for a new trial and in arrest of judgment, and have, in the argument in support of the motion, mainly relied upon the following points: 1st. That the court erred in its charge as to what constituted a conspiracy. 2d. That as the overt acts set out and proven were severally criminal, and the parties committing them were liable to a specific punishment, after such acts had been performed the parties could not be held liable for a conspiracy to do them; and 3d. That the verdict is against evidence.

The first two are those mainly relied upon. As to the first, after listening to the able and ingenious argument of the learned counsel, and after a careful and critical re-examination of my charge on the question, I am thoroughly satisfied that I correctly instructed the jury on that point. The instruction and charge on that question is supported and warranted by the following authorities: *Rex v. Cope*, 1 *Strange*, 144; *The People v. Mather*, 4 *Wend.*, 260 *et seq.*; *Rex v. Parsons*, 1 *W. Black.*, 392; *Gardner v. Preston*, 2 *Day (Conn.)*, 205; *United States v. Cole*, 5 *McL.*, 513; *Commonwealth v. Warren*, 6 *Mass.*, 74; *Regina v. Murphey*, 8 *Carr. & P.*, 297; 3 *Greenl. Ev.*, sec. 93; 2 *Bish. Cr. L.*, sec. 187.

§ 204. *The fact that the several acts constitute separate criminal offenses does not exonerate the parties from the crime of conspiracy.*

The law upon the second point I find too well settled and uniform against the defendants to be at this time questioned. The fact that each of the overt acts constitutes an offense is no answer to this indictment for conspiracy. Upon a charge of conspiracy, an overt act, which is itself criminal, may be proven, to show the existence of the conspiracy charged. Conspiracies, from their very nature, are usually entered into in secret, and are consequently difficult to be established by direct evidence. It has been, therefore, universally held that they may be inferred from circumstances. The common design is the essence of the charge, and may be shown by circumstances and the acts

performed by the different alleged conspirators; and the fact that the several acts constitute separate criminal offenses does not exonerate the parties from the crime of conspiracy, or bar a prosecution therefor. This is sustained by an almost unbroken chain of authorities, both in this country and England.

§ 205. *Proof of the crime committed in a prosecution for a conspiracy to commit a crime.*

In *Regina v. Boulton*, 12 Cox Cr. Cas., pt. 3, p. 87, in court of queen's bench, before Ch. J. Cockburn, in 1871, although the course of receiving proof of the commission of the substantial crime is not regarded as satisfactory, yet it is decided that such a course is legal, and in that case, it being a charge of conspiracy to commit a felonious crime, proof of the commission of the crime itself was allowed. The chief justice cited and relied upon the authority of the late Lord Cranworth, in *Regina v. Rowland*, 5 Cox Cr. Cas., 497, note. In that case the parties had been indicted, not for the offense they had committed, but for a conspiracy to commit it, and the judge, after stating that it would have been more satisfactory if the parties had been indicted for what they had done and not for conspiracy to do it, stated "that the course pursued was no doubt legal, and, being legal," he said, "I shall not now step out of the path of my duty by speculating upon the policy that has been adopted in this case. It would be much more satisfactory to my mind if parties had been indicted for that which they have directly done, and not for having previously conspired to do something, the having done which is proof of the conspiracy. It never is satisfactory, although undoubtedly it is legal." I have quoted this language as expressive of my first view of the question when raised during the trial, and I can say now, as I said then, that the better way, in my judgment, would have been to have indicted all parties here for the particular offense committed by each, but under the law it seems I have not the right to say they must be so prosecuted. The course pursued in this matter by the government attorney, in the language of those cases, is "undoubtedly legal," and I can, therefore, only consider the case as it is presented on this indictment.

These cases, if followed, dispose of the second question so strenuously pressed by defendants' counsel. The case of *Commonwealth v. Kingsley*, 5 Mass., 106, laying down a contrary doctrine, does not seem to have been followed in that state, for the same judge, Parsons, in *Commonwealth v. Warren*, 6 Mass., 74, refused to arrest a judgment on a charge of conspiracy, where the overt act was a felony, and was completed and the avails of the crime divided; and in *Commonwealth v. Davis*, 9 Mass., 415, it is held that acts in execution of the conspiracy may be shown in aggravation. In the case of *United States v. Boyden*, 1 Low., 266 (§§ 2294-98, *infra*), being an indictment under the same act and section as this, this question was raised and examined upon principle and authority, and Judge Lowell, before whom it was tried, arrived at the conclusion that though the act concerning which the conspiracy was formed was completed, and there was a specific penalty for doing that act, still the government could elect under which to proceed. This doctrine is also supported by *People v. Mather*, 4 Wend., 259; *Collins v. Commonwealth*, 3 Serg. & R., 220. The *dictum* in the opinion of Senator Spencer, in *Lambert v. People*, 7 Cow., 103, I do not think entitled to much weight, as the case there did not turn on any such question. Indeed, it is impossible to tell what principle was settled in that case in the court of errors.

On the other point, that the verdict is not supported by the evidence, I need only say that if the jury believed the testimony of Rogers and Lacher, the

charge was most clearly made out. Assuming their testimony to be true, the fact of an unlawful conspiracy to defraud the government out of the tax upon spirits to be manufactured at Rogers' distillery, as charged, is established beyond all controversy.

§ 206. *Place of trial.*

The section of the act declaring the conspiracy expressly provides that the parties may be tried in any district where the conspiracy is committed, or an overt act is done in furtherance of the illegal purpose. The overt acts were performed in this district, and the case is properly triable here. The motion for a new trial and in arrest of judgment is overruled.

UNITED STATES v. SMITH.

(Circuit Court for Ohio: 2 Bond, 323-332. 1869.)

Charge by the Court.

STATEMENT OF FACTS.—This case, after a long and tedious investigation, is now to be committed to the jury for their action. It has been most strenuously contested by counsel, and you are entitled to the thanks of the court for the patient attention you have given to it during its progress. It is the purpose of the court to state, as briefly as possible, the legal points arising in the case and the views of the court upon them, leaving it exclusively for the jury to pass upon the facts. The defendants are on trial for a criminal act, specially set forth in the indictment, in which there are three distinct counts. The first and third counts are substantially alike in their structure, and do not require a separate consideration. The first count alleges a conspiracy by the defendants, in concert with others, entered into in the county of *Champaign*, in the southern district of Ohio, in November, 1867, to defraud the United States of the legal tax or duty imposed upon a large quantity of distilled spirits. The overt act of the conspiracy charged is the unlawful removal of fifty barrels of spirits from the distillery of one A. C. Campbell, where it was manufactured, to the rectifying establishment of the defendants, not being a bonded warehouse, with a criminal intent. The third count varies the charge by averring the unlawful conspiracy to have been entered into on March 15, 1868, in the county of *Montgomery*, in said district, and charges, as the overt act, the removal of the spirits to the rectifying establishment owned by the defendants and other persons. The second count alleges a conspiracy for the fraudulent removal of fifty barrels of distilled spirits from the distillery to the rectifier by night—that is, after sunset and before daylight—in violation of the statute and with a criminal intent.

§ 207. *Act of congress of March 2, 1867, providing for the punishment of conspiracy to defraud the government.*

The indictment is framed under section 30 of the act of congress of March 2, 1867, which provides that if two or more persons shall conspire to commit any offense against the United States, or to defraud the United States in any manner whatever, and one or more of said parties to the conspiracy shall do any act to effect the offense, such person shall be deemed guilty, and shall be liable to punishment. The jury will observe that the statute is as broad and comprehensive as language can make it. It includes any conspiracy to violate a law of, or to defraud, the United States, in any manner whatever. But to consummate the offense contemplated by the statute, there must be, what the law terms, an overt act done, to effect the object of the unlawful conspiracy.

Such an overt act, namely, the unlawful removal of the spirits, is averred in all the counts in this indictment.

To justify a verdict of guilty under this indictment, there must be proof satisfactory to the jury, *first*, that there was a conspiracy, to which the defendants were parties, substantially as alleged; and *second*, that the overt acts averred are proved by the evidence. And here it is proper to direct the minds of the jury to some legal propositions submitted by the counsel for the defendants, and state the views of the court upon them for the guidance of the jury in their action in the case. I regret that the infirm state of my health will not permit me to do this as fully, or perhaps as satisfactorily, as I could desire.

§ 208. *An indictment charging an offense to have been committed in one county is sufficiently sustained by proof of its commission in another county in the same judicial district and within the jurisdiction of the court.*

It is insisted, in the first place, that under the first count of the indictment, in which it is alleged, inadvertently no doubt, that the unlawful conspiracy was entered into in *Champaign* county, whereas the proof shows the entire transaction took place in *Montgomery* county, there can be no conviction. The claim is, that in this particular the evidence does not sustain the first count, and that the jury must return a verdict of not guilty on it. In other words, that there is a fatal variance between the first count and the evidence offered to sustain it. I have not had the opportunity of investigating this point as fully as I could have desired. From the reflection I have bestowed upon it, I cannot concur with the counsel for the defense on the point. The discrepancy between the averment as to the county in which the conspiracy was formed and the evidence is not material. This court has jurisdiction in crimes throughout the territory and counties included in the southern district of Ohio. And the general averment in the indictment, that the offense charged was committed within the district, without designating any particular county, would have been sufficient to sustain the jurisdiction of the court. And the United States, in this case, is not bound to prove that the offense was committed in the county alleged, and the allegation may be rejected as surplusage, as in that case the averment would be that the offense charged was committed within the judicial district, and within the jurisdiction of the court.

§ 209. *A bonded warehouse connected with a distillery is in effect a part of the distillery for legal purposes.*

It is also strenuously urged by defendants' counsel, that there is a fatal variance between the averments in the several counts and the proof, in this, that the removal of the spirits is alleged in the indictment to have been from the distillery of A. C. Campbell, whereas the proof shows the removal was from the bonded warehouse connected with the distillery. This objection is exceedingly technical in its character, and if sustained, the court would be compelled to withdraw the case from the consideration of the jury, and instruct them, without regard to the merits of the case, that they must return a verdict of not guilty. I am reluctant to do this in any case, unless the law requires it as an imperative duty. In a case like this, which has been so fully presented to the jury on the facts, and which has occupied so much time in its investigation, I prefer submitting it to them for their action. And, in my view, the point submitted does not require me to withdraw the case from the jury. While it is true, the removal of the spirits was directly from the bonded warehouse, and not from the part of the building used as the distillery, I am quite

clear that the bonded warehouse may be legally held to be a part of the distillery premises; and that the proof sustains substantially the averment that the removal was from the distillery. The law in force at the time made it the duty of every distiller to provide a bonded warehouse in immediate connection with the distillery, in which the spirits, when manufactured, were to be deposited, and which may be held to be a part of the distillery. In point of fact, if I rightly remember the evidence, this place of deposit was under the roof of, and a part of, the building in which the distillation was carried on.

§ 210. *In an indictment for a removal of spirits, etc., the government is not bound to strict proof of the ownership of the rectifying establishment.*

There is still another technical legal point urged as a ground for the acquittal of these defendants. It is insisted the evidence does not sustain the averment in the indictment as to the ownership of the rectifying distillery. The evidence as to the parties interested in the rectifying seems not to be satisfactory. I do not propose to refer specially to it, as it is doubtless in the memory of the jury. It may be well doubted whether this question of ownership is material in the case. The criminal overt act charged is the removal of the spirits to a place other than a bonded warehouse, and the proof of such removal constitutes the gist of the offense. It was not necessary to allege in the indictment the ownership of the rectifying establishment; and such averment may be stricken out as not a necessary element of the offense charged. But, if I am correct in my understanding of the averments of the indictment, the objection on the ground of variance in proof and the allegations as to ownership does not lie. In the first count, the ownership of the rectifier is stated to be in these defendants alone, and in the third count, to be in them and other persons. So that whether they were the sole owners, or whether there were other persons interested with them, the evidence sustains one or the other of these counts. And a verdict may be returned on either, according to the effect to be given to the evidence by the jury.

§ 211. *What is a conspiracy against the United States.*

If it shall be necessary hereafter to consider these several legal points, and give to them a fuller examination, the opportunity will be afforded for that purpose. For the present the jury will receive the views stated by the court as the law upon these points. And in this aspect of the case, it will be the duty of the jury to consider it on its merits, with reference to the evidence before them. The first inquiry for the jury will be, whether the conspiracy charged in the indictment is proved to their satisfaction. A conspiracy within the meaning of the statute is, where two or more persons combine, confederate, or agree to do any unlawful act, or to commit a fraud against the United States. And the proof of such conspiracy may be, first, by direct proof by witnesses having positive knowledge of its existence; or, second, it may be legally presumed from facts and circumstances leading with reasonable certainty to that conclusion. It will be obvious to the jury that it will rarely happen that a conspiracy can be established by direct and positive proof. Persons acting together for an unlawful end pursue their plans in secrecy, studiously avoiding all means by which their guilty purpose may be known to others. In the present case, there is no direct evidence that these defendants entered into a deliberate agreement between themselves, or others, to defraud the United States of the tax imposed on the spirits in question; and the inquiry for the jury will be, whether from all the facts in evidence they can fairly infer there was such a conspiracy. In other words, are the jury satisfied that the defendants between themselves, or

in combination with others, were actuated by a fixed purpose of committing a fraud upon the United States, and whether, in accomplishing that object, there was a oneness of purpose, and a unity of action, evidencing their guilty intent to effect their object. This is an inquiry exclusively for the jury, as it involves merely the force and effect to be given to the evidence. The claim of the counsel for the United States is, that the proof shows, not only that these defendants had knowledge of the fraud intended by the unlawful removal of the spirits specified in the indictment, but that they participated and aided in such removal. On the other hand the defendants' counsel most strenuously contend there is nothing in the evidence which in any way implicates them in the charge of a conspiracy to defraud the government, or in any overt act to effect the unlawful purpose of such a conspiracy, if one existed, in law or in fact.

As remarked before, if the jury find the fact of the existence of the conspiracy charged, they will inquire whether these defendants were so connected with, or aiding and assisting in, the unlawful removal of the spirits, charged as the overt act of the conspiracy. There is certainly some conflict and contradiction in the testimony. But one fact is beyond controversy, and is not denied, namely, that frauds of the most deliberate and repulsive character were committed in numerous instances in reference to the spirits manufactured at the distillery of A. C. Campbell, now deceased. One of the methods by which these frauds were perpetrated was by the fraudulent removal of the spirits to the rectifying establishment of these defendants, situated near the distillery. Without payment of the tax, they passed through the process of rectification, and then were sent to market and sold as tax-paid spirits. And the fact in relation to these frauds, and which renders them all the more odious, is, that government officers, in gross violation of their oaths, were participants and aiders in their commission. It will be for the jury to say whether, from all the circumstances proved, these defendants are implicated in the frauds charged. And it may be proper to remark here, that though it is clearly proved that others were perhaps more flagrantly guilty of these frauds than these defendants, it is no justification for them if they too were guilty participants in them.

§ 212. *Rule of law as to the credibility of an accomplice as a witness.*

The jury will doubtless have noticed that the government in this case has introduced a witness — Huffman — whose testimony, if credible, most clearly implicates these defendants in the frauds charged. This witness, it is not denied, was a prominent actor in the frauds. He does not deny his guilty agency in them. The defendants' counsel insist that his position before the jury as an accomplice in the crime charged renders his testimony utterly worthless, and that it should be wholly rejected by the jury. Without discussing the law as to the credit due to an accomplice, I may briefly state that, on the soundest principles of reason, it does affect the credibility of a witness occupying that position. And, as a general rule, his testimony must be received with great caution, and unless sustained and corroborated, in the material facts stated by him, by credible witnesses, his testimony should be wholly rejected. It is also insisted that the veracity of this witness is seriously impeached by other witnesses, who positively contradict him as to material parts of his testimony. And there seems to be no doubt as to the fact that these contradictions do appear. But, without further notice of this witness, I will remark that it is the exclusive province of the jury to pass on the question of the credit due to witnesses, and to them in this case it is referred.

§ 213. *Recapitulation as to the facts necessary to warrant a conviction.*

In conclusion, I may report to the jury that they are to direct their inquiries :
 1. To the proof—as to the existence of the conspiracy charged; and 2. To the question of the guilt of defendants in effecting the objects of the conspiracy, by the unlawful removal of the spirits charged as the overt act. As to the first of these inquiries—the existence of the conspiracy,—the jury must be satisfied of the fact, having reference to the legal principles applicable to it, as before laid down by the court, to justify a verdict of guilty. And as to the other inquiry, the connection of the defendants with the overt acts, the jury must be satisfied that the averments of the indictment are substantially sustained by the evidence. As to dates and the quantity of spirits removed, the government is not bound to make the proof in exact correspondence with the statements in the indictment. The gist of the question is, whether spirits in a larger or less quantity than is named in the indictment, were unlawfully removed, with the guilty participation and aid of the defendants in the act. And I may here remark that whatever doubts the jury may entertain as to the criminal complicity of the defendants, they can have none as to other parties not now on trial. If they were before the jury to answer for the crime with which these defendants are charged, there could not be a shade of doubt as to the result.

In my remarks I have made no special reference to the second count, charging a violation of the statute in the removal of the spirits after sunset and before sunrise. I do not suppose it is necessary for the jury to consider this count. If the defendants, in the judgment of the jury, are guilty under the first and third counts, it is not material to inquire as to the second. And if the jury find they are not guilty under the first and third counts, they would probably not be prepared to return a verdict of guilty under the second. The mere fact of a removal of the spirits at a time forbidden by the statute, in the absence of a fraudulent or criminal intent, would not, in a criminal prosecution, be regarded as a sufficient basis for a verdict of guilty.

§ 214. *Proper effect of evidence of good character of defendant.*

I am requested by counsel to remind the jury that the defendants have produced very satisfactory evidence of their previous good characters for integrity and good citizenship. Such proof they have undoubtedly given, and they are entitled to all the benefits the law secures to them from it. But, in its legal effect, it cannot be held to negative or set aside clear proof of guilt. Its chief value is in cases where a well-founded doubt may exist in the minds of a jury, from the evidence adduced, of the guilt of a defendant charged with crime. In such a case the law benignantly holds that good character may be taken into consideration by a jury as affording a presumption in favor of the innocence of the accused party. (Verdict, guilty.)

§ 215. Conspiracy defined.—A conspiracy is an agreement by two or more persons to commit an unlawful act or acts. *United States v. Whalan*,* 7 Int. Rev. Rec., 161. See §§ 152-155.

§ 216. To constitute a conspiracy it is not necessary that there should have been any pecuniary consideration for engaging in the unlawful act, or a definite absolute contract, but the offense is made out by a concert of action and intent. *United States v. Allen*,* 7 Int. Rev. Rec., 163.

§ 217. A conspiracy is a combination formed by two or more persons to effect an unlawful end, said persons acting under a common purpose to accomplish the end designed. It is not necessary that there should be an actual meeting of the parties, or that there should be a

formal agreement for the unlawful scheme, or that they should state in words or writing what the unlawful scheme is, or the details by which it is to be carried out. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. Every person thus contriving becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a distance remote from the other conspirators. *United States v. Babcock*,* 3 Dill., 585.

§ 218. A conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose. *United States v. Doyle*,* 6 Saw., 612.

§ 219. To make out a conspiracy it is not necessary to prove that the defendants came together and actually agreed in terms to have the common design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same objects, often by the same means, one performing one part and another another part of the same, so as to complete it with a view to the attainment of the same object, the conclusion is that they were engaged in a conspiracy to effect that object. *Ibid.*

§ 220. A conspiracy under the laws of the United States is formed when two or more persons combine to accomplish by their united action a criminal or unlawful purpose; and the offense is complete when such agreement is made, or such combination is entered into, and one or more of the parties do any act to effect the object of the conspiracy; but without such an act the offense is incomplete. *United States v. Nunnemacher*, 7 Biss., 111 (§§ 723-732).

§ 221. It is not necessary, in order to constitute a conspiracy, that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, in words or writing, state what the unlawful scheme is, and the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. *Ibid.*

§ 222. Without a corrupt agreement or understanding there can be no conspiracy. *Ibid.*

§ 223. The gist of a conspiracy against the United States is a combination between two or more parties to do an act which is an offense against the United States, and some act of one or more of the parties in pursuance of the common design. *United States v. Allen*,* 7 Int. Rev. Rec., 163.

§ 224. Act of one the act of all.—If an unlawful act has been accomplished by several persons in pursuance of a conspiracy, the act of one is the act of all. But if there was no conspiracy, the act of each one is his individual act. *United States v. Doyle*,* 6 Saw., 612. See §§ 157, 165.

§ 225. Each member of a conspiracy is responsible personally for the acts of every member thereof, done in furtherance of its illegal purposes, whether he be himself present or not. *United States v. Butler*,* 1 Hughes, 457.

§ 226. Any person who, after a conspiracy is formed, knowing of its existence, joins therein, becomes as much a party thereto, from time to time, as if he had originally conspired. *United States v. Babcock*,* 3 Dill., 586.

§ 227. Where a conspiracy has been formed and an act is done by one of the parties in furtherance of the object of the conspiracy, this constitutes a complete offense as to all of the members of the conspiracy, for in that case the act of one becomes the act of all. *United States v. Nunnemacher*, 7 Biss., 111 (§§ 723-732).

§ 228. A personal pecuniary interest in the object of a conspiracy is not essential to render a person guilty of conspiracy, but the motive or interest of a person charged is a proper circumstance to be considered by a jury in determining the question of the guilt or innocence of a party accused thereof. *Ibid.*

§ 229. Proof of knowledge of conspiracy.—A knowledge of a conspiracy by an alleged conspirator may be shown by circumstantial as well as by direct evidence. Facts and circumstances are sufficient proof of such knowledge if they show it beyond a reasonable doubt. *United States v. Babcock*,* 3 Dill., 589.

§ 230. In a prosecution for a conspiracy, where dispatches have passed between various known conspirators and between them and the defendant, so far as such dispatches are relied upon to prove the defendant's guilt, primary reference must be had to the dispatches to and from the defendant, and more especially to dispatches he is shown to have received or acted upon. If the dispatches to and from the defendant, in connection with the other facts and circumstances of the case, show that he knew of the conspiracy, and that he was a guilty participator therein, then the dispatches of his fellow conspirators among themselves or to others, sent for the purpose of promoting the conspiracy, become evidence against the defendant, but not otherwise. *Ibid.*, 616.

§ 231. **Proof of overt act.**— In an indictment for a conspiracy it is not necessary to prove the time of the commission of the alleged overt act strictly as laid. *United States v. Graff*, 14 Blatch., 391. See §§ 165, 166, 173.

§ 232. **To resist an officer.**— Upon the trial of defendants for a conspiracy to resist and obstruct the marshal of the United States in executing a writ of execution issued upon a judgment, the merits of the controversy in which the judgment was rendered cannot be inquired into. *United States v. Doyle*, * 6 Saw., 612.

§ 233. **Two persons necessary.**— Under the statute of the United States providing that "if two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc., two may form a conspiracy, but there must be at least two. *Ibid.* See § 175.

§ 234. **To intimidate voters.**— To sustain a charge for the offense created by section 5520 of the Revised Statutes, punishing any two or more persons who shall conspire to prevent, by force, intimidation or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy, in any legal manner, toward or in favor of the election of any lawfully qualified person as a member of the congress of the United States, it must be proved, (1) that the person intended to be prevented was a citizen of the United States; (2) that he was entitled to vote at any election held in his county for a member of congress; (3) that the candidate for congress whose support and advocacy were thus prevented was a qualified person for the office of a member of congress; and (4) that the defendants or some of them unlawfully conspired, etc., as is forbidden by the statute. To sustain a count under the same section for conspiring to injure a citizen in his person or property on account of such advocacy and support, the same facts must be proved, except as to the object of the conspiracy. *United States v. Butler*, * 1 Hughes, 457. See § 156.

§ 235. **To prevent free exercise of rights.**— To sustain an indictment, based on section 5508, Revised Statutes, prescribing a punishment if two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of having exercised the same, which charges a conspiracy to injure, etc., a certain person in the free exercise of his right to vote, on account of his race and color, it must be shown that the person intended to be injured, etc., was a citizen and entitled to vote in his county; that the defendants or some of them conspired to injure, etc., the person in the exercise of his right of voting; and that the same was done on account of his race and color. *Ibid.*

§ 236. It is not necessary that the conspiracy under the above act should have been formed against the person alone whom it was charged to have been formed against. It is sufficient that such person was included in a class against which the conspiracy was formed. It is not necessary that such person should have been mentioned by name in the agreement or mutual understanding of the conspirators. *Ibid.*

§ 237. **To defraud the government.**— A conspiracy to defraud the government, though it may be directed to the revenue as its object, is punishable by the general law directed against all conspiracies, and cannot be said in any just sense to arise under the revenue laws; consequently it is not subject to the limitation prescribed for offenses against the revenue, but to the general limitation of three years. *United States v. Hirsch*, 10 Otto, 35.

§ 238. On an indictment for a conspiracy to defraud the government by means of fraudulent revenue bonds, it must be shown that there was a criminal intent, or such an amount of carelessness and indifference as amounts to criminality in order to make an offense. *United States v. Allen*, * 7 Int. Rev. Rec., 163. See §§ 154, 173, 178, 2532.

§ 239. Where a conspiracy exists to defraud the government, any act by any conspirator in furtherance of the conspiracy completes the offense as to all. *United States v. Callicott*, * 7 Int. Rev. Rec., 177.

§ 240. Notwithstanding that an Indian agent, as such, cannot commit the crime of embezzlement, nor the crime of conspiring to procure an embezzlement, congress having failed to make embezzlement a crime as to such persons, yet an Indian agent may be indicted and punished for conspiring to defraud the United States, under the act punishing that offense. Although the indictment contains the charge of conspiring to cause goods of the United States to be embezzled, yet if, by leaving out the word *embezzlement*, the offense of conspiring to defraud the United States is sufficiently charged, the indictment is good for that offense. *United States v. Upham*, * 2 Mont. T'y, 170.

§ 241. Under the act of congress punishing the offense, a person may be indicted and punished for conspiracy to defraud the United States by conspiring and confederating with others to fraudulently dispose of the goods of the United States, although he is the trustee of such goods for the United States, and the goods came lawfully into his possession, and he could not be guilty of stealing them. *Ibid.*

§ 242. In order to convict a person of a conspiracy with intent to defraud the government, it is necessary to show that there was a combination or agreement between the defendant and some other person relating to the fraud; and an act which would aid in the accomplishment of the fraudulent purpose is not sufficient to convict the defendant of conspiracy, unless it is shown that it was done in pursuance of an agreement or combination. *United States v. Jenkinson*,* 1 McC., 226.

§ 243. Under section 5440, Revised Statutes, declaring that "if two or more persons conspire, either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc., it is indictable to conspire to commit a trespass against private persons or private property where such is a violation of the criminal laws of the United States. The crime conspired need not be a fraud against the United States or tend to obstruct the operations of the government. A conspiracy to plunder a wrecked vessel, within the maritime jurisdiction of the United States, is therefore indictable under this section. *United States v. Sanche*, 7 Fed. R., 715 (§§ 2308, 2309).

§ 244. The act of March 2, 1867, now substantially embodied in section 5440, Revised Statutes, punishing conspiracies against the United States, applies to conspiracies to defraud the United States by presenting false claims in the court of claims, and supporting them by fraudulent testimony, as well as conspiracies against the revenue. *United States v. Dennee*,* 3 Woods, 47.

§ 245. A prosecution for conspiring to present and prosecute a false claim for moneys received by the United States from the sale of cotton is a case arising under the internal revenue laws, and is only barred by the five years' statute of limitations. *Ibid.*

§ 246. *New parties added.*—The identity of a conspiracy is not necessarily destroyed by the connection, at a subsequent period, of new or additional parties thereto, but it may continue to exist as the same conspiracy. *United States v. Nunnemacher*, 7 Biss., 111 (§§ 723-732).

§ 247. *Proof.*—It is competent to prove an alleged conspiracy by circumstances. *Ibid.*

§ 248. *Guilty connection with a conspiracy* may be established by showing association by the person accused with others in and for the purpose of the prosecution of the illegal object. Each party must be actuated by an intent to promote the common design, but each may perform separate and distinct acts in forwarding the design. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose, though the participation need not be active, and may be subordinate. *Ibid.* See § 167.

§ 249. *Overt act.*—The offense of conspiracy is completed when the unlawful combination is formed, though no act was done towards carrying the main design into effect. *United States v. Martin*, 4 Cliff., 156 (§§ 2299-2304). See §§ 165, 166, 176.

§ 250. *Merger.*—Conspiracy to commit a misdemeanor is not merged in the completed object of the conspiracy. *Ibid.* See § 144.

§ 251. *Against national banks.*—A person may be indicted and punished for conspiring with an officer of a national bank to embezzle its funds, though he is not an officer or employee of the same or any other bank. *Ibid.*

§ 252. *At common law—Jurisdiction.*—Conspiracy as known at common law, not being defined by any act of congress to be an offense against the United States, is not cognizable in the federal courts; but by statute, where a conspiracy exists to commit an offense against the United States, or to defraud it in any manner, and an act is done to effectuate the object of the conspiracy, the parties to such act are liable to certain penalties. *Ibid.*

III. COUNTERFEITING AND FORGERY.

[See XXVI, 4, *infra*. Also CONSTITUTION AND LAWS, §§ 496-500.]

SUMMARY—Under act of February 25, 1862, § 253.—Coin must resemble the original, § 254.—Coin punched and plugged, § 255.—Passing, uttering and publishing, §§ 256, 257.

§ 253. Section 6 of the act of February 25, 1862, declaring it to be a felony "if any person or persons shall falsely make, forge, counterfeit or alter, . . . any note, bond, coupon or other security issued under authority of this act, or heretofore issued under acts to authorize the issue of treasury notes and bonds; or shall pass, utter, publish, or sell, . . . any such false, forged, counterfeited, or altered note, bond, coupon or other security," etc., is not void for repugnancy. The objection that if the note which the person is charged with passing was, in the language of the statute, "issued under the authority of this act, or heretofore

fore issued under acts to authorize the issue of treasury notes or bonds," it must be a genuine note, and if not issued under the authority of some of these acts, the passing of the note is not made an offense by the law, is not sound. We often speak of "false diamonds," or "forged bank-notes," and the language is open to the same objection. *United States v. Howell*, § 258.

§ 254. The offense of counterfeiting consists in the making of coins so resembling the genuine that they might deceive persons using ordinary caution, and a conviction cannot be had for uttering pieces of metal which are not in the likeness or similitude of genuine coins. So a conviction for passing certain pieces of metal, apparently gold, octagonal in form, on one side of which was the device of an Indian, and on the other the inscription " $\frac{1}{4}$ dollar, Cal.," cannot be sustained under the laws of the United States relating to counterfeiting. *United States v. Bogart*, §§ 259-261. See § 295.

§ 255. When a coin is duly issued from the mint and a hole is made in it so that a portion of the metal is abstracted, and the hole is plugged with a base metal, this is counterfeiting; but if the hole is made with a sharp instrument and none of the metal is abstracted, but is crowded aside, it is not counterfeiting, though the coin is rendered misshaped. *United States v. Lissner*, § 262.

§ 256. An indictment for "passing, uttering and publishing" counterfeit currency is sustained under a statute which punishes the uttering, passing, publishing or selling of such notes, but omits the words "as true," or their equivalent, by proof of the sale of such notes with intent that they be used to defraud. The words "uttering" and "passing" do not import that the notes are to be transferred as genuine, but include such a sale. *United States v. Nelson*, §§ 263-265.

§ 257. Under an indictment for "passing, uttering and publishing" counterfeit currency, a conviction will be sustained by proof of the selling of such money with intent that it be passed as genuine, though another statute in terms prohibits and punishes the sale of it. *Ibid.*

[NOTES.—See §§ 266-307.]

UNITED STATES v. HOWELL.

(11 Wallace, 432-433. 1870.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of California.

STATEMENT OF FACTS.—Howell was indicted for passing counterfeit treasury notes under the act of February 25, 1862.

Opinion by MR. JUSTICE MILLER.

The judges of the circuit have certified to this court five questions arising on the indictment. The first question is, whether the second count of the indictment is bad as being in itself repugnant, and the four other questions relate to a similar repugnancy in the statute under which the indictment is framed. As the count to which the first question refers pursues the language of the statute, all the questions resolve themselves into the single one of whether the act, so far as it relates to altering and publishing forged or counterfeit notes of the United States, is itself void for repugnancy. The objection is, that if the note which the party is charged with passing was, in the language of the statute, "issued under the authority of this act, or heretofore issued under acts to authorize the issue of treasury notes or bonds," it must necessarily be a valid or genuine note, and if it was not issued under the authority of some of these acts, the passing of the note is not made an offense by the law.

§ 258. *It is competent for a statute to describe an offense as passing counterfeit notes "issued under the authority of this act," and an indictment framed in like language is good.*

There is some degree of plausibility in this hypercriticism at first blush, which, if it were sound, would make the act void for want of any meaning, a result which one of the first canons of construction teaches us to avoid if possible, and which is at war with the common sense, which assures us that the purpose of the act was to punish the making of counterfeits of the notes and bonds described in the statute. Nor is the criticism philologically just. The

offense is described as the passing of false, forged or counterfeited notes or bonds issued under the authority of the statute. We are to give due weight to all the words employed in describing the instrument, and cannot reject the words *false*, *forged* and *counterfeited*, if it is possible to adopt any reasonable construction which will permit them to stand. This is done by mentally supplying the ellipsis which is in general use in conversation or in writing in similar cases. We speak, for instance, of "false diamonds." According to the criticism we are considering this phrase has no meaning, because if the stones spoken of *are* diamonds they cannot be false, and if they are *false* they cannot be diamonds. But any one understands the meaning to be false stones which purport to be diamonds, or false similitude of diamonds. So we speak of a bank note. Now if the paper spoken of is a forgery it is not a bank note, which means an obligation of some bank to pay money. But here also the mind supplies the ellipsis which good usage allows, and understands that what is meant is a forged paper in the similitude of a bank note, or which on its face appears to be such a note. And in a similar manner we speak of a forged will. If the argument of defendant's counsel is sound there can be no such thing as a forged will, receipt, note or bond, because if forged they are void and therefore not notes, wills, bonds, etc. In fact the phrase "void will" or "void note," is, according to this argument, a solecism, because the instrument cannot be at once the will or note of the party and be void.

The use of the words false, forged and counterfeit, in the statute, imply, therefore, when applied to any of the obligations of government mentioned, that it purports to be such an instrument, but is not genuine or valid. And so are the authorities. See 2 Russ. on Crimes, 801; East's Pl. Cr., 950. It is conceded that if the statute had, in describing the offenses, called the instrument uttered a note, *purporting* to be issued under the authority of the statute, the difficulty would have been removed. In the case of *Rex v. Birch and Martin*, the indictment charged them "with publishing, as true, a false, forged and counterfeited paper writing, *purporting* to be the last will of Sir Andrew Chadwick." It was objected that the indictment was bad, because "it should have been said that they forged a certain will," which was the language of the statute, and *not a paper writing* purporting to be a will. "But," says Mr. East, who, in his Pleas of the Crown, p. 950, makes a full report of the case, "a variety of precedents were found, so that the judges held it to be good." But it is apparent, from the exception taken, and from the language of East and of Russell, that the usual mode of charging the offense was to say that the prisoner had forged the will or other paper, and that either form is good.

The case of *United States v. Cantrell* is relied on as holding an opposite doctrine to that we have here presented. That case was submitted without argument, and the report says that the opinion of the court was that the judgment should be arrested for the reasons assigned in the record. These reasons are that the indictment was repugnant, because it charged the prisoners with having published as true "a certain false, forged and counterfeited paper, *purporting* to be a bank bill of the United States for \$10, *signed* by Thomas Willing, president, and G. Simpson, cashier." And because the statute relating to the charge set forth in the indictment is inconsistent, repugnant and void. In this statement, the words signed and purporting are italicized, and the court may have held the indictment bad because the former word was used, thus sustaining the objection made in *Rex v. Birch and Martin*. Or it may have held that the language of the indictment amounted to an averment that the

bill charged to be forged was signed in fact by the president and cashier of the bank, in which case it could not have been a forgery. Or it may possibly have thought that under the peculiar language of that statute, which differs materially from the one under consideration, they were bound to hold it void for repugnancy. However that may be, we do not consider the case, as it is reported, an authority for holding the statute void which we are called on to construe.

To the first and third questions, and the first branch of the second, we answer, No. To the fourth and fifth, and the second branch of the second, we answer, Yes.

UNITED STATES v. BOGART.

District Court for New York: 9 Benedict, 314-317. 1878.)

§ 259. *The passing of pieces of metal, apparently gold, octagon in form, on one side a device of an Indian, and on the other the inscription "¼ dollar, Cal.," is not a crime under section 5461.*

Opinion by WALLACE, J.

This case presents the question, whether a conviction can be sustained, under section 5461 of the Revised Statutes of the United States, where the defendant passed certain pieces of metal, apparently gold, octagon in form, on one side of which was the device of an Indian, and on the other the inscription "¼ dollar, Cal."

The section under which the indictment is found was originally in an act passed June 8, 1864, and entitled "An act to punish and prevent the counterfeiting of coin of the United States," and read as follows: "Every person who, except as authorized by law, makes or causes to be made, or utters or passes, or attempts to utter or pass, any coins of gold or silver or other metal, or alloys of metals, intended for the use and purpose of current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design, shall be punished by a fine of not more than \$3,000, or by imprisonment not more than five years, or both." On first impression, this language seems sufficiently comprehensive to cover the present case; but, giving it that strict construction which is always to be applied to penal statutes, my conclusion is that the language is satisfied by a much narrower application.

(1) The pieces of metal passed by the defendant do not purport to be coins, in the legal definition of the word, but are tokens. (2) If it should be held that the section makes it a crime to make or utter any pieces of metal, with the intent that the pieces shall serve as a substitute for money, an offense is created which is new and foreign to the law of counterfeiting.

§ 260. *A counterfeit coin is one in imitation of the genuine.*

A coin is a piece of metal stamped and made legally current as money. A counterfeit coin is one in imitation of the genuine. The coins known to the law are those authorized to be issued from the mints of the United States, and those of foreign countries current here. The pieces in question are not in imitation of our own coin or of any foreign coin. They are calculated to impose upon the ignorant or unwary, and, if this purpose is effected, the utterer may be guilty of false pretenses. If they were passed upon the sole representation that they were issued by the state of California, it is doubtful if a conviction for false pretenses could be had, because every person is bound to know that the state of California cannot issue coins. If, instead of the pieces in question, the

defendant had pieces purporting to bear the stamp of Plato's republic, he would have been equally as guilty of a criminal offense as he now is.

§ 261. *A conviction cannot be had for uttering pieces of metal which are not in the likeness or similitude of genuine coins.*

One of the rules applicable to the offense of counterfeiting is, that the resemblance of the spurious to the genuine coin must be such as that it might deceive a person using ordinary caution, and a conviction cannot be had for uttering pieces of metal which are not in the likeness or similitude of genuine coins. It is not to be presumed that congress overlooked these familiar rules, when legislating "to punish and prevent the counterfeiting of coin;" and the title of the act is inconsistent with the idea that an offense radically differing from that of counterfeiting was the subject of legislative consideration. Full effect can be given to the language used without indulging in such a conclusion; and that is, by limiting it to meet cases which frequently occurred, where persons making or uttering coins which purported to be in imitation or similitude of current money of the country could not be convicted because the designs or devices were not those which the law prescribes as the devices or legends which shall be stamped upon the coin issued from the mints of the United States. These devices or legends are made by statute the authentic evidence of the genuineness of the coins. Where different ones were substituted, the utterer often escaped because the spurious coin was such that it ought not to have deceived, and, theoretically, could not have deceived, a person using ordinary prudence. The act in question remedies this difficulty, and, if the spurious piece purports to be coin of the United States, or of foreign countries, it is one within the statute, although the devices with which it is impressed are so far from a similitude to the genuine as to be of original design.

This conclusion is in harmony with the language employed, and is consistent with the nature of the offense which was the subject of legislation. It is also sustained by the several other acts of congress *in pari materia*. These all relate to the forging of coin in resemblance or similitude of the gold or silver coins coined or stamped at the mints of the United States, or of any foreign gold or silver coin which by law is current in the United States; and the last act of congress upon the subject, and one which was passed subsequent to the act now under consideration, is one which makes it a crime "to make, issue, or pass any coin, token, or device, in metal or its compounds, which may be intended to be used as money, for any one-cent, two-cent, three-cent, or five-cent piece now or hereafter authorized by law, or for coin of equal value"—an act which was entirely unnecessary if the one in question is to be construed as is now insisted by the counsel for the government. Under the last act a conviction could not be had for uttering a token intended to be used as money, for a four-cent piece or for a coin of equal value. No such coin is known to the coinage of the United States, and because of this, congress did not attempt to make it an offense to utter such a token. In view of this, the latest exposition of legislative intent, it would be unreasonable to hold that congress intended, by the former act, to make it a crime to utter a token which does not purport to be in imitation or in substitution of any coin known to the law. For these reasons the defendant must be discharged.

UNITED STATES *v.* LISSNER.

(Circuit Court for Massachusetts: 12 Federal Reporter, 840-842. 1882.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.—The defendant was convicted upon two indictments charging him with passing counterfeit silver coins of the denomination of quarter dollars and half dollars, knowing them to be counterfeit. The coins in question had small holes made in them, and these holes had been filled with some base metal and passed by the defendant, with knowledge of their condition. Some of the holes had been punched with a sharp instrument, involving no loss of silver; others were made by drilling out a part of the silver, though not with any intention of using the silver drilled out. Silver coins with small holes made in them are not fully current, some persons refusing and others accepting them. We understand that the defendant bought the coins at a slight discount and passed them for their nominal value. He probably did not consider himself guilty of passing counterfeit money; but he was guilty of doing an act which the law is to characterize. The point was a new one, and the learned judge, having much doubt upon it, ruled, for the purposes of the trial, that a coin which had been regularly coined at the mint and afterwards punched or mutilated, and thereafter restored to the similitude of a genuine coin by the insertion of any metal (meaning base metal), was counterfeit. To this ruling an exception was taken.

§ 262. *Boring and filing coin, and adding base metal.*

Silver coins of the denominations of quarter dollars and half dollars are required to be made of a certain weight and fineness, and are lawful tender in payment of debts to the amount of \$10 (R. S., §§ 3513, 3586; St. June 9, 1879, c. 3; 21 St., 7); and are to be received by the treasury in exchange for lawful money in sums of \$20 or any multiple thereof (St. June 9, 1879, c. 12, § 1; 21 St., 7). In the case of gold coins the law is that, when reduced in weight below the standard, they are a good tender at a proportionate valuation. R. S., § 3585. We find no such provision made for silver coins. If such a coin has had an appreciable amount of silver removed from it, we cannot say that it remains a good coin for its original value, or even for a proportionate value. If, then, the hole is plugged with base metal, or with any substance other than silver, this act is an act of counterfeiting, because it is making something appear to be a good coin for its apparent value which was not so before.

In the English case, *Reg. v. Hermann*, L. R., 4 Q. B. D., 284, cited by the United States, a gold coin had been filed away until the milling was destroyed, and then a new milling had been made. A majority of the court held that this coin was counterfeit. Two able judges dissented, but one of them said that, if any base metal had been added to the coin to make up the weight, he should not have doubted that it was counterfeit. If that case had been like this there would, we suppose, have been no dissent. We do not doubt that the judgment of the court was sound, because the milling was actually a counterfeited milling. The fraudulent alteration of a bank note, to make it appear of more than its true value, and other similar acts which are held to be forgery, are analogous. We are therefore of opinion that the ruling and conviction were proper in respect to those coins which had been drilled and afterwards filled up.

On the other hand, we do not consider it a criminal act, whatever the intent may have been, to add base metal to a good coin, and we see no ground for

holding that a hole punched through a coin with a sharp instrument, crowding the silver into a slightly different shape, but leaving it all in the coin, has any effect to render it less valuable or less lawful tender than before. The statutes above cited are silent upon this exact question; but we think it clear that a silver coin, duly issued from the mint, remains of full value so long as it retains all the appearance of a coin, and does besides contain all its original weight and fineness. This being so, we cannot regard the addition of something to it as a criminal act of counterfeiting. Passing such a coin works no injury to the person to whom it is passed.

The pleadings and evidence reported do not enable us to discriminate between the counts which apply to the one and to the other kind of alteration. We must, therefore, order new trials. Counsel will probably be able to arrange for a default upon such count or counts as relate to what we hold to be counterfeited coin. Verdict set aside.

UNITED STATES *v.* NELSON.

(District Court, Western District of Michigan: 1 Abbott, 135-140. 1867.)

Opinion by WITHEY, J.

STATEMENT OF FACTS.—The respondent, Theodore Nelson, was indicted in May last, and tried at the present October term on a charge of *passing, uttering* and *publishing* a counterfeit United States fractional note, with intent to defraud the United States. The trial consumed ten days, and resulted in a verdict of guilty. At the coming in of the verdict, a motion was made for a new trial on the ground of evidence improperly admitted.

The proof was, that a person employed by the government officials, as a detective for the purpose, applied to Nelson for counterfeit money, to be by the detective put in circulation. Negotiations were had between them, and resulted in Nelson selling to Mitchell, the detective, \$410 of spurious United States notes, for which he received in good money and a promissory note, \$133.

§ 263. *Selling counterfeit notes "as and for spurious."*

When the testimony was offered objection was made that, on a charge for *passing*, proof of *selling* was not admissible. The objection was overruled, and the testimony admitted. It is this ruling that forms the basis of the motion for a new trial. It is urged by learned counsel in behalf of the respondent, that it is no offense, under the act of June 30, 1864, to *utter, pass* and *publish* counterfeit notes *as and for spurious*; that the offense charged is committed only when the notes are passed, uttered or published *as true*; that the words *pass, utter, publish*, import "*as true*;" that *to pass* is to *put into circulation*, as Worcester defines "*pass*," and therefore to dispose of *false* notes *as and for spurious* is *not passing*,—*i. e.*, is not putting them into circulation. It is said that congress has by another statute, viz., the act of February 5, 1867, created the offense of *selling*, under which Nelson might and should have been indicted; hence *selling* spurious notes is a distinct offense for which there can be no conviction under a charge of having passed, uttered and published; that the charge should have been for selling.

It is true that it has been held that *uttering* is a declaration that the note is *good*, and that to offer it as genuine is an uttering—that to constitute an uttering there must be an intent to pass the note as good. *United States v. Mitchell*, 1 Bald., 367, and cases there cited. But what is the statute under which

the indictment is found, and what its meaning? The act of June 30, 1864, defines the offense to be, "to utter, pass, publish or sell counterfeit United States notes, knowing them to be such, with intent to deceive or defraud." There is an omission of the words "as true or genuine," or any equivalent words. Whatever reason may have existed in the mind of the pleader who drafted the indictment for omitting to charge the respondent with having *sold* the notes, is not important to know. The single question which I find it necessary to determine is, whether, under the statute last referred to, any *delivery* of a spurious note to another for value, for the object or purpose of being passed or put into circulation as and for money, is a passing within the meaning of the act of congress.

Mr. Justice Baldwin, in the case referred to, says: "The note is uttered when it is delivered for the purpose of being passed. When put off it is passed." In the case of *State v. Wilkins*, 17 Vt., 151, the indictment charged the defendant with having "uttered, passed and given in payment one certain false, forged and counterfeited bank note, with intent to defraud;" and the supreme court say: "It is objected to this indictment that it is not alleged that the bill was passed as a *true bill*." The court also remark, the statute 15 Geo. 2 provided "that if a person should utter or tender in payment any false or counterfeit money, knowing the same to be false or counterfeit, he should on conviction be subject to certain penalties." Under this statute, in the case of *King v. Franks*, 2 Leach Cr. L., 644, the indictment charged the respondent simply with *uttering* a piece of false and counterfeit money, and it was held that the offense was complete, even though it was uttered as base coin. In that case the indictment did not state the uttering to have been in payment *as and for a piece of good money*, and if it had, the evidence in the case would have rebutted the charge. The court further on say, neither in the statute of 1818, nor in the Revised Statutes of Vermont, is it made a part of the description of the offense that the counterfeit bill should have been uttered, passed or given in payment *as and for a true bill*; and the court held the indictment good.

Again, in the case of *Hopkins v. Commonwealth*, 3 Metc., 460, when the statutory offense was having in possession any counterfeit bank bills, with intent *to pass*, knowing the same to be counterfeit, and the indictment charged in the language of the statute, the supreme court of Massachusetts say the omission of the words "*as true*" strengthens the conclusion that the legislature intended to prohibit the passing of counterfeit bills *as money, or to be used or passed as money*, by any person at *any rate of discount or otherwise*, whether as between him and the immediate receiver *they were passed as true or not*. And further on in the case the court say: "The word 'pass,' as used in the statute, and generally as applied to bank notes, is technical, and means to deliver them as money, or as a known and conventional substitute for money." And therefore to sustain such indictment,—*i. e.*, an indictment for passing,— "it must be proved that the party who is charged passed the counterfeit bill to another for some valuable consideration, or otherwise *as for money or as to be used for money*, with the guilty purpose of defrauding the community."

§ 264. *A sale and delivery for circulation of forged notes is a felonious passing within the act of congress.*

I find no case in conflict with those I have referred to; hence the conclusion at which I arrived when the question arose on the trial is not shaken, but confirmed. The congress of the United States has defined it an offense to utter, pass,

publish or sell a counterfeit United States note, with intent to deceive or defraud, omitting the words "*as true*," or any equivalent words. The manner of passing, or the terms upon which the notes are put off or disposed of, are not material, so long as the delivery or putting off of the false notes be as and for money, in lieu of money, or to be used as and for money, with intent to deceive or defraud. And whether the receiver knew the notes were false or not; whether he took them at what their face purported, or for one-half, or one-third, or any other value, if the purpose was to put them into circulation *as money*, it is not only passing, but as the tendency would be to defraud the government, it must be held to be passing with intent to defraud the United States. A sale and delivery for circulation of forged notes is a felonious passing within the act of congress. Pass, utter, publish, and sell, are, in some respects, convertible terms, and, in a given case, *pass* may include utter, publish, and sell.

§ 265. *Repugnant statutes.*

So far as the act of February 5, 1867, is repugnant to or inconsistent with the act of June 30, 1864, it should be held to repeal the latter; but I am not inclined to take the view that there is any repugnancy. I think a given case may be presented under either statute, and this case is one of them. In the one case, under the act of June 30, 1864, the indictment must charge the passing to have been with intent to deceive or defraud; to prosecute for the same act of passing under the statute of February 5, 1867, the indictment must charge the passing to have been with intent that the false note *will be passed as true*.

In conclusion, I would remark that I have, by letter, referred the questions arising under this motion to my learned brother, Justice Swayne, who writes me he has examined the authorities, and is satisfied that I decided aright. Sustained by the high authority of this learned justice of the supreme court of the United States, I am doubly assured that the judgment which I pronounce is no denial of legal rights to the respondent. The motion for a new trial is denied.

§ 266. *Intent.*—To constitute the crime of counterfeiting the coin of the United States, as defined by the act of March 3, 1825, it must be shown that the defendant made or assisted in making the spurious coin, with the fraudulent intent of passing it as genuine; and no such intent can be fairly presumed, unless the coin is of the character and in a condition to be used for purposes of fraud or imposition. The jury are the judges of such character and condition. If, from incompleteness or the clumsiness of the manufacture, men of very ordinary circumspection and intelligence could not be imposed upon by them, it cannot be inferred that they were designed for fraudulent use. *United States v. Burns*,* 5 McL., 23. See § 67.

§ 267. The act of congress of March 3, 1825, punishing the act of passing counterfeit coin "with intent to defraud any body politic or corporate, or any other person or persons whatsoever," does not require the act, in order to be punishable, to be done with intent to defraud the United States or any of their officers acting under their authority. It is sufficient that the indictment avers the act to have been done with intent to defraud a certain person. *Campbell v. United States*,* 10 Law Rep., 400.

§ 268. To sustain an indictment under the act of congress providing a penalty against any one who shall falsely make, forge or counterfeit any silver coin in the semblance and similitude of any silver coin of the United States, or any foreign silver coin made current by law, it must be shown that the defendant made, or aided in making, one or more of the counterfeit coins described in the indictment, and that he made them with guilty intent to pass them as genuine. The word "falsely" in the statute implies that there must be a fraudulent or criminal intent, and the statute contemplates no other intent than that of passing or disposing of the coin as true. If the defendant made the counterfeit coin to aid him in his performances as a professor of magic, and without intent to pass them as true, he is not guilty. *United States v. King*,* 5 McL., 208.

§ 269. On an indictment for counterfeiting it is not necessary to establish by positive proof

that the notes counterfeited were counterfeited by the prisoner with intent to defraud, but circumstantial evidence of that fact is sufficient if it be sufficient to satisfy the jury. *United States v. Moses*,* 4 Wash., 726.

§ 270. **Uttering counterfeit coin.**—One may be convicted of uttering and passing imitations of the coin of the United States with guilty intent, where the similitude of the counterfeit coin to the genuine is purposely imperfect, its intended use being confined to transactions in which deceptions may be practiced by an artful exhibition of only the head side. In such a case it is not material that the reverse side omits some of the words and devices of the genuine coin, and contains loops like eyes of shirt studs or vest buttons. *United States v. Bricker*,* 3 Phil., 426.

§ 271. **Punishment — Repeal of statute.**—Section 14 of the act of April 30, 1790, punishing with death the forgery of any "certificate, indent or other public security," is held to have been, by implication, repealed by the seventeenth section of the Crimes Act of March 3, 1825, inflicting a lighter punishment for the forgery of any "indent, certificate of public stock or debt, treasury note, or other public security of the United States," etc. *United States v. Irwin*,* 5 McL., 178.

§ 272. **Coins — Description.**—The act of March 3, 1825, providing in general terms for the crime of counterfeiting the gold and silver coins of the country, and foreign coins made current by law, without naming them, the fact that in the act regulating the coinage of the country the pieces of coin, charged in the indictment to have been forged, are designated by different names from those used in the indictment, if those names are pertinent and of equivalent meaning, affords no sufficient ground for arresting the judgment. *United States v. Burns*,* 5 McL., 23.

§ 273. The lessee and occupant of a house, who procures or facilitates its use by others for the purpose of making counterfeit coin, and who, knowing such persons to be engaged in such business, promotes the execution of their guilty purpose by harboring them in his house while thus engaged, is guilty of assisting in making the coin. *United States v. Tarr*,* 4 Phil., 495.

§ 274. **Proof of existence of genuine coins.**—Upon the trial of an indictment for counterfeiting the coin of the United States, it is not necessary to prove that there are genuine coins of which those mentioned in the indictment are counterfeits. This is a fact upon which the jury may act without evidence. *United States v. Burns*,* 5 McL., 23.

§ 275. **Repugnancy of statute.**—The act of congress of June 27, 1793, providing for the punishment of the counterfeiting of notes of the United States, was so repugnant in its provisions that an indictment thereunder could not be sustained. *United States v. Cantril*,* 4 Cr., 167.

§ 276. **Presumption as to place where offense was committed.**—The place where an instrument is found or offered in a forged state affords *prima facie* evidence or a presumption that the instrument was forged there, unless the presumption be repelled by some other fact in the case. *United States v. Britton*,* 2 Mason, 464.

§ 277. Upon an indictment for uttering certain forged papers in Washington, D. C., and a special verdict that the defendant uttered the forged papers, but that the letter inclosing the same was written in Tennessee and mailed there, directed to the postmaster-general at Washington, and was opened by the postmaster-general there at a certain time, the defendant not being then nor ever before in the District of Columbia, a judgment was given for the defendant. *United States v. Wright*,* 2 Cr. C. C., 296.

§ 278. **What the subject of forgery.**—In order to sustain an indictment for forgery, it is not necessary that the paper, if genuine, should be obligatory. If it is void upon its face, then it is not the subject of forgery; but if its invalidity is owing to any fact not appearing on its face, it is the subject of forgery. *United States v. Mitchell*,* Bald., 365.

§ 279. The defendant having been indicted for uttering a forged instrument in imitation of a draft drawn by the president of a branch of the Bank of the United States on the principal bank, it was held that the genuine instrument which was imitated was not a bill issued by order of the president, directors and company of the Bank of the United States, according to the true intent and meaning of the eighteenth section of the act of April 16, 1816, incorporating the Bank of the United States. *United States v. Brewster*,* 7 Pet., 164.

§ 280. The counterfeiting the silver coin of Spain, called a "head pistareen," is not punishable under the twentieth section of the act of congress of 1825, which makes it a felony to forge and counterfeit any coin in the resemblance and similitude of any foreign gold or silver coin, which by law now is or hereafter may be made current in the United States. This coin is not made current by law in the United States. *United States v. Gardner*,* 10 Pet., 618.

§ 281. **Passing and uttering.**—The passing of counterfeit paper is putting it off, or giving it in payment or exchange. Uttering it is a declaration that it is good, or an offer to pass it as good. Every person who is present and consenting to the uttering or passing, or in

any way aiding or assisting in doing it, or doing any act or thing in concert with the person who utters or passes the paper which is connected with their common object, is guilty of the offense. *United States v. Mitchell*,* *Bald.*, 366.

§ 282. **Delivering coin to another to be disposed of.**— Under the act of Virginia of December 19, 1792, whereby the passing of counterfeit coin "in payment" is punishable with death, the passing of such coin, knowing it to be counterfeit, to another, to be disposed of for their joint benefit, or for the sole benefit of the owner, is not punishable. *United States v. Venable*, 1 Cr. C. C., 416.

§ 283. **Security for good behavior.**— Upon acquittal of a charge of passing counterfeit money against the act of Virginia of December 19, 1792, the court will not order the prisoners to give security for their good behavior, it having appeared that they had uttered counterfeit money, but not "in payment" of a debt as required by the act. *Ibid.*

§ 284. **Fictitious name.**— It is forgery to counterfeit a paper in the name of a person who never existed, or in a fictitious name, or on a bank when there is no such bank as the paper purports, or in an assumed name, if it is done with the intention to defraud, and the paper purports to be good and genuine. *United States v. Mitchell*,* *Bald.*, 361.

§ 285. Under the eighteenth section of the act of April 10, 1816, establishing the Bank of the United States, punishing any person who shall "falsely make, etc., any bill or note in imitation of or purporting to be a bill or note issued by order of the president, directors and company of said bank, etc.; or shall pass, utter or publish, or attempt to pass, utter or publish, as true, any false, etc., bill or note, purporting to be a bill or note issued by the order of the president, directors and company of the said bank, etc., knowing the same to be falsely forged or counterfeited," it is immaterial whether the bill attempted to be passed be signed in the name of the real officers of the bank, or fictitious persons as such officers, or whether it would, if genuine, be binding on the bank. *United States v. Turner*,* 7 Pet., 132.

§ 286. **The forgery of a written request to lend money is indictable at common law.** *United States v. Green*,* 2 Cr. C. C., 520.

§ 287. **Note of Bank of United States.**— The forgery of an indorsement on a post note of the Bank of the United States is not a counterfeiting of an order within the law of April 10, 1816, incorporating the bank. *United States v. Stewart*,* 4 Wash., 226.

§ 288. It was a criminal offense to forge or pass a check on the Bank of the United States, drawn by the president of a branch bank. *United States v. Shellmire*,* *Bald.*, 370.

§ 289. **Falsely altering a note in a material part, with intent to defraud any person, is forgery.** *United States v. Wood*,* 2 Cr. C. C., 164.

§ 290. **Possession by one of several.**— Where there is proven to have been a concert of action between several defendants for effecting the common object of passing counterfeit bank orders, the possession of such orders by one of the defendants is the possession of all, and the fact is admissible in evidence against all. *United States v. Human*,* 1 *Bald.*, 292.

§ 291. **Possession of forged bank notes, with intent to utter them as true, not indictable.** *United States v. Wright*,* 2 Cr. C. C., 68.

§ 292. **Possession of other counterfeit papers.**— Knowledge by a person that the paper he attempted to pass was counterfeit may be inferred from his having in his possession, or the possession of an accomplice or confederate, other counterfeit paper of the same manufacture, or of similar appearance, or that such paper was found in a place of which one of the parties had the keys or control. *United States v. Mitchell*,* *Bald.*, 366.

§ 293. **Possession — Proof of good character.**— When a man is arrested with counterfeit money in his possession, knowing it to be counterfeit, he cannot establish his innocence by vague hypotheses or theories or speculative statements in relation to his intentions and the manner in which he came by it. But he may relieve the charge thus placed upon him by proof of former character, showing that he would not be likely to be engaged in that class of business, or that he obtained the money in due course of business, supposing it to be genuine. It is to be expected that every honest man will be able to show such facts in regard to his character and conduct as are sufficient to rebut any evidence of guilty intention. The absence of evidence of such good character is to be taken as at least a strong circumstance to show that the person accused has no such evidence to produce. *United States v. Kenneally*,* 5 Biss., 122.

§ 294. **Attempt to pass coin.**— The offense of attempting to pass counterfeit coin is made out when it is proved that the agent of the accused, employed for that purpose, attempted to pass such coin. *United States v. Morrow*,* 4 Wash., 733.

§ 295. **Resemblance sufficient to deceive.**— To convict of passing or attempting to pass counterfeit coin, the jury must be satisfied that the resemblance of the forged coin to the genuine is sufficiently strong to deceive persons exercising ordinary caution. *Ibid.* See § 254.

§ 296. **Circumstantial evidence.**— Where the defendant was shown to have been the lessee of a room which he occupied in connection with another who was arrested therein, in which

a large amount of spurious coin and various instruments and appliances for coining were found; and it was also proved that a box containing plaster of paris, purchased by the defendant, was found in the room, and that when arrested several pieces of counterfeit coin were found on his person, the jury were told that these were circumstances from which, unexplained by testimony of the defendant relieving him from the suspicious inferences otherwise arising, they might presume his criminal participation in making the spurious coin found in his possession. *United States v. Burns*, * 5 McL., 23.

§ 297. Where several persons are indicted for counterfeiting, and a foundation has been laid by proof of connection between them, evidence may be given on the separate trial of each that parts of the apparatus used for counterfeiting were found in the possession of others. *United States v. Craig*, * 4 Wash., 729.

§ 298. On an indictment for passing a counterfeit note evidence is admissible of the conduct of the prisoner at the time of the passing of the note for which he was indicted; of his having in possession or passing other counterfeits of the same or a different appearance; of everything he said or did at the time, as a part of the *res gestæ*, indicative of his knowledge of the character of the notes he has about him or is passing. Evidence of passing notes of the same appearance and manufacture at other times or to other persons is also admissible if their general resemblance to the one laid in the indictment is such that a person who knows the one to be a counterfeit could not reasonably believe the others were genuine. But evidence of passing other and dissimilar notes at other times is inadmissible. The *scienter* must be brought home to the note laid in the indictment; the *scienter* as to any other note, however clearly proved, is only a matter of indifference. *United States v. Roudenbush*, * Bald., 514.

§ 299. *Extrinsic circumstances.*—An indictment for the forgery of an owner's oath, and other writings relating to an importation of goods, is not bad because it does not aver the existence of such goods subject to duty as are referred to in the writings alleged to be forged. *United States v. Lawrence*, * 13 Blatch., 211.

§ 300. In determining whether a writing set forth in an indictment is sufficient without extrinsic averments to sustain a charge of forgery, all the extrinsic circumstances tending to the fraud, which are implied from the writing, shall be taken to exist. *Ibid.*

§ 301. *The forgery of a military land warrant*, being a certificate that the person named in it is entitled to locate so many acres of public lands, is not within the seventeenth section of the Crimes Act of March 3, 1825, providing for the punishment of the forgery of any "indent, certificate of public stock or debt, treasury note or other public security," etc. *United States v. Irwin*, * 5 McL., 178.

§ 302. Section 14 of the act of April 30, 1790, punishing the forgery of any "certificate, indent or other public security," includes the forgery of a military land warrant. *Ibid.*

§ 303. *National currency.*—A person convicted of aiding in the making of a plate to use in counterfeiting national currency notes, under the act of June 30, 1864, moved in arrest of judgment that the eleventh section under which he was indicted did not punish the counterfeiting of national currency, and that the thirteenth section, which provided "that the words 'obligation or other security of the United States' shall be held to include national currency," did not apply to cure the defect, for the reason that the phrase "obligation or security of the United States" did not occur therein; but the court held that as the phrase did not occur anywhere in the act, it must be presumed that the thirteenth section referred to the words used separately and not as a phrase, and that as the word "obligation" occurred in the eleventh section, it included national currency, and the judgment could not be arrested. *United States v. Rossvally*, * 3 Ben., 157.

§ 304. The offense defined in section 12 of the act of June 30, 1864, is the having in possession genuine plates of the currency of the United States, and not counterfeit plates. *United States v. Addatte*, * 6 Blatch., 132.

§ 305. *Photographs of treasury notes.*—It is an offense against the laws of the United States to make miniature photographs of United States treasury notes, though they would not in such form deceive any one. *Ex parte Holcomb*, * 2 Dill., 392.

§ 306. *Variance.*—Under the act of congress of March 2, 1831, called the penitentiary act, enacting "that every person duly convicted" "of having passed, uttered or published, or attempted to pass, utter or publish, as true, any such falsely made, altered or counterfeited paper writing or printed paper to the prejudice of the right of any other person," etc., "knowing the same to be falsely made," etc., "with intent to defraud such person," "shall be sentenced to suffer imprisonment and labor," it is not necessary that the note given in evidence should correspond in words and figures with that set out in the indictment. *United States v. Hall*, 4 Cr. C. C., 229.

§ 307. Upon the trial of an indictment under the penitentiary act of March 2, 1831, for the passing of a forged note, which had been lost after the indictment and before the trial,

the court instructed the jury that unless they should believe from the evidence that the note passed by the defendant was in fact false and counterfeit, and known by him to be so, and that it corresponded with that set out in the indictment, in the names of the cashier and president, so far as that there was not in the one any letter added or omitted which would vary the sound of the name; and that the note, so passed, had upon its face the letters "No." prefixed to the second 15,402 as set forth in the indictment, then the jury ought not to find the traverser guilty. *Ibid.*

IV. DEFRAUDING THE GOVERNMENT.

[See §§ 237, 238.]

§ 308. **False claim for bounty land.**—By the act of March 3, 1823, which provides that if any person "shall transmit to, or present at, or cause to procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, every such person shall be deemed and adjudged guilty of felony," it was the intention of congress to embrace all claims, whether for land or money, and the act embraces a claim for bounty land. *United States v. Wilcox,* 4 Blatch., 395.*

§ 309. An indictment under the above act need not state all the facts necessary to be established in order to entitle a party to the bounty land claimed in the application alleged to have been supported by false papers. *Ibid.*

§ 310. To an indictment grounded upon the act of March 3, 1823, and charging the defendant with transmitting false papers to the pension office, in support of an application for bounty land, under the ninth section of the act of March 3, 1855, a demurrer upon the ground (1) that the act could not be extended to the case of an application for a bounty land warrant; (2) that the papers alleged to contain false statements were not such as were enumerated in the act, but were merely declarations and affidavits subscribed and sworn to by the signers; (3) that no offense was charged to have been committed in the district of Vermont, but only an offense in the District of Columbia, was overruled by the court. *United States v. Bickford,* 4 Blatch., 337.*

§ 311. Under the act of March 3, 1823, making it an offense for any person to transmit, or cause or procure to be transmitted to or presented at any office of the United States any false papers, with intent to defraud the United States, it is not necessary that one indicted for transmitting false papers to the pension office, in support of an application for bounty land, should have actually transmitted the papers. It is an offense to procure such papers to enable another to transmit them. *Ibid.*

§ 312. **Making a claim** against the government under Revised Statutes, 5438, consists in asking or demanding payment from the government for services. The object of the statute is to prohibit and punish the drawing of money from the treasury of the United States without having rendered legal and recognized equivalents. *United States v. Bittinger,* 21 Int. Rev. Rec., 342.*

§ 313. The words "false," "fictitious," and "fraudulent," as used in Revised Statutes, 5438, have no special legal signification, but are to be taken as commonly used. The word "knowing," as there used, means having a clear perception of the falsity of the claim made. *Ibid.*

§ 314. **Where an officer of the treasury department** is accused of fraud, in obtaining, by drafts, from a navy agent, public money placed in the hands of the navy agent as navy agent, the fraud, if any has been committed, is a fraud upon the public. *United States v. Watkins,* 3 Cr. C. C., 441.*

§ 315. **Place of commission of offense.**—Where the defendant in Washington, D. C., in carrying out a plan to defraud the United States, fraudulently procures money from the treasury to be placed to his credit in the hands of a navy agent in New York, and draws a draft on this fund and has it discounted in Washington and receives the proceeds of the draft there, the offense is committed in Washington. But the offense is not complete until the draft is paid. *Ibid.*

§ 316. Under sec. 5438, R. S., forbidding and punishing the making and presenting of fraudulent claims against the government, or vouchers therefor, an indictment may be found against an offender in the district where the claims were actually made, signed and approved, and to consummate such making no presentation to the accounting officers of the government is necessary. *Ex parte Shaffenberg,* 4 Dill., 271.*

§ 317. **False tokens or pretenses.**—The principle which, in transactions between individuals, requires, in order to make fraud indictable as a public offense, that it should be committed by means of tokens, or false pretenses, or forgery, or conspiracy, does not apply to direct frauds upon the public. *United States v. Watkins,* 3 Cr. C. C., 441.*

§ 318. Where the defendant is charged with defrauding the United States by drawing a draft on a navy agent and procuring such agent to issue a requisition on the treasury covering the amount, the getting the money out of the treasury into the hands of the navy agent is a necessary link in the chain of means to accomplish the fraud; and if that single link is obtained by deceptive practices of the defendant, those deceptive practices are as effectual in constituting the offense as if every other link in the chain had been forged by the like deception. *Ibid.*

§ 319. It may be a fraud upon the United States for the fourth auditor of the treasury, by false appearances, to deceive a navy agent into the belief that he had authority to draw drafts on such agent to be paid out of the money of the United States, so as to induce the navy agent to pay such drafts, although the fourth auditor has no such authority, and although the navy agent, in paying the drafts, may act in his own wrong and without actual authority. If the fourth auditor has authority to direct such an appropriation, still he may do it in such a way as to deceive the agent, or otherwise to use such deceptive practices in regard to it, as to constitute the drafts a fraud upon the United States. *Ibid.*

§ 320. False or forged writings.—Section 1 of the act of March 3, 1823, punishing the false making, forging, or altering of any writing, for the purpose of obtaining any money of the United States; and the uttering of any such false, forged, or altered writing with intent to defraud the United States, is confined to instruments designed to obtain money from the United States, and does not apply to the uttering of a forged bond required by the regulations of the secretary of the treasury established in pursuance of the Internal Revenue Act of June 30, 1864. *United States v. Barney*,* 5 Blatch., 294.

§ 321. Under section 5418 of the Revised Statutes, which punishes the forgery of "any bid, proposal, guaranty, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States," the words "other writing" include an owner's oath required to be taken before the entry of goods at a custom house; also an importer's entry and an importer's bond. *United States v. Lawrence*,* 13 Blatch., 211.

§ 322. The act of March 3, 1823, providing that if any person or persons shall transmit to, or present at, or cause or procure to be transmitted to or presented at, any office or officer of the government of the United States, any deed, etc., or other writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, etc., every such person, on conviction, shall be punished, etc., does not require the claim or account to be in favor of the person presenting the false writing in support of it. It applies as well to the guilty agent of the person in whose favor the claim or account is presented. *United States v. Kohnstamm*,* 5 Blatch., 222.

§ 323. The act of March 3, 1823, punishing the presentation at any office of the United States of any false papers in support of any claim, with intent to defraud the United States, is not repealed, as to offenses already committed, by the act of March 2, 1863, providing for the same offense, the offenses previously committed under the former act being saved by the language of the repealing clause of the latter, saving "all rights of suit or prosecution, under any prior act of congress, on account of the doing or committing of any act hereby prohibited." *Ibid.*

§ 324. Section 1 of the act of March 3, 1823, "for the punishment of frauds committed on the government of the United States," applies only to instruments altered or forged for the purpose of obtaining moneys from the United States or their officers or agents. It does not apply to an instrument forged for the purpose of obtaining a cession of land from the United States, or the confirmation of a claim to land alleged to have been granted by the Mexican government. *United States v. Reese*,* 4 Saw., 629.

§ 325. Fraud not sanctioned.—Where the defendant, an officer of the government, is charged with defrauding the United States by drafts on a navy agent, the fact that the government has since allowed a credit to the navy agent for the amount of the drafts does not sanction the drafts, nor exculpate the defendant from the fraud. Nor will it exculpate him that the officers of the government have entered the amounts of these drafts as a charge upon the defendant. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 326. The writing transmitted or presented, referred to in that part of section 3 of the act of March 3, 1823, punishing any person who "shall transmit to or present at, or cause or procure to be presented at or transmitted to, any office or officer of the government of the United States, any deed, . . . or other writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited," need not be an instrument forged or counterfeited, in the technical sense of the term. A writing genuine as to its execution, but false as respects the facts embodied in it, is within the act. This clause in the section provides for a distinct and independent offense, and considerations founded on the structure of the whole section will not control the language used. *United States v. Staats*, 8 How., 41 (§§ 2542-44).

V. UNDER ELECTION LAWS.

[See §§ 284, 290. Also CONSTITUTION AND LAWS, II, 2, and the index to that subject, title *Suffrage*.]

SUMMARY—*Disfranchisement under state laws*, § 327.—*Judges of election not liable if they act in good faith*, §§ 328, 329.—*Governor not an election officer*, § 330.—*Supervisor an election officer*, § 331.—*Unlawful commingling of spurious ballots*, § 332.—*Arresting a deputy marshal*, §§ 333, 334.—*Hindering and preventing voters from freely exercising their right to vote*, §§ 335, 336.—*Averment and proof as to the judges holding the election*, § 337.

§ 327. State statutes disfranchising persons convicted within the state of an infamous crime, deemed by the laws of the state to be a felony, do not include persons thus convicted in the federal courts of a statutory offense. *United States v. Barnabo*, §§ 333, 339.

§ 328. Although section 5515 of the Revised Statutes makes the naked act of "neglecting and refusing to perform their duties," on the part of judges of election, a crime; and such judges become technically guilty of the offense when they neglect and refuse to receive the votes of persons entitled to vote at the election, yet the law disdains to punish an unlawful act done innocently, or ignorantly, or in good faith; and it is necessary to prove that the neglect and refusal on the part of the judges of the election were coupled with some wrongful purpose, motive or intention on their part. *United States v. Foster*, §§ 340-343. See § 368.

§ 329. The fact that judges of an election, indicted under section 5515 of the Revised Statutes for refusing and neglecting to receive the votes of persons entitled to vote at the election, acted upon the opinion of the judges of the county court in refusing the votes, is evidence of good faith, but cannot excuse them for "neglecting and refusing to perform their duty" with wrongful intent. *Ibid.* See § 368.

§ 330. The governor of a state is not an election officer, under section 22 of the act of congress of May 31, 1870 (16 Statutes at Large, 145), making it a crime for any officer of any election at which a representative or delegate in congress was voted for, to issue, among other things, any false or fraudulent certificate of the result of such election. *United States v. Clayton*, §§ 344-348.

§ 331. A supervisor of elections appointed in pursuance of the act of congress relating to that subject, whose duty relates to the registration of voters as preliminary to the exercise by them of their right to vote, to be present at the polls during the time the votes are being cast, to engage in the work of canvassing the ballots, to personally scrutinize, count and canvass each ballot cast, and to remain with the inspectors and other officers of such election until the votes are canvassed and counted, and certificates and returns are wholly completed, is an officer of the election, within section 5515 of the Revised Statutes, punishing "every officer of an election" who neglects or refuses to perform any duty in regard to such election required of him by law. *United States v. Fisher*, §§ 349, 350.

§ 332. Under section 5511 of the Revised Statutes, declaring it to be an offense for any one "to interfere in any manner with any officer of such election in discharge of his duty," an indictment which charges the defendant with an unlawful commingling of spurious ballots with the legal ballots, at an election of the kind referred to in the section, and that such unlawful commingling constituted "an unlawful interference with the judges of the election in the discharge of their duties," is sufficient. *Ibid.*

§ 333. A deputy marshal, assigned to duty at a polling place, arrested a man for attempting to vote illegally. Through the interference of a crowd the prisoner escaped, and the marshal drew a pistol, after being deprived of his cane. The defendants, police officers, then arrested the officer on the ground that he was committing a breach of the peace under the state laws. *Held*, that the defendants were guilty of an offense under the statutes of the United States. *United States v. Conway*, §§ 351-353.

§ 334. The question whether the party arrested had a right to vote or not, and the fact of the marshal's drawing a pistol, were not material. The officer was obstructed in the discharge of his duty. *Ibid.*

§ 335. Proof that, at an election for representatives in congress, the defendant, in company with others, in a room where the polls were opened, made an attack upon a line of voters waiting for the opportunity of casting their ballots for a member of congress, and drove them from the room with violence, under the pretext that certain other voters not in the line were excluded from the polls, and attempted to fasten the doors against their readmission, makes out the offense defined by section 19 of the act of May 31, 1870, punishing any person who shall, "by force, threats, menace, intimidation or otherwise, unlawfully prevent any

qualified voter from freely exercising the right of suffrage." "Unlawfully preventing a voter from freely exercising the right of suffrage" may be construed to mean "to unlawfully prevent him from voting," without making section 19 cover the same offense as section 4 of the same act defines in the words "preventing, hindering or obstructing a qualified voter from voting," since section 4 punished only the offense of hindering, preventing, etc., when done under color or pretense of some state law, and the act was amended by adding section 19, which was limited to offenses committed at an election for members of congress, and included all preventions, whether under color of state law or not. *United States v. Souders*, §§ 354-361.

§ 336. Under section 19 of the act of May 31, 1870, punishing any person who, at an election for representatives in congress, shall, "by force, threat, menace, intimidation or otherwise, unlawfully prevent any qualified voter from freely exercising the right of suffrage," the voter need not be absolutely prevented from voting, and the hindrance need not continue during the whole day. *Ibid*.

§ 337. An indictment under section 19 of the act of May 31, 1870, for preventing qualified voters from voting at an election for members of congress, need not name the judges who held the election, nor is it necessary at the trial to show who the judges were. The certificate of the result of the election, required by law to be filed by the judges with the secretary of state, if offered in evidence by the government, and contradicts the oral proof as to who the judges were, does not affect the case of the government. If it comes from the proper custody it is conclusive; and if not, it has no force or effect. *Ibid*.

[NOTES.— See §§ 362-372.]

UNITED STATES v. BARNABO.

(Circuit Court for New York: 14 Blatchford, 74-79. 1876.)

Opinion by BENEDICT, J.

STATEMENT OF FACTS.— The accused is charged with having fraudulently registered at a registry of voters for an election for representatives in congress, he being at the time disqualified as a voter by reason of having been convicted of a felony. The conviction set forth is a conviction of uttering a counterfeited security of the United States, the offense being created by section 5431 of the Revised Statutes of the United States. A demurrer to the indictment presents the question whether the laws of the state of New York deprive of the right of suffrage a person who has been convicted, in a court of the United States, of an offense against the United States, of the character described in section 5431 of the United States Revised Statutes.

§ 338. *The statutes of a state disfranchising persons convicted of infamous crimes do not embrace cases of persons convicted in federal courts of offenses created by statute.*

The question is new in this court, and I have not been referred to any case where the question has arisen in the courts of the state. In order to a proper understanding of the statutory provisions in the laws of the state of New York, bearing upon the question, mention must be made of the following provisions in those laws. According to the provisions of section 25 of the act of April 17, 1822, no person was allowed to vote who had been "convicted of any infamous crime." In 1823 the second constitution of the state took effect, and gave authority to pass laws "excluding from the right of suffrage persons who have been, or may be, convicted of infamous crimes." In 1828 the Revised Statutes of the state (1 R. S., 127, § 3) excluded from the right of suffrage every person "convicted *within this state* of an infamous crime," "unless he shall have been pardoned by the executive, and, by the terms of such pardon, restored to all the rights of a citizen." In order to prevent infractions of this law, further provision was then made (1 R. S., 135, § 21), that, "if any person so convicted shall vote at any such election, unless he shall have been pardoned and restored to all the rights of a citizen, he shall be deemed guilty of a mis-

demeanor," etc. An original note of the revisers to chapter 6, title 4, article 2, section 10, says: "The act of 1822, section 25, provides that no person who has been convicted of an infamous crime shall be permitted to vote, but it does not point out any mode in which a challenge for that cause shall be determined. Parol evidence of the fact of conviction ought not to be received; nor ought the oath of the person challenged to be demanded. The revisers have, therefore, in the above section, required the production of the record; though it is worthy of consideration whether such a regulation would not make the exclusion, to all practical purposes, a nullity. Perhaps a list of the convicts might be annually furnished to the town clerks, and be made evidence in cases of this sort." On the 5th of April, 1842, a substitute for chapter 6 of part 1 of the Revised Statutes was enacted, in which it was provided (title 1, § 3) that "no person who shall have been convicted of an infamous crime *deemed by the laws of this state a felony*, at any time previous to an election, shall be permitted to vote thereat, unless he shall have been pardoned before or after his term of imprisonment has expired, and restored by pardon to all the rights of a citizen." This provision is still in force, and the question in hand depends upon the effect to be given to this statute of the state.

§ 339. *An offense created by an act of congress cannot be said to be deemed "by the laws of this state a felony." The disfranchisement by the laws of New York includes only persons convicted of infamous crime by the courts of that state.*

It will be noticed that the language of the original act of 1822 is sufficiently broad to cover all convictions of any infamous crime, wherever had. The Revised Statutes added, in express terms, the limitation that the conviction must have occurred "within this state," and, by implication, the further limitation that it must be a conviction in the courts of the state. This implication appears to arise out of the exception as to persons "pardoned by the executive, and, by the terms of such pardon, restored to all the rights of a citizen." The executive of the state only can be referred to here, as no pardon issued by the president of the United States would, by its terms, *restore* a person to the rights of a citizen of the state of New York. It would appear, therefore, proper to construe the statute as referring to those crimes only that can be pardoned by the governor of the state. Furthermore, such appears to have been the understanding of the statute by the revisers themselves, as their note above referred to shows. For, the remedy proposed by them in the note, while sufficient, if only convictions in the courts of the state are within the scope of the statute, is wholly insufficient if the statute includes convictions in the courts of the United States. The limitation which thus appears in the Revised Statutes is more plainly seen in the enactment of 1842, for while, in that act, the exception as to persons pardoned is substantially the same as before, the disqualifying clause requires not only that the conviction shall be of an infamous crime, but that it shall be of a crime "*deemed by the laws of this state a felony*." This statute requires not only that the crime be of the class of infamous crimes, but, also, that it be such a crime as, by the laws of the state, is declared to be a felony. The courts of the United States take cognizance only of statutory offenses against the United States, created by the laws of the United States, and I doubt whether it can be said that any mere statutory offense, created by a law of the United States, is "*deemed by the laws of the state a felony*." It has been contended that the word "*deemed*," as it is used, shows an intention to include all crimes presenting the feature designated by

the laws of the state as the characteristic of a felony, namely, a liability to be punished by death or by imprisonment in a state prison (2 R. S., 702, § 30), and hence it is concluded, that, inasmuch as the accused, upon his conviction under section 5431, became liable to imprisonment in a state prison, he is within the scope of the disqualifying statute. Here this difficulty arises, that, while the laws of the state are framed with the intent that the mode of punishment liable to be inflicted shall determine the character of the offense, as a felony or otherwise, the laws of the United States are not so framed. By the laws of the United States, upon conviction for any offense, where the sentence imposed is an imprisonment for a period of more than one year, the sentence may be directed to be executed in a state prison. R. S. U. S., § 5541. And there are offenses against the United States made, by express terms, misdemeanors, although punishable by hard labor in a state prison. It would, therefore, result, that a conviction for any offense against the United States, where imprisonment for a period of more than one year can be inflicted, would have the effect to disqualify the person convicted.

The better solution of the question is to be found in other provisions of the statutes of the state, now to be mentioned. On the 14th of May, 1872, was passed an act entitled "An act in relation to elections in the city and county of New York, and to provide for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage therein." In section 33 is found adopted the suggestion originally made by the revisers, in their note above referred to. By this section, obviously for the purpose of providing means of proving such convictions as work the disqualification of a voter, it is required that the clerks of the courts of oyer and terminer and general and special sessions shall file with the chief of the bureau of elections a certified record of all convictions for offenses punishable by death or imprisonment in a state prison. Here, the remedy provided by the law affords a statutory indication that the disqualifying provision is understood as applying only to cases of conviction in a court of the state. Furthermore, section 76 of the act of 1872—plainly inserted for a better enforcement of the disqualifying provision—declares that "if any person who shall have been convicted of bribery, felony or other infamous crime, *under the laws of this state*, shall thereafter vote, . . . he shall, upon conviction thereof, be adjudged guilty of a felony," etc. This section throws light upon the language of the disqualifying provision it was intended to enforce, and shows plainly that only convictions arising under the laws of the state are intended to work the disqualification of a voter. I therefore conclude, from an examination of the statutes of the state appertaining to this subject, that these statutes do not deprive of the right of suffrage a person who has been convicted, in the courts of the United States, of a mere statutory offense against the United States.

This conclusion is strengthened by the construction put, by the courts of the state, upon the provision respecting the disqualification of witnesses, contained in the laws of the state, where the language used is broader than that used in respect to voters. The provision in respect to witnesses is that no person sentenced upon a conviction for felony shall be competent to testify in any proceeding, etc., unless he be pardoned by the governor, etc. 2 R. S., 701, § 23. In *Cole v. Cole*, 50 How. Pr., 59, 66, it is intimated that a conviction in another state would not, probably, render the testimony of a witness inadmissible by virtue of this statute; and this has been expressly ruled on several occasions at *nisi prius*, as I am informed. The cases are not reported. See, also,

Commonwealth v. Green, 17 Mass., 515; Commonwealth v. Hall, 4 Allen, 305.

It is proper to add that the precise question in hand appears to have been presented to the attorney-general of the state, and the opinion expressed by that officer is in harmony with the conclusion I have reached. See Op. Att'y-Gen'l State, p. 413, and again on page 524, where the attorney-general says: "I am of the opinion that a conviction for crime, in order to disqualify an elector, must be had under the jurisdiction of, and in, the courts of this state, and that a conviction under the federal laws and in the federal courts does not work such disqualification." In accordance with these views the demurrer is sustained, and the accused must be discharged.

UNITED STATES v. FOSTER.

(Circuit Court for Virginia: 4 Hughes, 514-522; 6 Federal Reporter, 247-256. 1881.)

STATEMENT OF FACTS.—Foster and others, judges of an election, were indicted for refusing the votes of John Burton and a number of other persons, on the ground that their capitation taxes had been paid by other persons than themselves, and the further ground that the receipt of the auditor given for the receipt of the treasurer was signed by "G. W. Duesberry, clerk," and not by the auditor himself.

Charge by HUGHES, J.

Gentlemen of the Jury: This case is important as affording an opportunity for a judicial construction of the election laws upon the somewhat difficult questions arising on the evidence before us. This is the only manner in which a court of justice can concern itself with elections. Their office is to try and pass upon controversies between parties; either between the government and accused persons in criminal causes, or between one person and another in civil causes. A court of justice can regularly have to do only with causes *inter partes*. All its forms and proceedings lead to an issue of fact, or law, or both *between litigants*; and its function consists in deciding such issues. As incidental to this function it may grant injunctions and restraining orders for protecting property in controversy or the rights of litigants; and it may issue writs of *habeas corpus* as a means of ascertaining whether a person in confinement is lawfully confined upon a criminal charge. But these powers and processes are only incidental to its chief and principal office of determining controversies *inter partes*. A court cannot on or before an election day send out its process to all whom it may concern prohibiting judges of election generally or particularly from doing this or that, or directing them to give a law this or that construction.

§ 340. *Powers of judges of election.*

Judges of election are not part of the judiciary establishment, and are not amenable to instructions from courts of justice in the exercise of their high duties. Whether regarded as servants of the legislature or as a branch of the executive, judges of election are wholly independent of courts of justice in the power freely to perform their duty in the manner dictated by their own consciences, and in conformity with their oaths and the laws of the state and Union. If courts attempt interference with them in the act of discharging their duty at the polls, their action is extra-judicial, is *coram non judice*, is without authority of law, and is not binding upon judges of election. It is only when a case like the one at bar comes in a regular manner before a court of justice,

and election laws are thus brought under judicial construction, that a court of justice can act in an authoritative manner; and it is only then that its construction of election laws enters into the body of the law of the land, and as such becomes binding upon the conscience of judges of election in the same manner with the statute law itself.

The principal question in the present case is whether the men who offered to vote as named in the indictment were entitled to vote; for if they had a right to vote, and their votes were rejected, then these judges of election, the defendants, in rejecting their votes did "*neglect and refuse to perform their duty*" in the premises, and are technically guilty of the charge set out against them in the indictment. I say they are technically guilty by the mere act of "neglecting and refusing" to receive the votes, for the law on which the indictment is based, section 5515 of the Revised Statutes of the United States, makes the naked act of so "*neglecting and refusing*" a crime, and uses no qualifying term, such as "corruptly," or "wilfully," or "with wrongful intent," as necessary to be proved besides the naked act. But although such is the wording of the statute, I instruct you that the law disdains to punish a man who innocently, or ignorantly, or in good faith, commits an unlawful act; and therefore this indictment, though it need not necessarily have done so, charges that the *neglect and refusal* to perform their duty by these defendants was "unlawful." In order to a conviction in this case, I instruct you, therefore, that the prosecution must not only have proved a neglect and refusal by these defendants to perform the duty required of them by law, but that the neglect and refusal were coupled with some wrongful purpose, motive or intention on their part.

§ 341. *Under the election law of Virginia, a receipt signed by the clerk of the auditor for the receipt of the treasurer should be respected by judges of election.*

The principal question in the present case, I repeat, is whether the thirteen persons who offered to vote on the auditor's receipts, a sample of which is given above, were entitled to vote. It is conceded that in all other respects these persons (who were all colored) were qualified voters. It is also conceded that these receipts are genuine documents—that is to say, they are veritably what they purport to be: receipts issuing from the "office of the auditor of public accounts" of the "commonwealth of Virginia," at Richmond. Their genuineness was not disputed, and could not have been disputed in any part of the territory of Virginia. The only point made by the judges of election was that the receipt was signed by a clerk in the auditor's office, and not by the auditor himself. They held that section 7 of chapter 43 of the code of Virginia, in providing that on the treasurer's receipt for money paid into bank being delivered to the auditor the latter officer shall "grant a receipt therefor," required that this receipt for a receipt should be signed by the auditor himself.

When this question was submitted to me by the grand jury which found this indictment, I answered that, the genuineness of this receipt as a document issuing from the auditor's office not being disputed, its sufficiency must be presumed until the contrary is shown. This I did on the well known maxim of law, *omnia presumuntur rite et solemniter esse acta*; which means that all official acts of officers, done under their official oaths, in the line of their official duty, must be presumed to have been rightly and legally done in due form until the contrary is shown. That such acts were rightly done must be taken for granted from the necessity of the case; else infinite inconvenience, obstruction and confusion would take place, and the affairs of society could not go on. I also asked the grand jury to observe that the language of the code in respect

to the auditor was not that he shall *sign and grant* a receipt for the treasurer's receipt, but simply that he shall grant such receipt. The law seemed to contemplate that the pressure of labor upon the auditor's office might be so great at times as to render it inconvenient and sometimes impossible for him to sign all receipts with his own sign-manual, and in that view seems to have employed the word "grant," instead of the words "sign and grant." Besides, a mere receipt for a receipt is not so important an instrument but that the duty of signing it may very safely be delegated to a clerk.

§ 342. *In Virginia judges of election are not justified in rejecting a vote because the capitation tax of the voter was paid by another.*

Another objection of the defendants to receiving the votes of the persons holding these receipts was founded on the clause of the recent amendment to the state constitution declaring that the citizen, in order to be entitled to vote, shall, among other things, "have paid to the state, before the day of election, the capitation tax required by law for the preceding year;" and evidence was offered to show that the judges surmised, inferred or supposed that these persons had not paid their taxes in person; but that some one else had paid them in their stead; and this was supplemented with still other evidence, proving it to have been the opinion of these defendants that taxes so paid did not remove the disqualification from the persons who were offering to vote.

My instruction to you, gentlemen, on this whole set of opinions, set up for these defendants, is that each of the three grounds of objection to the votes in question is insufficient. The clause in the constitution is one of that class of clauses which all legal and political maxims of construction require to be liberally interpreted and applied. If a citizen's tax has been paid, and he is otherwise qualified, then by that fact he becomes a qualified voter. If it is paid for him by another, not in the way of a bribe, and without any understanding, express or implied, that he is to vote for a particular candidate, then the payment is legal and in every way proper. If it is paid as a bribe, or with an understanding, express or implied, that he is to vote for a particular candidate, then he commits an offense punishable by a \$20 fine, for which he may be prosecuted; and that is the only penalty which the law visits upon the act; it does not invalidate the vote or re-impose the disqualification of the voter. And so, if the taxes of these men had been paid, whether in violation of law or not in violation of law, the right to vote attached to them on such payment of the tax, and their votes should of right have been received. Judges of election have nothing to do with penal laws. They are not at liberty to suspect as to a citizen who pleads that his tax has been paid, that another person has paid it for him, to try him summarily under a penal statute, which condemns him only in the penalty of a \$20 fine, and to convict and sentence him to the different penalty of being disqualified from voting — acting in the space of five minutes as prosecutor, judge and jury. This would be a revival of Star-Chamber methods, and is repugnant to all our American ideas of free government and civil liberty.

I therefore instruct you, gentlemen, that these receipts were sufficient evidence of the payment of the taxes of the men named in them; that these men became thereby qualified to vote on the receipts whether the law of 1878 had been violated or not; and that even if the law had in fact been violated, such violation only subjected the parties to the offense to a fine of \$20, triable and punishable by a court of justice, and not to disfranchisement by these judges

of election; for the violation did not re-impose the disqualification which had existed before the tax had been paid.

I have thus disposed of the principal question in this case—to wit, whether the persons named in the indictment as having offered to vote were qualified voters. They *were* qualified voters under the law of the land, and in rejecting their votes the defendants did “neglect and refuse to perform a duty” required of them by the laws of Virginia and the United States, and they are technically guilty of the offense charged in the indictment.

§ 343. — *the rejection by judges of election of the votes of citizens whose capitation tax has been paid, if done with an improper motive, is an indictable offense.*

It only remains for me to say something on the question whether the defendants neglected and refused to do their duty in the premises with wrongful motive or intent. You can only judge of intention by words and acts. Men were not made with windows in their breasts through which we might read the motives of their conduct. We can discover intentions only from words and acts. It is shown that the judges acted upon the opinion in writing of the judge of the corporation court of Manchester, an officer upon whom the laws of the state devolve the ministerial, but not judicial, duty of appointing judges of election. It is certainly natural for conscientious men to consult the opinions of lawyers in whose learning and judgment they have confidence. But judges of election ought as certainly to be cautious how they accept opinions not given under the sanction of an oath or of official responsibility, as the basis of their action in so grave a matter as the disfranchisement of citizens from the privilege of voting. It is not a part of the duty devolved by law upon judges of courts of justice to give opinions on questions of law to other than grand juries or persons or bodies having like relations to their courts. If given, such opinions are not official, have not the sanction of an official oath, and carry no other authority than the moral weight of the authors of them. The defendants in this case, as judges of election, would have had a right to call upon the attorney-general of the state or the commonwealth's attorney of their corporation for his opinion on questions arising before them; and such an opinion would have come to them under the sanction of the official oath; but even with such sanction it would not have been binding upon these judges of election. They are officers who must act upon their oaths, their consciences, and their own responsibility to the law. If they “neglect and refuse to perform their duty” with wrongful intent, it is a poor and useless shift to attempt to shelter themselves behind the opinions, whether official or unofficial, of lawyers who advised them to do so. Still the fact that these defendants did seek and accept legal advice is an indication of good faith, and is a fact proper to be considered, even if the advice which they took misled them into the commission of a penal offense.

With these remarks I will leave the jury to deal themselves with the question whether the rejection of the votes under consideration was done in good faith or with wrongful intent, and will only remark that if that question is left in doubt by the evidence, the defendants are entitled to the benefit of the doubt.

UNITED STATES v. CLAYTON.

(Circuit Court for Arkansas: 2 Dillon, 219-228. 1871.)

STATEMENT OF FACTS.— This was an indictment against Clayton, who was at the time the alleged offense was committed the governor of the state of Arkansas. The offense charged was that Clayton, being governor, unlawfully and fraudulently issued to John Edwards a certificate that he, Edwards, had been duly elected to the congress of the United States. There was a demurrer to the indictment.

Opinion by DILLON, J.

The indictment against the defendant, who was at the time of issuing the certificate of election to Edwards the governor of the state of Arkansas, is founded upon section 22 of the act of congress of May 31, 1870. 16 Stats. at Large, 145. The amendatory act of February 28, 1871 (id., 433), does not apply to the case, since the indictment is for an act committed before its passage, and is not based upon section 20, which this last-named statute amends, but alone upon section 22, above mentioned. This section provides, "*That any officer of any election at which any representative or delegate in the congress of the United States shall be voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any state, territorial, district, or municipal law or authority, who shall neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any state or territory thereof; or violate any duty so imposed, or knowingly do any act thereby unauthorized, with intent to affect any such election, or the result thereof; or fraudulently make any false certificate of the result of such election in regard to such representative or delegate, . . . shall be deemed guilty of a crime, and liable to prosecution and punishment therefor,*" by fine or imprisonment, or both.

The indictment necessarily proceeds upon the theory that the defendant, although the act charged against him was one required by the laws of the state to be done by him in the capacity of governor, was, within the meaning of the act of congress just quoted, an *officer of election*, and as such, issued and delivered to Edwards the certificate of election which is alleged to be fraudulent. Accordingly, one of the counsel for the government well observed on the argument that the decisive question here was, whether the defendant, within the intention of congress, was or was not an *election officer*, and acting as such in making and delivering the election certificate set out in the indictment. If he is not an *election officer*, it was admitted that the indictment against him would not lie. To this fundamental inquiry, then, we first direct our attention; for, if this question be resolved against the government, that is an end of the case, and it is unnecessary to consider whether congress has the constitutional power to provide for the punishment of state officers in respect of acts performed by them as such, under state authority. And so, in this event, it would be equally unnecessary to determine whether, if the defendant were an election officer, the indictment sufficiently avers it, or charges the offense with the particularity required by the rules of criminal pleading.

§ 344. *Quære: As to the meaning of the words "officer of election"—whether they include the governor of a state.*

The act of congress, in the section under consideration, provides for the punishment of "any officer of election" who shall "fraudulently make any false certificate of the result of any election in regard to a representative" in con-

gress. The question is one as to the meaning of the phrase "officer of election" or "election officer." What was the scope of the legislative intention? Undoubtedly, this language was designed to include, and does appropriately include, local judges and clerks of election at which a representative in congress is voted for. But did congress mean, by this language, to include the chief executive officer of a state? Did it mean to include in any case an official act of the governor of a state, and to provide for his punishment if he shall neglect or refuse to perform any duty imposed by state laws in respect to elections for congress, or shall violate any such duty? Did it mean to include by this description an official act of the governor, which in any case cannot be done until thirty days or more have elapsed since the election was holden and the polls closed, and which, in the case made by the indictment, was not done by him until nearly four months after the election had ended? Is the act of the governor of the state, in granting the certificate of election, the act of an election officer?

§ 345. *Rules for the construction of criminal statutes.*

This is, as above observed, a question of legislative intention. Now, in what manner do the courts ascertain the legislative will? We answer, that it is ascertained primarily and chiefly by the language the legislature has used to express its meaning. We must suppose in the enactment of statutes, particularly statutes so important as the one under consideration, that congress weighed well the words it employed. In the office of interpretation, courts, particularly in statutes that create crimes, must closely regard and even cling to the language which the legislature has selected to express its purpose. And where the words are not technical, or words of art, the presumption is a reasonable and strong one that they were used by the legislature in their ordinary, popular or general signification. Statutes enjoin obedience to their requirements, and, unless the contrary appears, it is to be taken that the legislature did not use the words in which its commands are expressed in any unusual sense. For these reasons, whose cogency is obvious, the law is settled that in construing statutes the language used is never to be lost sight of, and the presumption is that the language is used in no extraordinary sense, but in its common, every-day meaning. When courts, in construing statutes, depart from the language employed by the legislator, they incur the risk of mistaking the legislative will, or declaring it to exist where, in truth, it has never had an expression. The legitimate function of courts is to *interpret* the legislative will, not to supplement it, or to supply it. The judiciary must limit themselves to expounding the law; they cannot make it. It belongs only to the legislative department to create crimes and ordain punishments. Accordingly, courts, in the construction of statutable offenses, have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the legislature, lest otherwise they shall hold an act or an omission to be a crime, and punish it, when, in fact, the legislature had never so intended. "If this rule is violated," says Chief Justice Best, "the fate of the accused person is decided by the arbitrary discretion of the judges and not by the express authority of the laws." *Fletcher v. Lord Sondes*, 3 Bing., 580.

§ 346. *Statutes will not be extended by construction to cases not fairly and clearly embraced in their terms.*

The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance

to the citizen. The courts have no power to create offenses, but if by a latitudinarian construction they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere verbal and sharp criticism; nevertheless the doctrine is fundamental in English and American law, that there can be no constructive offenses; that before a man can be punished his case must be plainly and unmistakably within the statute, and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the supreme court of the United States. *United States v. Morris*, 14 Pet., 464; *United States v. Wiltberger*, 5 Wheat., 76 (§§ 1632-36, *infra*); *United States v. Sheldon*, 2 id., 119. And see, also, *Ferrett v. Atwill*, 1 Blatch., 151, 156; *Sedgw. Const. & St. Law*, 324, 326, 334; 1 Bish. Cr. L., secs. 134, 145.

§ 347. *The governor of a state is not an officer of election within the meaning of section 22 of the act of congress of May 31, 1870.*

In view of these acknowledged rules of law, the question occurs: Did congress mean, by the use of the words "officer of election" or "election officer," in the section of the statute on which the indictment is framed, to include the governor of a state? Is the governor an election officer? It seems to us not. These words are apt and usual words to describe the clerks and judges of the election, but not to describe the governor of a state. Such is not their ordinary or usual meaning. To make them apply to the executive of a state in respect to an act done a month or more after the election is closed would be a forced and unnatural meaning, and one which is not necessary in order to give the statute effect or operation. We hazard nothing in saying that in popular use no one would naturally infer that the words "officer of election" included the chief executive of a state.

§ 348. *Relation of the states to the general government.*

Other considerations fortify the conclusion that congress did not intend to provide for the indictment of the governor of a state. The states are integral and indestructible parts of the general government, without which it cannot exist (*Texas v. White*, 7 Wall., 700), and in view of this relation, and of the high position and important relation of the executive of a state to the United States, as well as to the state itself, it would seem very improbable that congress would undertake to punish the governor for omitting or fraudulently discharging the duties enjoined by the laws of his state. The punishment by imprisonment would result in depriving the people of a state of the executive officer they had elected, and prosecutions of this kind, if authorized, could not fail frequently to lead to agitation, and disturb that harmony which should exist between the state and its people and the general government. Under the constitution (article 1, section 4), congress has the undoubted power to provide its own officers for the holding and conduct of congressional elections, and it would most probably exercise it, if it deemed it necessary, in preference to undertaking to make or treat the governor of a state as an election officer, and to punish him through the national courts for malfeasance or nonfeasance in office. *Commonwealth of Kentucky v. Dennison*, 23 How., 66 (§§ 3615-25, *infra*). And especially would this seem to be so in view of the fact that the certificate of the governor is not binding upon congress, each house of which

is, by the constitution, made the judge of the elections, returns and qualifications of its own members. Art. 1, sec. 5.

Admitting, for the occasion, the power of congress to provide for the punishment of the executive of a state, as claimed by the prosecution, we repeat that, in view of the foregoing considerations, it seems to be improbable that it would undertake to exercise the power. At all events, it is impossible, on legal principles, that any such intention should be held to exist from the use of the general words "election officers."

We have carefully considered the very able arguments which have been addressed to us to show that the governor is embraced in the more general language of sections 19 and 20 of the same act, and that, if so, these words, supposed to include the governor, should, though omitted by the legislature, be inserted by judicial engraftment into section 22, on which the indictment is founded. In answer to the argument, we deem it necessary only further to observe that the governor is not in terms named in either of those sections; that it is far from certain that they intended to embrace any official act of this officer; and, if they did, we could not, after the judgment of the supreme court, delivered by Chief Justice Marshall, in *The United States v. Wiltberger, supra*, enter upon the dangerous and unauthorized work of incorporating the provisions of one section of a law into another. We could never be sure that we did not put in what congress may have purposely left out. The bill charges no indictable offense, and the demurrer thereto must be sustained.

Demurrer sustained.

CALDWELL, J., CONCURS.

UNITED STATES v. FISHER.

(Circuit Court for Ohio: 8 Federal Reporter, 414-417. 1881.)

Opinion by BAXTER, J.

STATEMENT OF FACTS.—The indictment in this case is demurred to. It contains six counts—four of them predicated on section 5515, and the others on section 5511, of the Revised Statutes. Section 5515 provides: "That every officer of an election, at which a representative or delegate in congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any state, territorial, district or municipal law, or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any state or territory thereof; or who violates any duty so imposed; or who knowingly does any act thereby unauthorized, with intent to affect any such election or the result thereof, . . . shall be punished," etc.

One of these counts, which will serve as a sample of them all, charges that defendant, "being an officer of an election at which a representative in congress for the first congressional district of Ohio was voted for, to wit, a supervisor of election, duly appointed under the laws of the United States for the voting precinct A, of the first ward of the city of Cincinnati, did unlawfully and knowingly do an act unauthorized by the laws of the United States, or of the state of Ohio, in that, while the judges of said election were engaged in counting the ballots cast in said precinct, he did mingle with the ballots so cast certain, to wit, fourteen, ballots, having thereon the name of a candidate for representative in congress for said district which he well knew had not been voted by any of the electors of said precinct, with intent to affect the result

of said election by having them counted as ballots cast by the electors of said precinct," etc.

§ 349. *Who is an "officer of an election" under Revised Statutes, section 5515.*

No objection has been taken to the frame of the indictment. But defendant contends that none but *officers of an election* are amenable to indictment under the law, and that supervisors appointed pursuant to the act of congress relating to the subject are not such officers. We assent to the first part of the proposition. None but officers of an election are within either the letter or spirit of the law. But are supervisors such officers? An office, says Cowell, is "a function by virtue whereof a man hath some employment in the affairs of another." Webster defines it to be "a duty, charge or trust;" while Burrill says "the idea of an office clearly embraces the ideas of tenure, duration, fees or emoluments, rights and powers, as well as that of duty." A supervisor, we think, fulfils all these conditions. He is appointed and commissioned by authority of law, which fixes the tenure and duration of his office, is entitled to fees, vested with certain powers and privileges, and charged with defined duties. When in the discharge of these duties or in the exercise of these rights, he speaks and acts by authority of law, and is unquestionably an officer. It seems equally clear that he is an officer of elections. Every requirement which the law makes of him relates directly or remotely to elections. He is authorized and required to attend at all times and places fixed for the registration of voters, who, being registered, would be entitled to vote for a representative or delegate in congress, and to challenge any person offering to register; to attend at all times and places when the names of registered voters may be marked for challenge, and to cause such names registered as they may deem proper to be so marked; to make, when required, the lists provided for in section 2026, and verify the same; and upon any occasion and at any time, when in attendance upon the duties prescribed, to personally inspect and scrutinize such registry, and for purposes of identification to affix their signatures to each page of the original list, and to each copy thereof, at such times, upon each day when any name may be received, entered or registered, and in such manner as will, in their judgment, detect and expose the improper or wrongful removal therefrom or addition thereto of any name. Section 2016.

They are further authorized and required to attend at all times and places for holding elections of representatives or delegates in congress, and for counting the votes cast at such elections; to challenge any vote offered by any person whose legal qualifications they may doubt; to be and remain where the ballot-boxes are kept at all times after the polls are open, until every vote cast at such time and place has been counted, the canvass of all votes polled wholly completed, and the proper and requisite certificates or returns made, whether the certificates or returns be required under any law of the United States, or any state, territorial or municipal law; and to personally inspect and scrutinize from time to time, and at all times, on the day of election, the manner in which voting is done, and the way and method in which the poll-books, registry lists, and tallies or check-books — whether the same are required by any law of the United States, or any state, territorial or municipal law — are kept. Section 2017.

And to the end that each candidate for the office of representative or delegate in congress may obtain the benefit of every vote cast for him, supervisors are required to personally scrutinize, count and canvass each ballot cast in their election districts or voting precincts, etc.; and the better to enable them to dis-

charge their duties, they are authorized and directed, in their respective districts or voting precincts, on the day of registration, on the day when the registered voters may be marked to be challenged, and on the day of election, to take, occupy and remain in such position as will, in their judgment, best enable them to discharge their duties; and when the voting has ceased, to assume such position in relation to the ballot-boxes, for the purpose of engaging in the work of canvassing the ballots and performing such other duties as are prescribed by law, and there remain until every duty in respect to such canvass, certificates, returns and statements has been wholly completed. Sections 2018 and 2019. An officer whose only official duties relate to the registration of voters as preliminary to the exercise by them of their right to vote, to be present at the polls during the time the votes are being cast, to engage in the work of canvassing the ballots, to personally scrutinize, count and canvass each ballot cast, and to remain with the inspectors and other officers of such election until the votes are canvassed and counted, and certificates and returns are wholly completed, is an officer of the election so supervised by him within the meaning and intention of the section under and pursuant to which the counts under consideration were framed.

§ 350. *What is an "unlawful interference with judges of election," etc., within Revised Statutes, section 5511.*

The remaining counts, based on section 5511, proceed against defendant as an individual. This section declares it an offense for any one "to interfere in any manner with any officer of such election in the discharge of his duty." The counts thereunder recharge the same unlawful commingling of votes referred to in the preceding counts, and aver that such unlawful commingling of the spurious with the legal ballots constituted "an unlawful interference with the judges of the election in the discharge of their duties." I am unable to see any valid objection to them. They follow the law, and the facts alleged constitute, beyond doubt, an unlawful interference, within the plain meaning of the statute. The demurrer will be overruled.

UNITED STATES v. CONWAY.

(Circuit Court for New York: 18 Blatchford, 566-570. 1881.)

Opinion by BENEDICT, J.

STATEMENT OF FACTS.—The defendants were indicted, under section 5522 of the Revised Statutes of the United States, for obstructing a marshal of the United States in the performance of his duty. The facts appearing in the case are as follows: One Faser was a deputy marshal of the United States, duly appointed and assigned to duty at a polling place in the seventh election district of the seventeenth assembly district of the city of New York, on the last election day. On that day a man named Shafer attempted to vote at such polling place, under circumstances sufficient to justify the belief that he was not entitled to vote. The attempt was made in presence of the marshal and of a supervisor of election, who directed that Shafer be arrested. Thereupon Faser arrested Shafer for a violation of the laws of the United States, committed in his presence. While the marshal was removing his prisoner he was surrounded by a crowd. A cane which he carried was seized hold of, and the escape of the prisoner was effected. The marshal, when deprived of his cane, drew from his pocket a pistol. The defendants, who were members of the municipal police, at once arrested him and removed him to a police station,

where he was detained some four hours. Upon these facts the jury found the defendants guilty. They now apply for a new trial.

§ 351. *It is not error to omit to instruct where there is no evidence or where no instruction is asked.*

The principal proposition argued in support of this application is, that the court erred in not submitting to the jury the question whether the act of the marshal in drawing a pistol was not a breach of the peace. To this proposition one sufficient answer is, that no request was made of the court to have such a question submitted to the jury. Another answer is, that there was no evidence sufficient to justify the jury in finding that the act of the marshal in drawing his pistol was a breach of the peace. Still another answer is, that, assuming the drawing of the pistol to have been a breach of the peace, nevertheless, the arrest and removal of the marshal from the polling place, under the circumstances, was an offense against the laws of the United States.

§ 352. *The arrest of a deputy marshal of the United States, while in the discharge of his duty, is an offense against section 5511, Revised Statutes.*

The statute under which the defendants were indicted makes it an offense for any person, whether with or without any authority, power or process of any state or municipality, to obstruct or hinder a deputy marshal in the performance of any duty required of him by law. In this instance an offense against the laws of the United States, created by section 5511 of the Revised Statutes, had apparently been committed by Shafer in the presence of Faser, the marshal. It thereupon became the duty of the marshal, by virtue of section 2022 of the Revised Statutes, to arrest and take into custody the offender. Accordingly, the marshal did arrest the offender, and while engaged in maintaining custody of his prisoner he was arrested by the defendants and removed from the polling place. By the act of the defendants in arresting and removing the marshal, it was rendered impossible for him to maintain custody of his prisoner, or to regain that custody if the prisoner had already escaped from his control. The act of the defendants was necessarily an obstruction and hindrance of the marshal in the performance of the duty in which he was then engaged, namely, the duty to arrest and take into custody the person who, in his presence, had attempted to vote, under circumstances justifying the belief that he was not entitled to vote. The question whether the drawing of a pistol by the marshal was necessary to enable the marshal to protect his custody of the prisoner had no materiality. The material question was, whether the marshal, while engaged, as he was, in maintaining his custody of Shafer, had been obstructed and hindered by the defendants in the discharge of that duty. So, also, the question whether Shafer had, in fact, the right to vote was immaterial. When it was shown that the circumstances under which Shafer attempted to vote were sufficient to justify the belief that he had no such right, the duty of the marshal to arrest him was made to appear.

§ 353. *Interference with a deputy marshal not justified by the provisions of a state law.*

It has been further contended that the arrest of the marshal, under the circumstances, was no offense, because the laws of the state required the defendants, being policemen, to arrest any person believed to be committing a breach of the peace, and equally made it their duty to remove the prisoner to a police station. But the law of the United States (sec. 5522) made it the duty of the defendants, under the circumstances, not to obstruct or hinder the marshal in an effort to maintain the custody of a prisoner duly arrested by him. This duty,

created by the laws of the United States, was not affected by any provision of the laws of the state. The statute of the United States says, "whether, with or without any authority, power or process of any state or municipality," and indicates as clearly as language can, the intention of the legislative power to be, that no authority derived from a law of the state should furnish excuse or justification for an obstruction of a marshal in the performance of a duty required of him by law. Upon the occasion in question, this statute of the United States was the paramount law, binding upon policemen and all other persons. To this law the defendants owed obedience, any authority, power or process from any state or municipality to the contrary notwithstanding. Having been proved to have disobeyed this law, they were properly convicted. The rulings and charge of the judge at the trial were in harmony with the views here expressed.

These views derive support from expressions used by the supreme court of the United States, in *Ex parte Siebold*, 100 U. S., 371 (Constr., §§ 326-343), where the court, when speaking of this same statute, and in regard to a line of argument similar to that which has been addressed to us on this occasion, say: "The objection so often repeated, that such an application of congressional regulations to those previously made by a state would produce a clashing of jurisdiction and a conflict of rules, loses sight of the fact that the regulations made by congress are paramount to those made by the state legislature; and if they conflict therewith, the latter, so far as the conflict extends, cease to be operative." And again: "The regulations of congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the state. If both cannot be performed, the latter are *pro tanto* superseded and cease to be duties." We add, that an adoption of the arguments made in behalf of the defendants in this case would, in effect, make the execution of the laws of the United States in regard to elections to depend upon the will of the state, would render the marshals of the United States subject to the control of the municipal police in respect to the manner in which they should discharge their duties as to elections, and, in our opinion, would go far to nullify the law. The motion for a new trial is denied.

UNITED STATES v. SOUDERS.

(District Court for New Jersey: 2 Abbott, 456-470. 1871.)

Opinion by NIXON, J.

STATEMENT OF FACTS.—The defendant in this case has been indicted, and upon trial convicted, of "unlawfully preventing certain legal voters from freely exercising the right of suffrage" at an election for a member of congress, held on the 8th day of November last, in the township of Newton and county of Camden. The indictment was framed under section 19 of the act entitled "An act to enforce the right of citizens of the United States to vote in the several states, and for other purposes," approved May 31, 1870.

It may be assumed, in view of the verdict of the jury, that the government proved, at the trial, that on that day—fixed by law for the election of a representative in congress, and the several state and county officers—the polls were regularly opened at 7 o'clock, A. M.; that the election was conducted by certain officers, claiming to act under the authority of the township; that during the progress of the election, at about half-past ten o'clock in the morn-

ing, whilst the room in which the election was held was well filled with colored voters, waiting for the opportunity of casting their ballots, a violent attack was made upon them by a company of white men, driving them forcibly from the room into the street, and closing, or attempting to close, the door against them; that amongst the legal voters thus rejected were John Ray, Henry W. Sizer, Lorenzo Wilson, Wm. H. Newsome and Moses Wilcox; that these men, with others driven out, almost immediately rallied, and, with the aid of their friends, regained admittance to the room, and, in turn, drove out the white men; and that all of them subsequently voted. The jury has also found, as a question of fact, that the defendant, Francis Souders, was engaged in this outrage of expelling the colored voters from the room, and thus preventing them from freely exercising the right of suffrage. It further appears that, after the morning disturbance was quelled, the voting was resumed and continued without any serious interruption until about 6 o'clock in the afternoon; that eight hundred and sixteen ballots were deposited; and that then another crowd of white men took possession of the polls, seized the ballot-box, broke it in pieces, and scattered the ballots upon the floor and in the street.

Upon submitting this case to the jury, at the trial, I reserved two legal questions for consideration afterwards,—more in deference to the strongly expressed convictions of the able counsel for the defense, than because I entertained any serious doubt as to their correct import and meaning. Since then I have examined the briefs submitted by the counsel for the government and of the defendant, elaborately discussing these questions, and have given to them that careful attention which their importance, as bearing upon the conviction of the defendant, seemed to require. The first question involves the true construction of the clause of section 19 of the act entitled “An act to enforce the right of citizens of the United States to vote in the several states of this Union, and for other purposes,” under which the indictment against this defendant was drawn; and the second, the legal effect upon this case of the certificate of election, filed in the office of the secretary of state, by certain persons, claiming to make the return of the election in the township of Newton in the county of Camden, on November 8, 1870.

§ 354. *Assaulting voters and driving them from the polls is an offense, though the voters afterwards succeed in voting.*

I. The charge against the defendant in substance is, that at an election for a representative in the congress of the United States, held as aforesaid, he unlawfully prevented certain qualified voters from freely exercising the right of suffrage, by force, threats, menaces and intimidation. The proof is that, at said election, the defendant, in company with others, in the room where the polls were opened, made an attack upon a line of voters, waiting for the opportunity of casting their ballots for a member of congress, and drove them from the room with violence, under the pretext that certain other voters not in the line were excluded from the polls, and attempted to fasten the doors against their re-admission.

It is insisted, on the part of the defendant, that this is not the offense which congress meant to define in the clause of section 19, under which the indictment was framed; that preventing a voter from freely exercising the right of suffrage is not preventing him from voting; that the one is a mental restraint, and the other a direct physical interference; and that the design of congress, in using these words in this section, was to protect men in voting as they wished to vote, rather than to secure to them the opportunity of voting. It is further

maintained that, even if it be conceded that one of the meanings of the expression, "preventing a voter from freely exercising the right of suffrage," is "preventing him from voting," yet the facts of the case do not prove a prevention, but a hindrance; that to prevent is altogether to deprive him of the opportunity to vote, while to hinder is only to delay him temporarily in the exercise of the privilege; and that, as all the prosecutors afterwards voted, the offense defined in section 19 of the statute was not committed.

The argument is, that, in the first place, the proper definition of the words used will not admit of the construction claimed by the government; and that, in the next place, all the sections of the statute must be so construed as to render them operative, consistent, and harmonious with each other; that the construction given to section 19 by the government brings it in direct conflict with the provisions of section 4 of the act; that one penalty is described in section 4 for "preventing, hindering or obstructing a qualified voter in voting;" and that a different and more severe penalty is affixed in section 19, for "unlawfully preventing him from freely exercising the right of suffrage;" and hence, that it is necessary to assume, in order to harmonize the provisions of these two sections, that different offenses were in the mind of congress when the law, as a whole, was enacted.

§ 355. *In construing statutes, the object of all inquiry is to get at the intention of the legislature.*

1. Our first inquiry will be, whether a proper definition of the words used in the section fairly admits of the meaning insisted upon by the counsel for the government? There are well settled rules in the construction of statutes. The object of all inquiry is to get at the intention of the legislature in passing the law; and the sole duty of the court is to grant to that intention, when ascertained, its full force and effect. We first consider the language employed, giving to words and sentences their obvious import and signification; having regard more to their general and popular use than to etymological or grammatical refinements. If any doubt remains, we then look at the context; at the subject-matter; look to the effects and consequences of this or that interpretation; to the reason and spirit of the law itself; expounding it in the light of the mischief of the old law, or want of law; and the remedy which the legislature has attempted to provide.

§ 356. *Where a statute is penal it must have a strict construction.*

Where the statute is penal it must have a strict construction; for the law is tender as to the rights of individuals, and courts wisely shrink from the exercise of the power of punishment, except upon conviction in those cases where the legislature has clearly defined the offense and imposed the duty. But we must not err in a too liberal application of the rule. As was well said by Chief Justice Marshall, in *United States v. Wiltberger*, 5 Wheat., 95 (§§ 1633-36, *infra*): "Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest."

§ 357. *What is meant by preventing a person from freely exercising the right of suffrage?*

Holding these familiar principles in mind, let us consider the clause of the section, the meaning of which we are trying to ascertain. The words are, "that if at any election for representative, etc., any person shall, by force, threat, menace, intimidation, or otherwise, unlawfully prevent any qualified voter from freely exercising the right of suffrage," etc. What do these words mean? It would seem that there ought not to be any difficulty in arriving at their signification, if we give to them their obvious and usual import. When a man is spoken of as *exercising* a right, it is commonly understood that he is *doing* something. When a voter casts his ballot into the box, do we not say that he is exercising the right of suffrage? Can any words be used that better define the act of voting? And when he exercises this right freely, does he not do it according to his pleasure, without any constraint either upon his mind or his body? His will must be uncontrolled, and his physical opportunity for doing the act must not be interfered with. Any control over the one, or interference with the other, encroaches upon his freedom of action, and produces the mischief which the words of the statute were designed to guard against and cure.

And what is it to *prevent* a voter from exercising this right? It is to put such a restraint upon his volition, or his body, that he cannot perform the act; producing, by threats or otherwise, such apprehension of personal loss or injury as to induce him not to vote, or to vote contrary to his wishes, being a restraint upon his will; and intervening between him and the ballot-box, so as to render it physically impossible for him to cast his vote, being the restraint upon his body. If this was what the statute forbid, the words used might afford some color for the construction asked for by the counsel for the defendant. But it forbids more than this. It prescribes penalties against those who unlawfully prevent voters from *freely* exercising the right of suffrage. It not only guards the voter against being stopped in the act, but it shields him against all sorts of duress, mental or bodily, while in the performance of the act. Even if it be true that a man is only prevented from voting when he is hindered altogether from exercising the right of suffrage, it is also true that he is prevented from *freely* exercising such right, when, in its exercise, any kind of constraint is placed upon him by force, threat, intimidation, or otherwise. I am of opinion, therefore, that, looking at the words of the section in their obvious usual signification, and without any reference to the influence and control which other sections of the statute ought to have in the consideration of its construction, the indictment properly describes the offense which congress meant to define and punish, and the proof of the facts in the case sustains all the material allegations of the first and third counts of the indictment.

2. But it is insisted that such a construction of section 19 will bring it in conflict with section 4; that, if we hold that the identical offense is described in these two sections, we subject congress to the imputation of passing an act prescribing different penalties in different sections for the same misdemeanor; and that it is the duty of the court, under such circumstances, to find some other interpretation of the clause in section 9, which will bring the two into harmony and cause them both to stand. The court recognizes this authority and duty when the occasion arises for its exercise, but finds no occasion here. To create this antagonism it is necessary to assume that the phraseology of section 4 is broad enough to include congressional elections as well as state,

county and municipal. It does not do so in terms; and I am not willing to assert that, if that section stood alone, the language used is not capable of such construction. But it does not stand alone, and it must be construed in connection with other sections of the act; and if the absurd consequences suggested by the counsel for the defendant are to follow the assumption that section 4, as well as section 19, was designed to apply to federal elections, is it not more consonant to reason and the principles of right interpretation that we should limit the provisions of the one to state, county and municipal elections, and of the other to the election of members of congress, than to wrest the words from their natural and obvious meaning, in order to create different and distinct offenses?

And this brings us to the inquiry, What offenses did congress mean to guard against and punish in these two sections of the act? I must acknowledge that the question is not free from embarrassment, if we consider the words only which they have used to express their object. The whole law indicates a want of precision and harmony in the use of terms that suggests either haste or the work of more than one mind in its preparation.

§ 358. *Where the words of a statute do not clearly disclose the intention of the legislature, it is proper to consider what was said or done by the law-making power while the subject was under consideration.*

In construing a statute it is one of the fundamental rules to ascertain the intention of the law maker. Where the words used do not clearly disclose this intention, it is proper to consider what was said or done by the law-making power while the subject-matter was under discussion, in order to arrive at their meaning. Looking carefully into the mischief avowedly intended to be remedied by the law, and into the history of the legislation preceding and accompanying its enactment, can there be any doubt but that its different sections were the work of many minds; that the law gradually grew from a single proposition, including only one object, into a complex one, embracing several; that the first thirteen sections were prepared to enforce the fifteenth amendment; that the next five sections were inserted to more effectually provide for carrying out the fourteenth amendment, and that the nineteenth and subsequent sections were afterwards added to accomplish another object, to wit, to preserve the purity and freedom of elections for members of congress?

Bills were pending and under discussion at the same time in the senate and house of representatives, with different provisions, but relating to the same subject-matter, and having the same end in view. The title of these bills and the provisions of the several sections show that the primary design in each case was simply to provide the appropriate legislation deemed necessary to enforce the fifteenth amendment. The house bill, as passed on May 16th, and sent to the senate on the 17th, was confined to this object. When it reached that body the senate bill No. 810, entitled "An act to enforce the fifteenth amendment of the constitution," was under discussion. This, substantially, consisted of the first thirteen sections of the law, as subsequently passed, and a motion had just been made to enlarge the purposes of the bill by adding to it two other bills, then pending in the senate, to enforce the fourteenth amendment, and which embraced the sections from the fourteenth to the eighteenth inclusive of the present law. The senate amended the house bill by striking out all after the enacting clause, and substituting their original bill with the proposed amendments; and after a few days' discussion the object and scope of the act were still further enlarged by annexing the nineteenth and twentieth sections,

for the expressed purpose of punishing frauds committed in the election of members of congress. These subsequent sections had been embodied in house bill No. 477, entitled "An act to prevent and punish election frauds," and which had been reported to the house from the committee on elections, and was then pending before that body as an entirely distinct measure. The bill thus amended passed the senate, and the remaining sections were added to it by the committee of conference on the disagreeing votes of the two houses. Not much homogeneity of language or expression should be looked for in an act thus made up, and little force can be given to the argument, that, because different words and forms of expression have been used in different sections, it should be assumed that there was a design in the mind of the law-making power to express and define different offenses.

§ 359. *Object of the various provisions of the act of May 31, 1870.*

This reference to the origin of the law reveals the fact that the manifest object, in section 14, was to enforce the provisions of article 15 of the amendment to the constitution, and in section 19 to conserve the freedom and purity of elections for members of the house of representatives. In legislating to enforce the provisions of the fifteenth amendment, it was conceded that congress might prescribe penalties against national or state officers, for interfering with the free exercise of the right of suffrage, and against all persons claiming to act under color of some state law or constitution; and the question at once arose, whether the constitutional power existed in congress to pass any law which acted upon private individuals. That amendment, it was alleged, related only to acts done by the United States or any state, to abridge or deny the right to vote on account of race, color or previous condition of servitude. It had no reference to individuals acting as such, except so far as they pretended to be acting under the authority of existing law, state or national. It is not necessary for me to express any opinion upon that question here and now; but I allude to it in order to say that, in the debate upon section 4, it seemed to be admitted, both by the friends and opponents of the measure, that no indictment could be sustained under that section, against any one, unless the prevention of voting, or the denial of the right to vote, was done under the color or pretense of some state law or regulation. The act was amended by adding sections 19 and 20, expressly to cover the case of private individuals, who were corrupting the fountain of political life and social order by fraud, bribery, intimidation, force, or other unlawful means, and, anticipating the objection raised by others against the powers of congress to legislate in the matter of state elections, these sections were limited to offenses committed at an election for members of congress.

§ 360. *"Unlawfully preventing a voter from freely exercising the right of suffrage."*

I am, therefore, of opinion that the words "unlawfully preventing a voter from freely exercising the right of suffrage" may be construed to mean "to unlawfully prevent him from voting," without bringing section 19 in conflict with section 4, and that it is not necessary to find some other interpretation, to harmonize the provisions of these sections of the act. It is further insisted, that, to constitute the offense created by the clause of section 19 under consideration, the voter must be altogether frustrated in his efforts to cast his ballot; that the whole day is covered, so far as the meaning of the word prevention is concerned; and that, as these prosecutors found the opportunity to vote after their rejection, although for a time hindered, the offense was not committed.

It seems to me, as I have already intimated, that such a construction of the statute is too narrow, and that it defeats the purpose which congress had in view in enacting it. This purpose was to protect men in the discharge of their most sacred political privilege. That would be a slight protection, indeed, which allows bullies and rowdies to surround the ballot-box from the opening to the close of the polls, keeping off all legal voters by threats, intimidation or force, and then to hold that the offense is not committed, if by chance the hindered voters should avail themselves of a casual opportunity to slip in their ballots when the backs of these vigilant sentinels were turned. And yet this result follows the interpretation asked for. But the argument here, of the counsel of the defendant, loses all its force when we call to mind that "exercising the right of suffrage," in the statute, is qualified by the word "freely," which, in his reasoning, he seems to have overlooked. The proposition is, that we shall not prevent a voter from freely exercising the right of suffrage.

It may be admitted that prevention, in its strict signification, includes more than hindrance, and that it involves the idea of total exclusion from the right of voting. But is no force to be given to the word "freely?" In view of the fact that these five men afterwards voted, the counsel for the defendant asked whether they could truthfully answer "yes" to the inquiry, "Were you prevented from voting on the 8th of November last?" and insisted that their correct response would be, "No; we were hindered — not prevented." But suppose the inquiry had been, "Were you prevented from freely exercising the right of suffrage?" they would answer, "Yes, we were hindered from voting by being knocked down, shot, forced out of doors, and having the doors closed against us. We were prevented from voting *freely*. We voted under great difficulties." It is hardly necessary to multiply words upon this point. It is in proof that these five men stood waiting in line before the ballot-box with ballots in their hands, intending to vote for certain individuals upon a certain ticket, which they wished to deposit; that while thus standing prepared to exercise and intent upon exercising their right of suffrage, Francois Souder, with others, drove them from the room and shut the doors against them. How can it be said that they were not prevented from exercising their right *freely*?

§ 361. *Sufficiency of proof to show that an election was held and the character of the election.*

II. The only remaining question which we have to consider is the legal effect upon this case of a paper produced by the government from the office of the secretary of state, and purporting to be a certificate of election filed by certain persons claiming to make the return of the election held in the township of Newton on November 8th, last. The reasoning of the counsel for the defendant upon this point, as it appears to the court, is founded upon a misapprehension of the allegations of the indictment. The argument is, that the indictment charges that the offense was committed at an election held in the township of Newton, on November 8th last, by Alexander B. Mahan, Samuel P. Atkinson and Herman Klusterman, judges; that the statute requires the judges holding the election to file a certificate of the results, in the office of the secretary of state, certifying the number of votes polled and received by each candidate, and the names of the persons voted for, and that such paper shall be an official paper; that to sustain the allegation in the indictment, the prosecution produced this certificate, which is in fact signed by other parties, and therefore does not prove, but directly contradicts, the allegation.

The reply we have to make to the argument is, that there is no such allega-

tion in the indictment, nor was any such material or proper. The charge was that a stated election for a representative in the congress of the United States, and for certain state officers, was duly held on that day at the township of Newton, in the county of Camden. The facts, therefore, to be proved were, not that Alexander B. Mahan, Samuel P. Atkinson and Herman Klusterman were the judges who conducted the election, but that a stated election was then and there held; that it was conducted by persons claiming to act under the authority of public law, and that it was held for the purpose of electing a member of congress.

And were not these facts proven? A large number of witnesses testified to them. No one raised a doubt by questioning them. The defense fully showed them by producing the poll book required to be kept by section 40 of the state election law (Nix. Dig., 263), having the proper heading, and containing a record of the names of the persons whose votes were received, and the order of their reception, and offering the clerk and two of the judges of election as witnesses, by whom the facts of election and the correctness of the poll book were established. But it seems to be admitted that these material facts were proved. It is insisted, however, that a copy of a certificate was produced from the office of the secretary of state, which is invested by the statute with the character of an official paper, and which contradicted, and therefore invalidated or nullified, the verbal proof.

There are short and conclusive answers to this: 1. The paper thus produced was not made or certified in the manner, and did not come from the source, required by the statute to constitute it an official paper. It appears, upon inspection, to have been the copy of a return filed with the clerk of the county of Camden, with the certificate of that clerk appended that it was a full and correct return of the election in the township of Newton, as filed in his office. It did not come to the secretary of state, either from the board of election of the township, or from the board of county canvassers. 2. But admit that it has the prerequisites necessary to make it an official paper. Then it is a record, or it is not. If a record, and incapable of contradiction by verbal evidence, as claimed by defendant's counsel, all the facts which it contains must be accepted as true. It shows that there was an election in the township of Newton, in the county of Camden, on November 8th last, and that such election was for a representative in the congress of the United States, which are the material facts to be established; and all the verbal testimony in the cause, to the effect that some other judges held the election, must be regarded as untrue; exhibiting the depravity of the character of the witnesses, or the fallibility of their memory. But if it is not a record, and may be contradicted by other proof, then the verbal evidence offered is abundant to prove these necessary facts in the case, and the verdict was right.

Thus, after a careful survey of the law and the evidence, the court finds no sufficient reason to be dissatisfied with the result at which a patient and intelligent jury arrived, and the motion for a new trial is denied. Motion denied.

§ 362. Fraudulent registration.—Congress has a constitutional right to provide that a fraudulent registration under the state laws, or a fraudulent attempt to register, for the purpose of voting for a representative or delegate in congress, shall be a crime against the United States. *United States v. Quinn*, 8 Blatch., 56.

§ 363. Naturalization papers.—The use by the accused of a certificate of naturalization, for the purpose of registering as a voter, knowing that the certificate had been issued without his presence in court, and without any oath being taken, is not sufficient to convict him under section 5426 of the Revised Statutes. *United States v. Burley*,* 14 Blatch., 91.

§ 364. **Issuing fraudulent certificate.**—On an indictment against an officer of election for issuing a false and fraudulent certificate, it is essential to prove, as claimed, that the ballot-box was stuffed, and that such stuffing was done with the procurement or knowledge, or in consequence of the neglect, of the officers of election. It is not sufficient that the certificate was false; it must be fraudulent as well. *United States v. Baldridge*,* 11 Fed. R., 553.

§ 365. To warrant a conviction under section 5515, Revised Statutes, punishing officers of election who fraudulently make any false certificate of the result of an election, it must appear that the prisoners made a fraudulent certificate of the result of the election in the district, as charged. *United States v. Hayden*,* 52 How. Pr., 471.

§ 366. **Illegal voting.**—Upon an indictment of a female for voting at an election for congressmen in New York, where none but males are allowed to vote for members of the most numerous branch of the legislature, under the act of May 31, 1870, providing "that if at any election for representatives in the congress of the United States, any person shall knowingly vote without having a lawful right to vote, . . . every such person shall be deemed guilty of a crime," etc., it is no defense that the defendant voted in the belief that she had a right to vote. *United States v. Anthony*, 11 Blatch., 200.

§ 367. The constitution of Oregon declares that "the privilege of an elector shall be forfeited by a conviction of any crime which is punishable by imprisonment in the penitentiary." The defendant having been convicted on his plea of guilty to an indictment for assault with a dangerous weapon, which offense was punishable either by fine, imprisonment in the jail, or in the penitentiary, in the discretion of the court, and having been sentenced by the court to pay a fine, was indicted under section 5511, Revised Statutes, for voting for a representative in congress without having a right to vote. It was held (1) that the defendant was "convicted" within the meaning of the above constitutional provision when he pleaded guilty, and without regard to the judgment of the court; (2) that the crime was punishable by imprisonment in the penitentiary within the meaning of the constitutional provision, and that it was immaterial that it could be and was otherwise punished in the discretion of the court; and (3) that the defendant had therefore voted without having a right to vote. *United States v. Watkinds*,* 7 Saw., 85.

§ 368. **Judges of election** are not punishable criminally unless they have acted from a corrupt motive. *United States v. Gillis*, 2 Cr. C. C., 44. See §§ 328, 329.

§ 369. Upon an indictment charging judges of an election with neglecting their duties as such judges, contrary to section 5515 of the Revised Statutes, it must appear, in order to justify a conviction, that the inspectors of election intended to perpetrate some wrongful act or omission of duty, or were guilty of some palpable neglect that would lead to the conclusion that a violation of law was designed. The delivery of the keys of the ballot-boxes to one of the policemen attending the polls, pursuant to a custom prevailing in the district for many years, is not such a criminal neglect of duty, the character of the policeman being unimpeached. *United States v. Hayden*,* 52 How. Pr., 471.

§ 370. **Election of members of congress.**—Congress, under section 5515 of the Revised Statutes, cannot punish violations of state election laws unless such violations affect the election of members of congress. *United States v. Nicholson*,* 3 Woods, 215.

§ 371. On an indictment under section 5515 of the Revised Statutes, against state officers of election for doing an act intended to affect the result of an election of members of congress, it is necessary to convict to show the intent, and, as in other cases, if the acts done would have that effect it must be presumed, unless the presumption is rebutted, that they were thus intended. *Ibid.*

§ 372. Congress has the authority to provide for the punishment of any person who shall, by threats, force or intimidation, prevent any person from giving his advocacy and support in a lawful manner to the election of his favorite member of congress. *United States v. Goldman*, 3 Woods, 187 (§§ 2290-93).

VI. OFFENSES ON THE HIGH SEAS.

[See §§ 574, 637, 791-796, 262]. As to powers of master and duties and liabilities of seamen, see *MARITIME LAW*.]

1. In General.

SUMMARY—*Revolt; proof of national character of vessel*, § 373.—*Jurisdiction; high seas*, §§ 374, 375.—*Master wounding or imprisoning crew; "crew" defined*, § 376.

§ 373. Proof that the ship is American property is sufficient proof of national character to support an indictment of seamen for endeavoring to make a revolt. No documentary proof, such as a bill of sale or registry, is necessary where the above fact is established. *United States v. Seagrist*, §§ 377-380. See §§ 335, 502.

§ 374. A vessel lying in the port of Palermo, not within any inclosed dock, nor actually at any pier or wharf, but lying in what is called the harbor, fastened to the shore by cable, and communicating with the land by her boats, is, within the common acceptance of the term, on the "high seas," outside of low-water mark on the coast. A revolt committed on an American vessel in such a position is therefore within the jurisdiction of the courts of the United States. *Ibid.* See § 492.

§ 375. The offenses of mutiny, and the endeavor to make a mutiny, as defined by the act of 1835, are offenses against the person and authority of the master, and therefore cognizable in the proper circuit court of the United States, when committed on an American ship lying within the jurisdiction of any foreign state, under the act of March 3, 1835, giving the circuit courts jurisdiction in such cases where the offense is committed "by any person belonging to the company of said ship, or any passenger, on any person belonging to the company of said ship, or any other passenger." *Ibid.*

§ 376. Under the third section of the statute of 1835, providing "that if any master or other officer of an American ship or vessel on the high seas, or on any other waters, etc., shall from malice, hatred or revenge, and without justifiable cause, beat, wound or imprison one or more of the crew of such ship or vessel," etc., he shall be punished, etc., it is an offense for the master to commit the acts described upon the chief or other officer of the ship. The word "crew" includes all the officers except the master, as well as the common seamen. *United States v. Winn*, §§ 381-384. See §§ 458, 491, 499.

[NOTES.— See §§ 385-510.]

UNITED STATES *v.* SEAGRIST.

(Circuit Court for New York: 4 Blatchford, 420-425. 1860.)

STATEMENT OF FACTS.—Indictment against seamen for an endeavor to make a revolt and mutiny on an American ship in a foreign port. They were convicted, and move for a new trial. Further facts appear in the opinion of the court.

Opinion by BETTS, J.

The ground urged for a new trial in this case is the alleged misdirection of the court to the jury that the port of Palermo, where the offense is charged by the indictment to have been committed, is a place within the admiralty jurisdiction of the United States. The objection would have been more appropriately taken in arrest of judgment, but the validity of it may well be determined in either mode of proceeding.

§ 377. *What proof of the national character of a vessel is sufficient in a trial of seamen indicted for attempting to make a revolt.*

The objection that no documentary proof, such as a bill of sale or registry, was put in, establishing the national character of the vessel, cannot avail the defendants. The master testified that she was owned in this city by American citizens, and it was only necessary for the prosecution to prove that she was American property to support the indictment. It was not in any way an issue on the trial whether she was entitled to the privileges of an American bottom under our revenue laws. The only fact involved was whether she was American property, and of this there can be no doubt. 3 Kent's Comm., 130, 132, 150. The main point contested on the trial and on this motion rests on an exception to the jurisdiction of the court. The generic offense of endeavoring to make a revolt was first declared to be a crime, by the United States laws, in the crimes act of April 30, 1790 (1 U. S. Stats. at Large, 115, § 12); and the courts have recognized the offense as sufficiently described and specified under that denomination to be subject to judicial cognizance. *United States v. Kelly*, 4 Wash., 528; S. C., 11 Wheat., 417; *United States v. Smith*, 1 Mason, 147. It was decided in the first circuit that the offense, when committed within a harbor of the United States, was punishable under the act, and that it was not

a condition to the jurisdiction of the court that the offense should have been committed on the high seas. *United States v. Hamilton*, 1 Mason, 443. In *United States v. Keefe*, 3 Mason, 475, Judge Story ruled that an indictment under the act of 1790, for an endeavor to make a revolt, was triable in the circuit court, although the offense was committed in a foreign port, the criminal jurisdiction in admiralty being deemed to be, in a general sense, co-ordinate as to place with the civil jurisdiction. This last decision was made in 1824, and the argument on the present motion maintains that the act of congress of March 3, 1825 (4 U. S. Stats. at Large, 115, § 5), in giving directly to the courts of the United States jurisdiction over certain classes of offenses committed on board of American vessels in foreign ports, necessarily limits the jurisdiction to those specified cases, and that an endeavor to make a mutiny on board of a ship in a foreign port is not an offense on any person, and is, therefore, not subjected to the cognizance of the courts of the United States by the provisions of that act. The language of the statute is: "If any offense shall be committed on board of any ship or vessel belonging to any citizen or citizens of the United States while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of said ship, or any passenger, on any person belonging to the company of said ship, or any other passenger, the same offense shall be cognizable and punishable by the proper circuit court of the United States."

§ 378. *When a vessel may be considered on the "high seas."*

In considering this objection it is worthy of notice that the place where the vessel lay at the time, although called the port of Palermo, was not within any inclosed dock, nor actually at any pier or wharf. She lay out in what was called the harbor, fastened to the shore by cables. She communicated with the land by her boats. This position of the vessel would leave her, within the common acceptance of the term, on the "high seas," outside of low-water mark on the coast. *United States v. Hamilton*, 1 Mason, 152; *The Abby*, id., 360; *United States v. Kessler*, Bald., 15, 35 (§§ 1637-39, *infra*).

§ 379. *Construction of the act of March 3, 1825 (4 Stat. at Large, 115, sec. 5).*

The act of 1825 was not designed to abrogate or curtail the jurisdiction of the United States over crimes committed at sea, but manifestly to remove doubts whether that jurisdiction could be exercised when the *locus in quo* was a locked harbor, adapted by nature or artificially to cover and protect vessels from the perils of an open coastage. I do not find any construction given authoritatively by the courts of the United States, which establishes the doctrine that the act of 1825 affords the exclusive rule of decision with respect to offenses which are not alleged and proved to have been committed on or against the persons of individuals on shipboard. A case occurred in 1834, before the circuit court in Pennsylvania, in which the judges (Baldwin and Hopkinson) adopted that view of the law, but only decided that larceny within a port in the Bahamas, committed on board of an American ship, was not an offense punishable under the laws of the United States (*United States v. Morel*, 13 Am. Jur., 279), because it was an offense against property alone; and the court, in illustration of their conclusion, referred to the act of 1825 as omitting to extend the admiralty jurisdiction over any description of offenses within foreign ports, not committed on or against some person. Id., 287, 288. If that suggestion of the court offers the true exposition of the act of 1825, the crime charged in this indictment, and proved on the trial, may, without any impropriety of language, be defined to be one against the master of the vessel, and, being charged

in the words of the second section of the act of March 3, 1835 (4 U. S. Stat. at Large, 776), may be deemed sufficiently alleged, without any more pointed averment. Whart. Am. Cr. L., 132 (2d ed.). The first count of the indictment charges that the vessel, owned by a citizen or citizens of the United States, whereof Joseph Davis was then and there master and commander, being within a foreign port, and within the admiralty and maritime jurisdiction of the United States, the defendants, being four of the crew of the said vessel, "did then and there endeavor to make a revolt," against the peace, etc. In the second count, after the like preliminary averments, it charges that the same parties "did then and there combine and confederate with each other to make a revolt and mutiny." The third count, after the like preliminary averments, charges that the defendants "did then and there solicit, incite and stir up each other to disobey and resist the lawful orders of the master of the said ship, and to neglect and refuse their proper duty on board thereof, and to betray their proper trust therein." The first section of the act of 1835 defines, in very precise terms, the crimes of revolt and mutiny, and affixes a specific punishment to them; and the second section particularizes the acts of seamen on shipboard which shall subject them to the same punishment as an endeavor to make a revolt or mutiny. It is practically unimportant whether the provisions of the second section are expounded as so many instances or methods in which the offense of an endeavor to make a revolt or mutiny may be manifested, or whether they are taken distributively, and understood to be so many separate and distinct offenses, each being sufficient of itself to sustain an indictment. The three counts of this indictment are so framed as to secure to the United States the advantage of either construction. It appears to me, therefore, that the court did not err in instructing the jury that if the acts charged in the indictment were satisfactorily substantiated by the evidence, and if the defendants committed those acts with intent to resist the master in the free and lawful exercise of his authority and command on board of the vessel, they would amount, in law, to an endeavor to make a revolt.

§ 380. *The crime of endeavoring to make a revolt is one against the master of the vessel, and it is sufficient to charge it in the words of the act of 1835.*

I also consider that the court was correct in further instructing the jury that the offenses of mutiny, and the endeavor to make a mutiny, specified in the act of 1835, are, as defined in that law, by necessary implication, offenses against the person and authority of the master; and that an averment of the crime in the language of the statute is all that is required to make the charge of the offense complete, within the supposed requirements of the act of 1825, so as to come within the cognizance of the court. But, independently of that view of the case, the act of 1835, in subjecting the offenses therein created or described to the admiralty and maritime jurisdiction of the court, gives to the court, in my opinion, in relation to those cases, a cognizance co-ordinate with what it could exercise under any antecedent law, in causes of like character.

The motion is, accordingly, overruled, and judgment is pronounced against each defendant that he pay a fine of \$10, and be imprisoned for thirty days.

UNITED STATES v. WINN.

(Circuit Court for Massachusetts: 3 Sumner, 209-220. 1838.)

STATEMENT OF FACTS.—The defendant was convicted under the act of March 3, 1835, of the offense of imprisoning a member of the crew. He moves for a new trial. The person imprisoned was one Bassett, chief officer of the ship, and

the alleged offense was committed at places in the Pacific Ocean. It was contended on the part of defendant that Bassett was not a member of the crew within the meaning of the act.

Opinion by STORR, J.

The words of the third section of the statute of 1835, ch. 40 [ch. 313], are as follows: "That if any master or other officer of any American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall, from malice, hatred, or revenge, and without justifiable cause, beat, wound or imprison any one or more of the crew of such ship or vessel, or withhold from them suitable food and nourishment, or inflict upon them any cruel or unusual punishment, every such person so offending shall, on conviction thereof, be punished by fine not exceeding, etc., or by imprisonment not exceeding, etc., or by both, according to the nature and aggravation of the offense." And the question now presented for the consideration of the court is, whether the offense, when committed by the master upon the chief or other officer of the ship, is an offense within the purview and intent of the statute. In other words, is the word "crew" in the section used in contradistinction to officers of the ship, and so including the common seamen or mariners only; or does the word "crew," in the sense of the statute, embrace all the officers except the master, as well as the common mariners.

§ 381. *Construction of penal statutes.*

Now, I do not think anything material in the construction of this statute can turn upon the rule so ably and strenuously expounded at the bar, that penal statutes are to be construed strictly. I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course, in all these cases, is, to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature. I adopt on this subject the doctrine laid down in the case of the Schooner *Industry*, 1 Gall., 117, and which, I am persuaded, is in perfect consonance with the general authorities most considered and most relied on in cases of this sort. The court there said: "We are undoubtedly bound to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words, and the mischiefs, to be within the remedial influence of the statute." The most restricted sense, then, is not, as a matter of course, to be adopted as the true sense of the statute, unless it best harmonizes with the context, and stands best with the words and with the mischiefs to be remedied by the enactment.

§ 382. *Definition of the word "crew."*

Now, the word "crew" has several well-known significations. In its general and popular sense, it is equivalent to "company." Thus, for example, we find the most general definition of it laid down in Johnson's dictionary to be "a company of people associated for any purpose." And the same learned lexicographer adds, that, when spoken with reference to a ship, the crew of a ship, or ship's crew, means "the company of a ship," illustrating it by a verse from Dryden's translation of the *Æneid*:

"The anchor dropped, his crew the vessel moor."

Falconer, in his *Marine Dictionary*, says: "The crew of a ship (*Equipage*, French) comprehends the officers, sailors, seamen, marines, ordinary men, servants and boys;" adding, "but exclusive of the captains and lieutenants in the French service." Whether this definition, so far as it is applicable to the French service, is correct or not, it is not necessary to decide, though M. Boulay Paty, in his vocabulary annexed to his edition of Emerigon, has defined *equipage* somewhat differently. "*Equipage se forme de tous les Hommes d'un Batiment, portés sur un Registre, que l'on nomme Role d'equipage. Les officiers sont designés sous celui d'Etat Major.*" 2 Emerigon des Assur. par Boulay Paty, ed. 1827, vol. II, p. 682. Valin, after giving the text of the Ordinance of the Marine (Liv. 2, tit. 1, Du Capitaine, art. 5), "*Appartiendra au Maître de faire l'Equipage du Vaisseau, de choisir et louer les pilote, contre-maitre, matelots et compagnons,*" in his commentary, adds,—"*Ces termes, Matelots et compagnons, employés dans cet article sont synonymes. De tous temps, suivant les us et coutumes de la mer, les matelots ont été designés sous le nom de compagnons du Maître.*" 1 Valin Comm., 386. In this sense, it is nearly equivalent to our phrase crew, or ship's company. See, also, Pothier on Marit. Contracts, by Cushing, n. 163, pp. 98, 99. Roccus (*De Nav. et Naut.*, n. 9) has used the word *Nauta* in the same general sense. *Habet [Navis] etiam nautas, quod est nomen generale, et comprehendit omnes personas, quæ in navi deserviunt, et faciunt illam navigare.* But upon a question of the construction of our own laws, little light can be derived from the usages of language in foreign nations.

The general sense of the word "crew," being then, as I think, equivalent to ship's company, which, it can scarcely be doubted, embraces all the officers, as well as the common seamen, that sense ought not to be displaced, unless it is manifest that the legislature have used the word "crew" in a more restrictive sense; and this must be ascertained, either from the context, or from the object to be accomplished by the enactment. Now, in examining our laws upon maritime subjects, it will be found that the word "crew" is used sometimes in the general sense above stated, and sometimes in other senses, more limited and restrained. It is sometimes used to comprehend all persons composing the ship's company, including the master; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to comprehend the common seamen only, excluding the master and officers. But in these two last classes, I think, upon close examination, it will be found that the context always contains language which explains and limits the general to the particular sense.

There are various acts of congress in which the words "crew" and "ship's company" are used as equivalent to each other. In the ninth section of the act of 1790, ch. 56 [29], requiring a certain quantity of provisions to be put on board for every person in a foreign voyage, the word "crew" seems used as

equivalent to ship's company, and to include officers as well as common seamen. See, also, Passenger Act of 1819, ch. 170, § 3. In the act of 1803, ch. 62, § 1, which requires the master to deliver to the collector a list and "description of the persons composing his ship's company, to which list the oath or affirmation of the master shall be annexed, that the list contains the names of his crew," etc., etc., it is plain that crew and ship's company are used as equivalent; and the form of the list prescribed by the treasury department shows that all the officers are included as a part of the ship's company or crew. See, also, Act of 1813, ch. 184, § 3. In the salvage act of 1800, ch. 14, § 4, the distribution of the salvage in cases of recapture is to be among the commanders, officers and crew of public armed vessels; and in case of private armed vessels, "among the owners and company," which manifestly includes the master, officers and common seamen, or the whole ship's company.

In the piracy act of 1819, ch. 200, the first section, in providing for the employment of the public ships of the United States "in protecting merchant vessels of the United States and their *crews* from piratical aggressions and depredations," manifestly includes the master and officers, as well as common seamen, in the descriptive word "crew." The second section of the same act uses the word "crew" in the same comprehensive sense, as applicable to the persons belonging to the piratical vessel. On the other hand the third section speaks of the "commander and crew of every merchant vessel," and authorizes them to oppose and defend themselves against any piratical aggression, in which the word "crew" as clearly comprehends all the officers and common seamen. In the piracy act of 1820, ch. 113, §§ 3, 4 and 5, the words "crew" and "ship's company" are used as exact equivalents: "If any person, being of the crew or ship's company of any piratical ship or vessel, shall land," etc., etc.; and "if any citizen, etc., being of the crew or ship's company of any ship or vessel, etc., shall land," etc.; where the word manifestly comprehends the master, officers and common seamen. In the act of 1792, ch. 24, § 8, respecting the discharge of the crew of the vessel in a foreign country, it is provided that "the master, unless the crew are liable by their contract to be discharged there, or do consent, shall send them back." Here the word "crew" embraces officers, as contradistinguished from the master. And, generally, it may be stated that, wherever in a statute the words master and crew occur in connection with each other, the word crew embraces all the officers as well as the common seamen. See Abb. Shipp., pt. 2, ch. 1, § 5, pp. 87, 88.

On the other hand, in the act of 1817, ch. 204, § 3, providing that bounties in the fisheries shall be to such vessels only where "the officers and three-fourths of the crew" shall be citizens, the word crew is used as applicable to the common seamen or fishermen only. So, in the act of 1790, ch. 56, § 3, where it is provided "that if the mate or first officer under the master, and the majority of the crew of any ship or vessel," etc., shall discover the vessel to be leaky, etc., they may require the vessel to proceed to some convenient port to examine her state, the same construction must prevail; or rather, the word "crew" there comprehends all the officers, except the mate or chief officer, as well as the common seamen.

The result of this examination of some of the leading provisions of our own statutes upon similar subjects shows that the word crew is ordinarily used as equivalent to ship's company, and that whenever it is not intended to embrace the officers, the context manifestly excludes them by enumerating them, as contradistinguished from the rest of the crew.

§ 383. *The word "crew," when used in a statute, deemed to include every other officer except the master or commanding officer.*

But, passing from the consideration of other statutes, let us now proceed to the examination of that of 1835, ch. 40, upon which our judgment must finally turn. The first section provides "that, if one or more of the crew of an American ship or vessel, on the high seas, etc., shall unlawfully, etc., usurp the command of such ship or vessel from the master or other lawful commanding officer thereof, etc., etc., every such person, etc., shall, on conviction," etc., be punished as provided for in the act. Now, it seems to me that every other officer of the ship, except the master or commanding officer, is, and ought to be, deemed within the purview of the act, as one of the crew. He may commit the offense of usurping the command of the vessel, as well as a common seaman; and the mischief is the same as in the case of a common seaman; and he is one of the crew or ship's company in the sense of the general maritime law. Why, then, should not the section be construed to embrace all cases within the words and within the mischiefs? Why should we resort to the narrowest possible sense of the words instead of the general sense, if there is the same mischief in each case to be suppressed, and the same public policy in the protection of the commercial interests of the country?

The second section admits of similar considerations. It provides that "if any one or more of the crew of an American ship or vessel, on the high seas, etc., shall endeavor to make a revolt," etc., he shall be punished as stated in the act. Why is not an officer, not being the commanding officer, to be deemed within the purview of the section? The offense would be even more reprehensible, when committed by a subordinate officer, than by a common mariner. So far from there being any public or presumed policy in exempting such an officer from the reach of the penalties of the section, there would seem to be a very strong ground for holding him within it. Why, then, should the general import of the word "crew" be restricted in his favor?

When we come to the third section, the language is somewhat varied. It provides "that if any master or other officer of an American ship or vessel, on the high seas, etc., shall, from malice, hatred, or revenge, and without justifiable cause, beat, wound or imprison any one or more of the crew of such ship or vessel, or withhold from them suitable food and nourishment, or shall inflict upon them any cruel and unusual punishment." Now, the plain object of this section is not to punish every offense of the like nature committed by any person belonging to or on board of the vessel, when committed upon any other person belonging to or on board of the same vessel. The offense can be committed only by the master or an officer of the ship; and it must be committed upon some person belonging to the ship, and of the crew of the ship. Hence, the like offense, when committed by any one of the crew, not being an officer, or by a passenger or a stranger on board, is not punishable by the act. And so, on the other hand, the offense, when committed by the master or other officer of the ship upon any person on board not of the crew, as upon a passenger or a stranger, is also not within the reach of the act. It was manifestly, then, the intention of the act to punish only such offenses as were committed by persons standing in a particular relation to each other on board. There is also some reason to infer that the object of the section was confined to the offense when committed by a superior upon some person who stood in relation to him in the character of a subordinate, or in a subordinate station. The consideration that the acts enumerated are required to be done by officers

from malice, hatred, or revenge, and without justifiable cause; that some of them, at least, are of a nature properly within the functions of a superior officer on board, and might be exercised officially for a justifiable cause, such as imprisonment, withholding suitable food and nourishment, and inflicting cruel and unusual punishments; and that ordinarily these acts could not be done on board except by the instrumentality, consent or authority of the superior officer on board,—these circumstances, I say, do greatly enhance the presumption that the offense could be committed only by a superior officer upon some one inferior to him. In this view the words “other officer” might well be interpreted to mean commanding officer, standing in connection with the word master, so as to import an officer *ejusdem generis, pro hac vice*. If this were to be admitted as the true interpretation of the section, then the word “crew” would naturally embrace all the ship’s company, except the master or commanding officer, at the time of the offense.

But suppose this construction not to be entirely free from doubt, and I cannot but think that there is considerable force in it as a true interpretation of the legislative intention, from the very words used, let us proceed to consider the words of the section in other aspects. The words must be read distributively, “If any master shall, from malice, etc., beat, wound, or imprison,” etc.; or, “if any other officer shall, from malice, etc., beat, wound, or imprison,” etc. Now, if the first clause only had been in the section, “If any master shall, from malice, beat, wound or imprison any one or more of the crew of such ship or vessel,” I confess that I should have entertained no doubt that the word “crew” was here used in its most comprehensive sense, as embracing all the officers under the master, as well as the common seamen. The words master and crew, in such a connection, naturally embrace all persons on board constituting the ship’s company; and our statutes (as we have seen) so interpret them. Can it make any difference whatsoever in the case, that the words “other officer” are added? They only extend the persons who may become offenders; but they do not change or limit the persons against whom the offense may be committed. The word “crew” ought reasonably (one should suppose) to receive the same interpretation, whether the words “other officer” are in or out of the statute. Now, because the offense must be committed by the master or other officer, it does not follow, in reason, that it may not be committed upon another officer as well as upon a common seaman.

§ 384. *The word “crew” includes officers as well as common seamen.*

If the word “crew,” in its general sense, includes officers as well as common seamen, there does not seem any ground why the interpretation should be restricted to the latter. It is not so common for a master or other officer to beat, wound or imprison another officer, as to beat, wound or imprison a common seaman. But the act is not the less reprehensible in the former case than in the latter. Indeed, it is justly considered more reprehensible; for it goes to the overthrow of all authority and discipline, and degrades the officers in the eyes of the whole body of seamen. The mischief to be remedied, then, is, to say the least, equal, and the public policy the same. The word “crew,” in its general, appropriate, and even popular sense, covers both cases. It admits, I agree, of being construed in a more restrained sense, which will not, however, reach the whole mischief. But my difficulty is, how the court is to presume that the legislature intended the more restrained sense, when the word in its actual connection equally admits of the general sense? The argument for the narrower interpretation comes to this, that the words “master and other

officers" are used in contradistinction to "crew" in the clause. But I think that they are used merely as descriptive of the offenders, and that the word "crew" is used, not in contradistinction to "officers," but in contradistinction to other persons who might be on board, as passengers or as mere strangers. The argument reads the clause as if it were, "If any master or other officer shall beat, wound or imprison any of the rest of the crew, or any others of the crew, not an officer." Now, I am not prepared to say that this is the true reading. The more natural construction is, "If any master or other officer shall beat, wound or imprison any *other* of the crew," if we must interpolate a word to express the full sense.

Upon the whole, after much deliberation upon the subject, I adhere to the construction which was stated to the jury at the trial. I think the word "crew" was intended to include the officers as well as the common seamen; and that the section uses the word as equivalent to ship's company. In this view, it is used in the same sense as it is in the first and second sections of the act; and for purposes equally important to the due protection of all engaged in the maritime service, and equally necessary for the safety and security of the voyage.

DAVIS, D. J., concurred.

§ 385. **Revolt.**—An endeavor to make a revolt in a ship is an endeavor to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is in effect an endeavor to make a mutiny among the crew of the ship, or to stir up a general disobedience or resistance to the authority of the officers of the ship. A mere act of disobedience to a lawful command of the officers is not of itself an endeavor to make a revolt; but to amount to the offense it must be combined with an attempt to excite others of the crew to a general resistance or disobedience of orders, or a general neglect and refusal of duty. *United States v. Smith*,* 1 Mason, 147. See § 373.

§ 386. It seems that an endeavor to make a revolt is an endeavor to excite the crew to overthrow the lawful authority of the master and officers of a ship. *United States v. Smith*,* 3 Wash., 525.

§ 387. Although the act of congress punishing a revolt does not define it, courts may give the language a judicial definition, and punish the acts coming within it. *United States v. Kelly*,* 11 Wheat., 417.

§ 388. The making of a revolt on shipboard is where the crew, or any part of them, throw off all obedience to the commander, and forcibly take possession of the vessel, by assuming and exercising the command and navigation of her, or by transferring their obedience from the lawful commander to one who has usurped the command. Previous confederacy is not necessary, and it is immaterial whether the command be afterwards regained by the prowess of the lawful commander, or by foreign aid, or whether the possession of the vessel remained with the mutineers a day, an hour, or only a few minutes. *United States v. Haskell*,* 4 Wash., 402.

§ 389. An endeavor to make a revolt consists of an endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of the commander, with intention to remove him from his command; or, against his will, to take possession of the vessel by assuming and exercising the navigation and government of her, or by transferring their obedience from the lawful commander to one who has usurped his station, or to whom they may transfer their obedience. *United States v. Kelly*,* 4 Wash., 528; 11 Wheat., 418.

§ 390. Mere insolent conduct of seamen, disobedience to orders, or even violence committed on the person of the master, unattended with other circumstances, will not amount to an endeavor to make a revolt. *United States v. Kelly*,* 4 Wash., 528.

§ 391. An illegal combination by the crew, for a common and illegal object, a refusal to obey the lawful orders of the master, and inciting each other to persist in disobeying, so as to overthrow the authority of the master, will constitute an endeavor to make a revolt. *United States v. Gardner*,* 5 Mason, 402.

§ 392. To constitute an endeavor to make a revolt by a seaman, there must be some effort or act to stir up others of the crew to disobedience of the lawful commands or authority of the master. *United States v. Savage*,* 5 Mason, 400.

§ 393. An endeavor to commit a revolt may be complete by stirring up, encouraging or combining with any one or more of the crew to produce a deliberate disobedience to any lawful order of the master or other officers; but there must be a clear intent to produce such a revolt. *United States v. Thompson*,* 1 Sumn., 171.

§ 394. Assaulting and beating the master does not amount to an attempt to excite a revolt. *United States v. Lawrence*,* 1 Cr. C. C., 94.

§ 395. A mere conspiracy of the crew to make a revolt will not amount to an endeavor to make a revolt unless it be followed by some overt acts tending to that end; nor is concert among the crew to make a revolt an essential ingredient in the offense. *United States v. Kelly*,* 4 Wash., 528.

§ 396. The master of a ship is prevented in the free and lawful exercise of his authority and command, within the meaning of the act of 1835, ch. 40, § 1, punishing a revolt, when he is prevented by the force, fraud, threats or intimidations of the crew from carrying into effect any one lawful command. The command to continue the business of whaling by the master of a whaling ship is *prima facie* a lawful command. *United States v. Borden*,* 1 Spr., 374.

§ 397. A combination by the crew to refuse to pursue the business of the vessel is not of itself intimidation within the meaning of the above act. But if by array of numbers and union the fears of the master are excited, and through such fear he is prevented in the free and lawful exercise of his authority, there is intimidation. Such intimidation must be done wilfully and knowingly and intentionally to prevent the master, etc. In doing this the crew must also have acted unlawfully. *Ibid.*

§ 398. If, from the improper conduct of the captain, the crew have good reason to believe that they will be subjected to unlawful and cruel punishment, or that a great wrong is about to be inflicted upon one of the crew, they have a right to take reasonable measures to prevent it. *Ibid.*

§ 399. A revolt, in the sense of the act of 1790, punishing any seamen who "endeavor to make a revolt," is an usurpation of the authority and command of the ship, and an overthrow of that of the master or commanding officer. If the crew, or a part thereof, conspire to refuse to do further duty on board, and to disobey all further orders of the master, for this purpose, it is an endeavor to make a revolt. A combination to resist a single lawful order of the master, for like purposes, and any act done in pursuance of such combination, and any endeavor to stir up others of the crew to such resistance, is also an endeavor to make a revolt. *United States v. Hemmer*,* 4 Mason, 105.

§ 400. Where the crew, by violence, prevent the master from punishing a seaman, they are guilty of an endeavor to commit a revolt. *United States v. Morrison*,* 1 Sumn., 448.

§ 401. In order to the commission of the offense, it is not necessary that there should be any previous deliberate combination for mutual aid and encouragement. *Ibid.*

§ 402. Actual disobedience to some order given is not necessary to constitute an endeavor to make a revolt. If the crew have combined together to disobey orders and to do no duty, the offense is complete by such combination, although no orders have been subsequently given. But a simple refusal by one or more to do duty does not amount to the offense, unless it is done by a common combination, or to effect a common purpose. The parties must act together, and with the intention of mutual encouragement and support. *United States v. Barker*,* 5 Mason, 404.

§ 403. If the crew of a vessel, or any two or more of them, combine or confederate to refuse to do further duty on board the ship, and to resist the lawful commands of the officers in regard to the sailing or preparations for the voyage, or if they encourage each other in such acts of refusal and disobedience, it is an endeavor to make a revolt, and punishable by the act of 1835, ch. 40, § 2, unless some justification for the refusal and disobedience is made out. *United States v. Cassidy*,* 2 Sumn., 582.

§ 404. A mutual co-operation and combination of members of the crew of a vessel to refuse duty and to disobey the master amounts to an endeavor to make a revolt, within the meaning of chapter 9 of the crimes act of 1790. *United States v. Haines*,* 5 Mason, 272.

§ 405. A revolt on shipboard occurs whenever, by overt acts of the crew, the authority of the master in the free navigation or management of the ship, or in the free exercise of his rights and duties on board, is entirely overthrown, and there is intentionally caused by such acts an actual or constructive suspension of his command. Direct or positive force upon, or constraint or imprisonment of, the master, is not essential. A positive refusal to perform any duty on board until he has yielded to some illegal demand of the crew, when it has produced a suspension of his power of command, or when, by a general combination, the crew refuse obedience to the lawful orders of the master, is a revolt. Mere disobedience of orders by one or two of the seamen, without combining with the others to produce a deliberate disobedience, although it is highly censurable and may be punished by the master on board the

ship, is not a revolt; nor does mere offensive or insolent language constitute this crime. *United States v. Forbes*, *Crabbe, 560.

§ 406. On an indictment for resisting the lawful authority of a master on shipboard it is not necessary that the defendants should either deprive the master of his command, or usurp it themselves, or transfer it to another. It is enough that the captain issued lawful orders, which they refused to obey, and that they resisted the enforcement of the orders with violence. *United States v. Peterson*, *1 Woodb. & M., 305.

§ 407. On an indictment for an attempt to excite a revolt on shipboard, it is sufficient if the defendants collected together in a tumultuous manner in a noisy and insubordinate state, endangering the police of the vessel, and likely to terminate in actual disobedience of orders and actual resistance to the master's lawful authority. *Ibid.*

§ 408. Under the act of congress of April 30, 1790, making it an offense to "endeavor to make a revolt," and under the act of March 3, 1835, declaring that "unlawfully, wilfully, and with force, or by fraud, threats, or other intimidation, depriving the master of his lawful authority to command," will constitute a revolt, a combination and confederacy by the crew to refuse to go to sea in a brig, and to prevent the brig from sailing pursuant to the orders of the master, while they were on board, and this determination being made known to the master, constitutes an endeavor to make a revolt. *United States v. Nye*, 2 Curt., 225.

§ 409. — **master may be disarmed.**—If a master of a ship, without any disobedience of orders or resistance, is about to attack any of the crew, he may be disarmed, if done in repelling great violence which is threatened and impending without any justifiable cause. But if the crew are disobedient, and resort to personal violence and seditiously resist the master in enforcing his lawful orders, he can then rightfully arm himself, and if only intending to use his weapons so far as is necessary to produce obedience and put down mutiny, he cannot be properly opposed or disarmed by his crew. *United States v. Peterson*, *1 Woodb. & M., 305.

§ 410. — **unseaworthiness of vessel.**—If the crew of a vessel, acting in good faith, and upon reasonable grounds of belief, refuse to go to sea because of the unseaworthiness of the vessel, they cannot be found guilty of revolt, even though the jury, upon all the evidence, should be in doubt as to the actual seaworthiness of the vessel; or even if they should, upon a measuring cast, be inclined to think she might have been seaworthy. *United States v. Givings*, *1 Spr., 75.

§ 411. If seamen upon coming on board of a vessel make an examination and decide that the vessel is unseaworthy, and then reasonably object to enter on their contract, they are not punishable as criminals for refusing to begin to serve at all. But if, after full examination, they have begun their service, they are still bound to obey all lawful commands, and are not justified in conduct otherwise mutinous unless, perhaps, in immediate peril of life. *United States v. Staly*, *1 Woodb. & M., 338.

§ 412. It is a good defense to an indictment, under section 12 of the crimes act of 1790, for a combination by seamen to resist the lawful authority of the master, that the ship was clearly unseaworthy and unfit for the voyage, and the combination was made to compel the master to return home on that account. And also, if the seamen acted *bona fide* upon reasonable grounds of belief that the ship was unseaworthy, and the seaworthiness of the ship was doubtful, they ought not to be convicted. If the ship was clearly seaworthy the combination was unlawful. *United States v. Ashton*, *2 Sumn., 13.

§ 413. — **attack upon master.**—An attack by seamen upon the master of the vessel, to constitute the offense of endeavoring to make a revolt, under the act of April 30, 1790, must be accompanied by some evidence indicating on the part of the assailants an intention to take possession of the vessel. *United States v. Smith*, *3 Wash., 78.

§ 414. — **right of self-defense.**—If seamen are justifiable in refusing to go to sea, the master has no right to compel them; and if he threatens or uses violence upon them for the purpose of forcing them to go to sea, they have a right in self-defense to use such force as is necessary to resist his attempt. *United States v. Givings*, *1 Spr., 75.

§ 415. — **lawful resistance.**—If the general object of resisting the master of a vessel by the crew be legal, the particular acts of one person who in such resistance goes farther than is necessary, not being a part of the general object, does not render the others liable. *Ibid.*

§ 416. — **new master.**—It is no justification for an endeavor by seamen to make a revolt that a new master has been substituted in place of the one under which they shipped. Their contract is with the owners of the vessel, and they are not discharged from this contract by the death, removal or resignation of the original commander. *United States v. Cassedy*, *2 Sumn., 582.

§ 417. If a person, substituted as master, is grossly incompetent to the duties of his station, from want of skill, or from grossly bad habits, or from profligate and cruel behavior, it may furnish a suitable excuse for a refusal to do duty on the part of the crew. *Ibid.*

§ 418. It is no excuse for an endeavor to make a revolt, in refusing to obey orders, that the

master under whom the seamen shipped was compelled to abandon the voyage on account of sickness, and the owners to substitute a new master, where by the articles the seamen expressly agreed to make the voyage under the master under which they shipped or any other master. And even without such a stipulation in the shipping articles, there would be no excuse. The shipping contract is not dissolved in such a case. *United States v. Hamilton*,* 1 Mason, 443.

§ 419. Where a master is dismissed for reasonable cause without fraud, the contract of the seamen, already entered into, is not dissolved, and they may be guilty of endeavoring to make a revolt, by disobeying the orders of the new master. *United States v. Haines*,* 5 Mason, 272.

§ 420. — power to remove mate.—On an indictment for an endeavor to make a revolt, it was held that the master's power to remove the mate is absolute; that if the mate is wrongfully removed he must look to the law for redress, and must not attempt to redress his wrongs by violence. *United States v. Savage*,* 5 Mason, 460.

§ 421. — in a home port.—The twelfth section of the act of April 30, 1790, providing that "if any seaman shall confine the master of any ship or other vessel, or endeavor to make a revolt in such ship," he is to be punished as provided by the act, does not limit the offense to the high seas. The offense is punishable under this act when committed in Salem harbor. The limitation of certain offenses to the high seas, in the previous part of this section, does not include this offense. *United States v. Hamilton*,* 1 Mason, 443.

§ 422. — in a foreign port.—It is not necessary that the offense of endeavoring to make a revolt should have been committed on the high seas in order to bring the case within the twelfth section of the crimes act of April 30, 1790, whose words are that "if any seaman shall confine the master of any ship or other vessel, or endeavor to make a revolt in such ship," he shall be liable to the punishment prescribed by the act. If committed in a foreign port, the act is punishable in the proper circuit court. *United States v. Keefe*,* 3 Mason, 475.

§ 423. The offense of endeavoring to make a revolt, committed either on the high seas or in a foreign port, being punishable in the circuit court for the district where the defendant is apprehended, or into which he may first be brought, it is immaterial that the indictment alleges the crime to have been committed on the high seas, when in fact it was committed in a foreign port. *Ibid.*

§ 424. — refusal of single seaman to obey.—A mere refusal to do duty on the part of a single seaman, without any attempt to encourage, or aid, or influence any others of the crew to the same act, will not amount to an endeavor to make a revolt. If each seaman separately refuses to do duty, without any encouragement or mutual understanding, there is no endeavor to make a revolt. To constitute the offense there must be an effort to excite others to disobedience, or some common understanding to act together for mutual encouragement. *United States v. Haines*,* 5 Mason, 272.

§ 425. — deviation.—Where seamen shipped for a voyage from Boston to the Penobscot river and thence to the West Indies, and the vessel on its voyage returned from Penobscot river and touched at Boston, and the seamen thereupon refused to do further duty because there had been a deviation from the voyage, it was held that such refusal was justifiable and was not an endeavor to commit a revolt within the statute of 1835, ch. 40. *United States v. Matthews*,* 2 Sumn., 470.

§ 426. — by one not a seaman.—Under the act of congress punishing "any one or more of the crew of an American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States," who "shall endeavor to make a revolt or mutiny on board such ship or vessel, or shall conspire, combine or confederate with any other person or persons on board to make such revolt or mutiny, or shall solicit, incite or stir up any other or others of the crew to disobey or resist the lawful orders of the master or other officer of such ship or vessel, or to refuse or to neglect their proper duty on board thereof, or betray their proper trusts therein," one who was not a seaman at the time may be punished for soliciting and inciting a second mate who was doing duty as a seaman, and who was an unnaturalized foreigner, to steal money on board the ship. *United States v. Turner*,* 2 N. Y. Leg. Obs., 256.

§ 427. — presumption against seamen.—On the trial of members of the crew of an American vessel for refusing to do duty, contrary to the act of March 3, 1835, the court will presume that the orders disobeyed were orders which the crew were bound to obey, by the terms of the shipping articles, where the crew did not, at the time the orders were given, refuse to obey them on the ground that the shipping articles did not require such duty. *United States v. Lynch*,* 2 N. Y. Leg. Obs., 51.

§ 428. — power of congress to punish.—Upon an indictment of the members of the crew of a whaling vessel, for disobeying the orders of the master, and endeavoring to make a mutiny and revolt, the objection that congress has no constitutional power to punish mis-

demeanors committed on the high seas was overruled. The court were of the opinion that the offense charged was an offense against the law of nations, and, therefore, within the express constitutional power of congress to punish; and further, that as congress had exercised this power by various acts through a long series of years, it was not proper for the circuit court to question its rightful exercise. *United States v. Crawford*,* 1 N. Y. Leg. Obs., 389.

§ 429. — **distressed seamen taken on board.**—Distressed seamen taken on board of an American vessel at a foreign port to be brought to the United States, at the request of the American consul there, as provided by section 4 of the act of February 28, 1803, are bound to do duty on board of such vessel according to their abilities, and may be punished for the offense of making a revolt, trying to make a revolt, and confining the captain, as defined and punished by the act of congress. *United States v. Sharp*,* Pet. C. C., 118.

§ 430. — **pilot an officer.**—The pilot who has rendered himself on board a vessel to pilot her to sea is an officer on board the vessel, within the meaning of the act of March 3, 1835, punishing members of the crew of American vessels for endeavoring to make a mutiny or revolt, or for resisting the lawful orders of the master or other officer of the ship. A refusal of the crew to obey the orders of the pilot to put the vessel to sea renders them liable under this act. *United States v. Lynch*,* 2 N. Y. Leg. Obs., 251.

§ 431. — **refusal to proceed; reference to shipping articles.**—In cases where the refusal of seamen to proceed on a voyage is charged as constituting the offense of "endeavoring to make a revolt," the shipping articles must be referred to to determine the obligation of the seamen to proceed. The law is imperative and unequivocal that the shipping articles must contain a statement of the precise voyage or voyages for which the sailor contracts, and if a deviation from such specification is carried out (not caused by *vis major*), without the consent of the mariner, by going to intermediate ports and landing or receiving on board passengers or freight, or an ulterior voyage is attempted to be superadded or substituted, and the sailors refuse to do further duty, they are not thereby guilty of endeavoring to make a revolt. So where a crew signed shipping articles for a voyage from New Orleans to Havre, and thence to one or more ports in Europe, should the master require, and thence back to a port of discharge in the United States; and passengers and freight were taken on at Havre for the port of New York, and the cargo of a distressed vessel to carry on freight to Charleston, and on reaching New York, and when the passengers and freight for that port had been landed, and the captain was about sailing for Charleston to deliver the remainder of his cargo, the crew refused to proceed, considering the voyage ended, it was held that they were not guilty of making a revolt; since, if New York was not the port of discharge, the coming to New York was such a deviation from the voyage contracted for in the shipping articles as to discharge the crew from further duty. *United States v. White*,* 6 N. Y. Leg. Obs., 230.

§ 432. — **port of discharge.**—On an indictment for endeavoring to make a revolt, it is held that the port of discharge is the port at which the cargo is actually unladen. *United States v. Barker*,* 5 Mason, 404.

§ 433. — **vessel not licensed and enrolled.**—It is held that members of the crew of an American whaling vessel cannot be convicted and punished for an attempt to revolt under the act of 1835, where the vessel proceeded on the voyage on which the revolt is alleged to have been committed, without being licensed and enrolled as required by the act of February 18, 1793, entitled "An act for enrolling and licensing ships or vessels employed in the coasting trade and fisheries, and for regulating the same." *United States v. Jenkins*,* 1 N. Y. Leg. Obs., 344.

§ 434. The act of 1835, ch. 40, provides that "if any one or more of the crew of an American ship or vessel, on the high seas, etc., shall endeavor to make a revolt," he and they shall on conviction be punished as provided in the act. To bring the case within this statute, the voyage for which the seamen are shipped must be a lawful one, and they must at the time be of the crew of an American vessel. Since, under the statute of 1793, ch. 52, no registered ship or vessel can, while she remains registered, engage in the whale fisheries, the crew of a registered vessel shipped for a whaling voyage and engaged in a whaling voyage cannot be guilty of the crime punished by the above act. *United States v. Rogers*,* 3 Sumn., 312.

§ 435. — **character of vessel.**—It cannot be objected that an endeavor to make a revolt cannot be committed on a vessel of any other description than a ship. *United States v. Kelly*,* 4 Wash., 528.

§ 436. — **running away with vessel.**—In order to constitute the offense of running away with a vessel by seamen employed on it, it must appear that the act was done feloniously and with an intent to convert the ship and cargo, or either of them, to their own use. *United States v. Haskell*,* 4 Wash., 402.

§ 437. — **insufficient crew.**—Where the crew shipped for a voyage had rendered themselves on board, and the vessel had left her fastenings and dropped out a short distance, and the master, finding that he had shipped a more numerous crew than he needed, went on shore

to leave some of them, and the balance refused to obey orders on the ground that they were going to sea shorthanded, and they were indicted for the offense, the jury were charged that it was incumbent on the prisoners to satisfy the jury that the crew left on board were incompetent in point of numbers to navigate the vessel safely at sea. *United States v. Lynch*, * 2 N. Y. Leg. Obs., 51.

§ 439. — **yielding to command of usurper.**— Where seamen are charged with revolt, and set up as a defense that they acted in obedience to the commands of a usurper through fear, the defense is not available unless the fear under which they acted is the fear of death, and such a fear as a man of ordinary courage and fortitude might yield to. *United States v. Haskell*, * 4 Wash., 402.

§ 439. **Confining the captain.**— To find a seaman guilty of the offense of confining the captain as defined by section 12, Laws United States, volume 2, page 94, it is not necessary that he should be proved individually to have used any force or threats to compel the captain to confine himself to his cabin or resign his commission, if he joined in the general confederacy, and by his presence countenanced the acts of violence which produced these consequences. *United States v. Sharp*, * Pet. C. C., 118.

§ 440. The master of a vessel may so conduct himself as to justify his officers and crew in placing restraints upon him to prevent the commission of acts which might endanger the lives of the whole, and in such a case they are not punishable for confining the master. *Ibid.*

§ 441. Under the act of congress of 1790, declaring that "if any seaman shall confine the master of any ship or other vessel, or endeavor to make a revolt in such ship," he shall be punished, confinement is not limited to mere personal restraint by seizing the captain and preventing the free movements of his body, or by locking him up; but extends to preventing his free movements about the ship, by force or intimidation, as by limiting him to walking on a particular part of the deck by terror of bodily injury, or by present force. *United States v. Hemmer*, * 4 Mason, 105.

§ 442. Every confinement of the master by the seamen is not illegal; if the master is about to do an illegal act they may restrain him; they may also confine him in justifiable self-defense, but they are bound to submit to reasonable chastisement. *United States v. Thompson*, * 1 Sumn., 172.

§ 443. The crew are not punishable for confining the master of a vessel, where they do so upon evidence sufficient to satisfy a reasonable and firm man that the captain is insane and that there is danger that he will blow up the vessel if permitted to go at large. *United States v. Sharp*, * Pet. C. C., 118.

§ 444. A mere assault and battery committed at sea by a seaman upon his commander does not amount to a confinement of the commander, nor to an attempt to excite a revolt, within the meaning of the act of congress of April 30, 1790. *United States v. Lawrence*, * 1 Cr. C. C., 94.

§ 445. Any confinement of the master of the vessel by the seamen, whether by depriving him of the use of his limbs, or shutting him up in the cabin, or by intimidation, preventing him from the free use of every part of the vessel, amounts to a confinement in contemplation of law. *United States v. Smith*, * 3 Wash., 78; *United States v. Sharp*, * Pet. C. C., 118.

§ 446. The offense of endeavoring to make a revolt and confining the captain of the vessel, committed in a river at St. Ubes, is held to be within the jurisdiction of the circuit court. *United States v. Smith*, * 3 Wash., 78.

§ 447. If a refractory seaman seizes the captain of the vessel and throws him upon the deck and holds him there for twenty or thirty minutes, it is a confinement of the captain within the sense of the law. But the offense does not consist in forcibly restraining the captain; it must be feloniously done; that is, with violence, and without justifiable cause, etc. *United States v. Henry*, * 4 Wash., 428.

§ 448. If the mate seizes the captain by the collar and holds him upon the deck until released by other members of the crew, it is a confinement of the captain. *United States v. Stevens*, * 4 Wash., 547.

§ 449. Confinement of the master may consist in holding him against the ship's rail against his will, if only for a minute. *United States v. Thompson*, * 1 Sumn., 171.

§ 450. On an indictment for confining a sea captain, evidence to show that, in an affray between the captain and a seaman, the latter held the captain in confinement for any length of time, is sufficient to sustain the charge. *United States v. Smith*, * 3 Wash., 525.

§ 451. If the captain of a vessel is restrained from performing the duties of his station by such mutinous conduct of his crew as might reasonably intimidate a firm man, this amounts to a constructive confinement of the captain within the sense of the law. It makes no difference in this respect that the master does in fact go unmolested to every part of his vessel, whenever he pleases, if compelled by a regard for his own safety to go armed. *United States v. Bladen*, * Pet. C. C., 213.

§ 452. The seizing of the master of a vessel by a member of the crew, and the attempt to throw him overboard, is a confinement of the master within the meaning of the law, although the confinement last only for a minute or two. The raising of a chair by the captain and pushing the sailor forward with it, on his refusal to go forward when ordered, will not justify the sailor in seizing the captain. *Ibid.*

§ 453. The offense of confining the master of a vessel by one or more of the members of the crew, being punishable under the twelfth section of the crimes act of 179), whether committed on the high seas or in port, and section 5 of the later crimes act having declared that if an offense shall be committed on board of a vessel belonging to a citizen of the United States, while lying within a port within a foreign jurisdiction, by any person belonging to the ship's company, or by any passenger, it may be cognizable in the proper circuit court of the United States, in like manner as if it had been committed on the high seas, the place where the offense of confining the master is committed, whether upon the high seas or in port, is immaterial and need not be proved. Nor does the proviso to this latter act require that the indictment should negative the fact that the defendant has been acquitted or convicted of the offense by a tribunal of the country where it was committed. *United States v. Stevens*,* 4 Wash., 547.

§ 454. Use of deadly weapon by master.—Where a seaman is brandishing a deadly weapon and threatening the master with it, and there are indications that others of the crew are about to co-operate with him, and the circumstances are such as to induce a captain of ordinary firmness and discretion to believe that the use of a pistol is necessary to suppress a mutiny, and the captain does so believe, he is justified in using the pistol. *United States v. Colby*,* 1 Spr., 119.

§ 455. The master of a vessel is not authorized to use a dangerous weapon in punishing or coercing a seaman, unless in a case of necessity. If the captain, acting as a man of ordinary firmness, in the exercise of a sound discretion, and judging honestly from the circumstances as they appear to him at the time, sincerely believes that the danger is imminent, and requires the use of a dangerous weapon to reduce to obedience a seaman actually in mutiny, and makes use of such a weapon from honest motives, then he is justified in so doing, although subsequent events make it appear that less severe and dangerous measures might perhaps have accomplished the purpose. *Ibid.*

§ 456. The word "assault," in an indictment against the master of a vessel for assaulting a seaman with a dangerous weapon, carries with it the allegation of illegality. Such an indictment requires proof of an unjustifiable offer or attempt to do bodily harm; but malice is not an ingredient of the offense, and need not be proved. *United States v. Lunt*,* 1 Spr., 311.

§ 457. The master of a vessel has not only the right of self-defense, but also to defend his authority. He shall not use more force to maintain his supremacy than is necessary. It is not lawful for him to use a deadly weapon except from necessity. If, from the mutinous and menacing conduct of the men, he, as a man of ordinary firmness, has good reason to believe, and does believe, that the use of a deadly weapon is necessary to protect his authority as master, and to prevent his being deprived of command by force and violence, he will be justified in using a deadly weapon, without it subsequently appearing that the danger was apparent and not real. *Ibid.*

§ 458. Punishing seamen.—Where a master was indicted for flogging a sailor maliciously, and without justifiable cause, that punishment being forbidden by law, the jury were instructed that as flogging was absolutely forbidden, the question of justifiable cause could not enter into the case, for no provocation could justify the unlawful act; that the flogging prohibited was punishment with a cat, or any punishment like it in substance and effect; that it was for the jury to find whether, as a matter of fact, the punishment given amounted to flogging; that the degree of punishment was immaterial, provided it was that which was forbidden; and that the malice to be shown was simply a departure from a known duty. *United States v. Cutler*,* 1 Curt., 501. See § 376.

§ 459. An indictment against the master of a ship under the third section of the act of March 3, 1835 (4 Stats. at Large, 776), for inflicting a cruel and unusual punishment on a seaman, is not sustained by proof that the punishment was a flogging, although flogging is prohibited by law, and no matter how unjustifiably it was inflicted. *United States v. Collins*,* 2 Curt., 194.

§ 460. The master of a vessel has a right to inflict reasonable punishment for the offense of desertion, and to use means of coercion to compel obedience to orders, and the performance of duty; but the punishment inflicted and the means of coercion, except in extreme cases, must not be such as would likely be permanently injurious to the health of the seaman. *United States v. Alden*,* 1 Spr., 95.

§ 461. Where the mate of an American vessel lying within the waters of Massachusetts

bay assaults a seaman with a cutlass, it being a dangerous weapon, the offense is made out under the crimes act of March 3, 1933, unless the infliction of the wound with the cutlass is justified on account of some positive necessity really then existing, or on account of some supposed necessity, then honestly and reasonably believed to exist by the defendant, either justifiable or excusable in law. If there was such real or supposed necessity, and yet the punishment was excessive either in kind or degree, the offense is not excused. The right of the mate to inflict punishment on seamen when the muster is on board and at hand can be justified only by the immediate exigency of the sea service, or as a necessary means to suppress mutinous, illegal or flagrant misbehavior on the part of the seaman, or to compel obedience to orders or other duties which require prompt and instant action and interference on the part of the officers, and admit of no delay. The authority of the officers of a ship to compel obedience and inflict punishment is of a civil and not a military character. *United States v. Hunt*,* 2 Story, 120.

§ 462. In the third section of the act of congress of 1833, providing "that if any master or other officer of an American ship or vessel on the high seas, or in any waters within the admiralty and maritime jurisdiction of the United States, shall, from malice, hatred, or revenge, and without justifiable cause, beat, wound or imprison any one or more of the crew of such ship or vessel," he shall be punished, etc., the word "malice" means a wilful intention to do a wrongful act, regardless of or in known violation of duty. *United States v. Taylor*,* 2 Sumn., 584.

§ 463. The word *malice*, as used in section 5347 of the Revised Statutes, making the infliction of blows on a seaman from malice an offense, means ill-natured wilfulness. It is a wilful intention to do a wrongful act. *United States v. Harriman*,* 1 Hughes, 525.

§ 464. To secure obedience to his orders, the law gives to the officer of a ship authority to use force at the moment. In the exercise of this authority, however, regard must be had to the occasion and to the circumstances of the ship, and especially to the character and conduct of the seaman. If the officer exceeds his power by exercising his authority harshly, or unjustly, or maliciously, he is answerable when he returns to port. It is, however, the duty of the seaman to endure the cruelty at the time, placing reliance upon the courts and juries of his country. *Ibid.*

§ 465. The master stands in the relation of parent to the seaman, and is bound to exercise his own judgment as to the time, the manner, and the circumstances under which punishment is to be inflicted on the crew for any past misdemeanors, or for any present misdemeanors not immediately, at a critical moment, affecting the ship's safety. *Ibid.*

§ 466. The master generally has the sole authority on board the ship to authorize the punishment of any of the crew. He cannot delegate to an inferior officer this general authority to inflict punishment. Nor can the inferior officer inflict punishment at his own pleasure. The authority of an inferior to give blows exists only when it is at the very moment absolutely required by the necessities of the ship's service to compel the performance of duty. If he inflicts blows, it is upon him to establish, upon clear evidence, that they were inflicted in a moment of peril to the ship or in self-defense. *Ibid.*

§ 467. For misbehavior of a mariner at sea, the captain is justified in giving him moderate correction; and in case of resistance or mutinous conduct, he may suppress it in the best way he can; he may use a greater degree of violence in such a case than in case of misbehavior merely. *United States v. Wickham*,* 1 Wash., 316.

§ 468. The captain of a ship may inflict personal chastisement on a seaman who uses offensive language to him. The seaman may endeavor to escape from it, and if pursued, or otherwise exposed to a repetition of such treatment, he may lawfully resist in such a manner as to protect himself against injury. If the master makes use of an unlawful weapon, or the seaman is otherwise exposed to apparent danger of life or limb, he may lawfully resort to any species of defense necessary to avert the danger. *United States v. Smith*,* 3 Wash., 525.

§ 469. Leaving seaman in foreign port; forcing him ashore.—If a master maliciously leaves a member of his crew at a foreign port, he is liable to criminal indictment. To justify leaving men at a foreign port there must be such an exigency as would control the judgment of men of reasonable firmness for ship-masters. A greater exigency would be required to justify the leaving of seamen at some ports than at others. The law is said to be jealous of leaving seamen at foreign ports, especially if they are confined in jail there and thereby placed under the control of persons not subject to our laws. *United States v. Lunt*,* 18 Law Rep., 683.

§ 470. To constitute the offense created by section 10 of the act of 1925, declaring that "if any master, etc., shall, during his being abroad, maliciously and without any justifiable cause, force any officer or marine of such ship, etc., on shore, etc., he shall, on conviction, be punished by fine," etc., both facts must concur. The act must be done both maliciously and without justifiable cause. The word *malice*, as used in this section, does not mean a

wicked, malignant and revengeful act, such as in cases of murder constitutes malice. If the act be wantonly done, that is, with a wilful disregard of duty or right, it is malicious, in the sense of the statute. *United States v. Ruggles*,* 5 Mason, 192.

§ 471. While the master may, in extreme cases, imprison a seaman in a common jail in a foreign port, the authority is confined to extreme cases, and cannot be justified when a more moderate punishment on shipboard would be effectual and safe. And where authorized, the imprisonment must be with the intent to take the seaman on board again, and bring him home. The master can punish only to promote good discipline, and compel obedience to orders on board of the ship. He is not clothed with judicial authority to sentence seamen to punishment for their offenses. *Ibid*.

§ 472. In a prosecution for forcing a seaman on shore in a foreign port, contrary to the act of 1825, it is not material that the seaman is a foreigner. A "justifiable cause," in the sense of the act, is not every case of misbehavior which would justify a discharge, but the right arises only in extreme cases; and "maliciously," in the sense of the act, includes all acts done wantonly or wilfully, and not necessarily those done in a spirit of hatred or revenge. *United States v. Coffin*,* 1 Sumn., 394.

§ 473. The master must act on his own responsibility in leaving members of his crew in foreign ports on account of misconduct. It is proper for him to take the advice of the consul, but such opinion is only advice, and the responsibility rests with the master. *United States v. Lunt*,* 18 Law Rep., 683.

§ 474. If a master, in leaving seamen at a foreign port, acts under an honest mistake of judgment, especially after taking the advice of proper persons, he is not guilty criminally. If he acts in known violation or in wilful indifference or in disregard of duty, he is guilty. *Ibid*.

§ 475. To support an indictment for seizing and confining the master, it is only necessary to show that the act was unlawful—not done in justifiable self-defense, or for some other legal cause. *United States v. Savage*,* 5 Mason, 460.

§ 476. The offense of forcing an officer or seaman ashore at a foreign port, as defined and punished by the tenth section of the act of March 3, 1825, may be committed by the commander of a vessel, without using any physical force in putting the person on shore; as if he left the ship under a well-grounded fear of danger to his life from the commander if he continued on board to perform his duties on the return voyage. But mere ill-treatment received on the outward voyage would not be sufficient moral force. *United States v. Riddle*,* 4 Wash., 644.

§ 477. Under the tenth section of the crimes act of 1825, providing a penalty against any master of a vessel, belonging in whole or in part to any citizens or citizen of the United States, who "shall, during his being abroad, maliciously and without justifiable cause, force any officer or mariner of such ship or vessel on shore, or leave him behind in any foreign port or place, or refuse to bring home again all such officers and mariners of such ship or vessel, whom he carried out with him, as are in a condition to return, and are willing to return," it is not necessary that the officer or mariner should have been forced on shore as well as left behind, or refused to be brought home. It is sufficient if the mariner or officer is either forced ashore or left behind, or refused to be brought home. It is not necessary to the completion of the offense of leaving the officer or seaman behind, that he should have been willing and in a condition to return. This qualification applies to the third and last offense only. *United States v. Netcher*,* 1 Story, 307.

§ 478. Where the master of a vessel imprisons a seaman at a foreign port and leaves him behind, the fact that the seaman had previously applied for a discharge, and was willing to be discharged from the ship, is no excuse for leaving him behind, the application being refused and the seaman sent to prison instead. *Ibid*.

§ 479. Casting away or burning a vessel.—Upon an indictment for burning a ship contrary to the act of 1804, punishing with death "any person, not being the owner, who shall, on the high seas, wilfully and corruptly cast away, burn or otherwise destroy any ship or other vessel, unto which he belongeth, being the property of any citizen or citizens of the United States," the court were of opinion that a partial burning was not within the statute. But the prisoner desiring that the jury should pass upon his case, the court consented, reserving for the prisoner the question of law. *United States v. Lockman*,* 11 Law Rep., 151.

§ 480. To "destroy a vessel," as the words are used in the act of congress punishing the act as a crime, is to unfit her for service beyond the hopes of recovery by ordinary means. This, as to the extent of the injury, is synonymous with "cast away." Both of these terms mean such an act as causes the vessel to perish; to be lost, to be irrecoverable by ordinary means. *United States v. Johns*,* 1 Wash., 363.

§ 481. Under the act of 1804, punishing "any person, not being the owner, who shall, upon the high seas, wilfully and corruptly cast away, burn or otherwise destroy any ship,"

etc., to burn "wilfully" is designedly and intentionally; corruptly is from a bad motive. The burning need not be for purposes of gain or hire. *United States v. Lockman*,* 11 Law Rep., 151.

§ 482. Where a vessel was left on the high seas completely water-logged, beyond the power of the vessel, into which the captain and crew were taken, to save her, without any other vessel in sight, and filling with such rapidity as to render her loss almost certain, and the chance of her being saved by ordinary means altogether hopeless, it was cast away within the meaning of the first section of the act of March 26, 1804, punishing the casting away of vessels. *United States v. Vanranst*,* 3 Wash., 146.

§ 483. The great lakes are not "high seas" within the meaning of the seventh section of the act of congress of July 29, 1850, which provided for the punishment of any person who shall wilfully set fire to any vessel on the high seas. *Miller's Case*,* 1 Brown, 154.

§ 484. Section 22 of the act of March 3, 1825, punishing any persons who "shall on the high seas, or within the United States, wilfully and corruptly conspire, combine and confederate, with any other person or persons, such other person or persons being either within or without the United States, to cast away, burn, or otherwise destroy, any ship or vessel, or procure the same to be done, with intent to injure any person or body politic that hath underwritten, or shall thereafterwards underwrite, any policy of insurance thereon, or on goods on board thereof, or with intent to injure any person or body politic that hath lent or advanced, or thereafter shall lend or advance, any money on such vessel on bottomry or *respondentia*," is intended to protect commerce, internal as well as foreign. The protection to underwriters is incidental. *United States v. Cole*,* 5 McL., 513.

§ 485. It is no defense to an indictment under the above act for conspiring to destroy the cargo, that the invoices or bills of lading were false. *Ibid*.

§ 486. To sustain an indictment under this act it is not necessary to prove the burning of the boat or that the underwriters were injured. The offense consists in conspiring to burn the boat to defraud the insurance officers. But the burning of the boat may be evidence. *Ibid*.

§ 487. Two or more of the defendants must be found guilty, or the conspiracy under the above act will not be established. *Ibid*.

§ 488. The common design, which is the essence of this charge, may be made to appear, when the defendants steadily pursue the same object, whether acting separately or together, by common or different means, all leading to the same unlawful result. *Ibid*.

§ 489. To sustain a conviction for this conspiracy, it must be proved that it was entered into to injure the underwriters. *Ibid*.

§ 490. **Plundering a wreck.**—Section 9 of the act of March 3, 1825, punishing the plundering, stealing or destroying of any money or goods belonging to a wrecked, distressed, lost, stranded or castaway vessel, applies to a case where the plunder or stealing takes place after the vessel has gone to pieces and disappeared. But it does not apply to a treasure taken from the sea by an expedition fitted out after the treasure has ceased to be under the charge of the officers of the wrecked vessel, and all effort for the recovery of the property has been given up by them. The treasure is then derelict and abandoned property. *United States v. Smiley*,* 6 Saw., 640.

§ 491. **A cooper is a seaman in contemplation of law.** *United States v. Thompson*,* 1 Sumn., 160. See § 376.

§ 492. **High seas.**—A vessel lying outside of the bar, within three miles of the shore, is on the high seas. *United States v. Smith*,* 1 Mason, 147. See §§ 374, 375.

§ 493. **Foreign seamen.**—The seventh section of the act of July 20, 1790, for the government and regulation of seamen in the merchant's service, applies only to seamen engaged in the merchant's service of the United States, and a foreign seaman in a foreign vessel cannot be committed for desertion. *Ex parte D'Olivera*, 1 Gall., 474.

§ 494. On an indictment for resisting the lawful commands of the captain of a vessel it is not necessary to show that the defendants are citizens of the United States, provided the unlawful acts were committed upon an American vessel. *United States v. Peterson*,* 1 Woodb. & M., 305.

§ 495. **Seamen on foreign vessels.**—Section 51 of the act of June 7, 1872, commonly called the shipping act, providing "that when any seaman who has been lawfully engaged . . . commits any of the following offenses, he shall be liable to punishment as follows, that is to say: . . . Fourthly, for wilful disobedience to any lawful command he shall be liable to imprisonment, etc. Fifthly, for continued wilful disobedience to any lawful command . . . he shall be liable to imprisonment," etc., is held to apply to seamen employed on other than American vessels, when the offense is committed within the jurisdiction of the United States. *United States v. McArdle*,* 2 Saw., 367.

§ 496. **Disobedience — Entry in log-book.**—A prosecution against a seaman for wilful disobedience, etc., under section 4596, Revised Statutes, cannot be maintained unless the master

make an entry concerning the offense in the official log-book as soon as possible after the occurrence, and read the same to the offender, or furnish him with a copy of the same, and enter his reply thereto. *United States v. Brown*,* 3 Saw., 608.

§ 497. **End of voyage.**—A voyage to a certain port for a cargo, and return to the United States, is not ended until the arrival of the vessel at the port of discharge. *United States v. Smith*,* 1 Mason, 147.

§ 498. **Self-defense.**—On an indictment for murder against a sea captain, where the defense is self-defense, slighter evidence of danger may be admitted in his justification than in that of a person on land. But it must be shown that there was a necessity for what he did, to prevent an apparent intention to commit a felony. *United States v. Wiltberger*,* 3 Wash., 515.

§ 499. **Imprisoning sailor.**—To sustain an indictment, under the statute of March 3, 1835, against the master of a vessel for imprisoning a member of his crew, it must not only be shown that the imprisonment was unlawful, but that it was inflicted by the master "from malice, hatred or revenge;" and this latter is a fact to be determined by the jury. *United States v. Alden*,* 1 Spr., 95. See § 376.

§ 500. **Murder.**—Where a seaman was in such a state of weakness and exhaustion that he was unable to perform his duty as a seaman, and such was known to the master, who ordered the seaman to go aloft, under such circumstances as that he must have foreseen that the enforcement of his order would probably be attended either by death or enormous bodily injury to the seaman by falling, so that the jury can infer that it must have been persisted in from personal malice to the deceased, or from such a brutal malignity of conduct as carries with it the plain indications of a heart regardless of social duty and fatally bent on mischief, and the seaman fell from the rigging and was drowned by reason of his weakness and exhaustion, the master is guilty of murder. In the absence of such actual or constructive malice, if the circumstances of the case show that there was gross heedlessness, want of due caution, and unreasonable exercise of authority on the part of the master, and that he ought to have known and could not but have known that the seaman was unfit to go aloft, and that there was probable and immediate danger of his life in so doing, then, notwithstanding the absence of malice, the offense is at least manslaughter. *United States v. Freeman*,* 4 Mason, 505.

§ 501. The act of 1790, ch. 9, applies to all murders and robberies committed upon or on board of American ships upon the high seas. *United States v. Gibert*,* 2 Sumn., 37.

§ 502. **Character of the vessel.**—To sustain an indictment for an offense committed on the high seas, it must be shown that the vessel on which the offense was committed was an American vessel. But the character of the ship may be proved by parol, without the production of the title papers. And when the vessel is proved to have cleared and sailed from an American port, on a whaling voyage, and to have returned there after the voyage was broken up, the jury may reasonably infer that she was an American vessel. *United States v. Crawford*,* 1 N. Y. Leg. Obs., 388. See § 373.

§ 503. **Assault.**—Under the act of March 3, 1825, punishing any person who, upon the high seas, on board an American vessel, with a dangerous weapon, commits an assault upon another, it is an assault for a distressed American seaman, who is being sent home by a consul, to threaten the mate with a dangerous weapon in his hand, on being ordered to do duty, provided he was so near the mate as to have been able to inflict a blow with the weapon by extending his arm. It is not an assault if the prisoner was at such a distance from the mate as that he could not have possibly reached him. It is not a defense that such a seaman was not a member of the crew, for the law requires him to do such duty as he is able; and the mate may order him to do duty if the captain has not ordered to the contrary. *United States v. Salisbury*,* 2 N. Y. Leg. Obs., 53.

§ 504. Upon trial of an indictment of the second mate for an assault with a dangerous weapon upon an emigrant passenger on shipboard, the jury were instructed that, if the defendant was using this weapon, which he knew to be dangerous, in a reckless manner, so that he had reasonable cause to believe that he might injure some one, he was guilty of a criminal intent, as if he had special intention to injure the passenger. If, in contest with another person, he used it unlawfully, and hit the passenger by accident, he would be guilty. But if he hit the complainant accidentally, either while engaged in a contest in which he had a right to use the weapon, or when using it to make a noise to warn the passengers to cease noisy disturbance, if used so as not to be likely to injure any one, he would not be guilty. The acts of the defendant, his language used after the occurrence, and the reasonableness of his going below armed with such a weapon, and his general peaceable and temperate character on this and other voyages, might be considered in ascertaining his motive. *United States v. McClare*,* 17 Law Rep., 439.

§ 505. If the mate, on casually meeting the master, presents a pistol, which he declares to be loaded, to the breast of the latter, it is an assault with a dangerous weapon. *United States v. Stevens*,* 4 Wash., 517.

§ 506. Using a British pass.—The owner and commander of a vessel may be punished under the act of August 13, 1813, ch. 56, for using a British pass or protection, although the pass consists of a piece of blue cloth which was intended to be affixed to the masthead, as a signal concerted with the enemy, upon seeing which they were to suffer him to pass unmolested. *United States v. Briggs*,* 2 Gall., 362.

§ 507. When consul may send seamen home.—A consul has no authority to take seamen from a vessel for criminal conduct, and send them home in another vessel for trial, except under instructions from the department of state. *United States v. Lunt*,* 18 Law Rep., 683.

§ 508. Larceny.—An indictment for larceny committed on the high seas cannot be maintained under the act of April 30, 1790, where the offense was committed on board an American vessel, while lying in an inclosed dock, in the port of Havre, in France, into which dock the water was admitted only at the will of the owner. *United States v. Hamilton*,* 1 Mason, 152.

§ 509. Under the act of congress of 1790, an indictment will not lie for larceny committed on board of an American vessel lying at the port of Savannah in the state of Georgia. The circuit court of the United States has no jurisdiction in such a case. *United States v. Davis*,* 2 N. Y. Leg. Obs., 35.

§ 510. Upon an indictment, based on the act of April 30, 1790, declaring it to be an offense "if any person upon the high seas shall take and carry away with intent to steal or purloin the personal goods of another," and charging the cook of a vessel, who also acted as steward, and whose duty it was to cook for the officers and crew alone, with stealing and purloining the provisions belonging to the owners of the vessel, and disposing of such provisions to the steerage passengers, who were to furnish their own provisions, the court instructed the jury that the taking from the constructive possession of the owner was sufficient, and the only question to be determined was whether the goods had been obtained by the prisoner with a felonious intent; that if the prisoner had intended to make away with the provisions of the vessel when he received them for cooking, he was guilty of larceny, but if he had taken possession of the goods in the first instance fairly and without felonious intent, he was not guilty. *United States v. Holland*,* 2 N. Y. Leg. Obs., 55.

2. Piracy.

[See § 2641, *infra*. Privateers, see WAR.]

SUMMARY—*Power to define piracies*, § 511.—*Defined*, §§ 512, 513.—*Power to punish foreigners*, § 514.—*Powers of congress generally*, § 515.—*Revolted subjects of a foreign power; belligerent rights*, § 516.—*Each individual liable; national character*, § 517.—*Ship taken from officers; loss of national character*, § 518.—*Murder on an American vessel*, § 519.—*Offense within foreign jurisdiction*, § 520.—*American citizen cruising against foreign nation*, § 521.—*Proof of national character of vessel*, § 522.—*Murder and robbery on a vessel having no national character*, § 523.—*Does not depend upon citizenship*, § 524.—*Whether act was performed on shipboard or on the sea*, § 525.—*Burden of showing that the vessel was a privateer*, § 526.—*Commission issued to captor, no defense, when*, § 527.—*Power to punish under act of 1790*, § 528.—*Robbery and larceny defined*, §§ 529-531.—*Seizure of arms by rioters*, § 531.

§ 511. To "define" piracies in the sense of the constitution is merely to enumerate the crimes which shall constitute piracy; and this may be done either by reference to crimes having a technical name and determinate extent, or by enumerating the acts in detail upon which the punishment is inflicted. *United States v. Smith*, §§ 532-534.

§ 512. Piracy is generally defined as robbery on the high seas, and is an offense defined and punishable by the laws of nations, and not by any particular municipal code. *Ibid.* See § 563.

§ 513. Robbery, though not punished with death if committed on land, is piracy within the eighth section of the act of congress of April 30, 1790, if committed on the high seas. *United States v. Palmer*, §§ 535-541.

§ 514. Although congress has the authority to punish piracy though the offenders may be foreigners and have committed no acts of violence against the United States, yet under the crimes act of April 30, 1790, the unlawful act must be by or against citizens of the United States in order to constitute piracy. *Ibid.*

§ 515. Congress can inflict punishment for offenses committed on board the vessels of the United States, or by citizens of the United States anywhere, but congress cannot make that piracy which was not piracy by the law of nations, in order to give jurisdiction to its own courts over such offenses. (Per JOHNSON, J.) *Ibid.*

§ 516. The revolted subjects of a foreign government are no more liable to be punished as pirates than are the loyal subjects. A commission is not necessary to exempt a person serving on a ship from conviction as a pirate. It is only necessary to show that war exists and that the vessel is really documented, owned and commanded as a belligerent vessel, and not colorably so for piratical purposes. *Ibid.*

§ 517. When embarked on a piratical cruise, every individual becomes equally punishable under the crimes act of April 30, 1790, whatever may be his national character, or whatever may have been that of the vessel in which he sailed, or the vessel he attacked. *United States v. Pirates*, §§ 542-551.

§ 518. When a ship is taken from her officers, and proceeds upon a piratical cruise, the national character of the crew is lost. *Ibid.*

§ 519. The courts of the United States may punish a piratical murder on board of an American vessel, or by means of a gun discharged or a boat's crew sent out from it. And a vessel once American does not, by starting on a piratical cruise, so become a foreign vessel that such offenses are not punishable by the United States, under the crimes act of April 30, 1790. *Ibid.*

§ 520. It is no defense to a charge of piracy in the courts of the United States, that, though the unlawful act was committed upon the high seas, yet it was within the jurisdictional limits of a foreign state, for those limits, though neutral to war, are not neutral to crimes. *Ibid.*

§ 521. An American citizen who fits out an American vessel in an American port to cruise against a foreign nation is not protected by a commission from a nation at war with such foreign nation, from acts upon Americans which would be proper, under his commission, against the foreign nation against whom he is cruising. *Ibid.*

§ 522. On an indictment for piracy, it is competent to prove the national character of the vessel upon which the aggression was committed, by evidence *in pais*, in the absence of the ship's papers. *Ibid.*

§ 523. Murder or robbery committed upon the high seas is an offense cognizable by the federal courts, though committed on board of a vessel not belonging to citizens of the United States, if she had no national character, but was possessed and held by pirates, or persons not lawfully sailing under the flag of any foreign nation. *United States v. Holmes*, §§ 552-556.

§ 524. On an indictment for piracy it makes no difference whether the defendant is a citizen of the United States or not. If the offense is committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is to be considered, *pro hac vice*, as belonging to the nation under whose flag he sails; and so if it be committed by any person, either a citizen or a foreigner, on board of a piratical vessel, the offense is cognizable by the federal courts. *Ibid.*

§ 525. Under an act of congress punishing certain acts committed on the high seas, it is immaterial whether the acts in question be performed on shipboard or in the sea. *Ibid.*

§ 526. In a prosecution for piracy, where it is claimed that the vessel on which the depredations were committed was a privateer, the burden of showing that fact is on the defendants. *Ibid.* See § 572.

§ 527. A commission issued to a person who captures a vessel at sea is no protection where it appears that the capture was not *jure belli*, but *animo furandi*. *United States v. Klinton*, §§ 557, 558.

§ 528. Although under the crimes act of April 30, 1790, subjects of a foreign state cannot be punished for piratical aggressions on foreign vessels, yet where the aggressor is a pirate, acting in defiance of all law, he may be punished by the United States, because the piratical act is against it as one of the family of nations. *Ibid.*

§ 529. Robbery is larceny accompanied by intimidation and force, and the felonious intent in taking constitutes the offense. The taking must be *animo furandi*, or, what is the same thing, *lucri causa*. *United States v. Durkee*, §§ 559-562.

§ 530. Larceny is a wrongful taking of goods, and the *lucri causa* is an essential element thereof. To constitute the offense there must be a taking from the possession, a carrying away against the will of the owner, and a felonious intent to convert the goods to the defendant's use. *Ibid.*

§ 531. It is not robbery for one of a number of rioters to break into a ship and seize arms belonging to the state which were procured to be used against the rioters, if such arms were not seized for the purpose of appropriating them, or any part of them, to the taker's own use, but simply for the purpose of preventing their being used against his associates. *Ibid.*

[NOTES.—See §§ 563-591.]

UNITED STATES *v.* SMITH.

(5 Wheaton, 153-183. 1820.)

CERTIFICATE OF DIVISION from the U. S. Circuit Court for Virginia.

STATEMENT OF FACTS.—The defendant was indicted for piracy, and the question certified was whether the facts found by the jury constituted piracy under the act of March 3, 1819. The facts found by the special verdict were as follows:

That the prisoner and others were part of the crew of a private armed vessel, called the *Creollo* (commissioned by the government of Buenos Ayres, a colony then at war with Spain), and lying in the port of Margaritta; that the said prisoner and others of the crew mutinied, confined their officer, left the vessel, and in the said port of Margaritta, seized, by violence, a vessel called the *Irresistible*, a private armed vessel, lying in that port, commissioned by the government of Artigas, who was also at war with Spain; that the said prisoner and others, having so possessed themselves of the said vessel, the *Irresistible*, appointed their officers, proceeded to sea on a cruise, without any documents or commission whatever; and while on that cruise, in the month of April, 1819, on the high seas, committed the offense charged in the indictment, by the plunder and robbery of the Spanish vessel therein mentioned.

Opinion by MR. JUSTICE STORY.

The act of congress upon which this indictment is founded provides "that if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, etc., be punished with death."

§ 532. *Power of congress to define piracy. It may be defined by enumerating the crimes constituting it, or the acts punishable as piracy.*

The first point made at the bar is, whether this enactment be a constitutional exercise of the authority delegated to congress upon the subject of piracies. The constitution declares that congress shall have power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." The argument which has been urged in behalf of the prisoner is, that congress is bound to define, in terms, the offense of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. If the argument be well founded, it seems admitted by the counsel that it equally applies to the eighth section of the act of congress of 1790 (1 Stats. at Large, 113), ch. 9, which declares that robbery and murder committed on the high seas shall be deemed piracy; and yet, notwithstanding a series of contested adjudications on this section, no doubt has hitherto been breathed of its conformity to the constitution. In our judgment the construction contended for proceeds upon too narrow a view of the language of the constitution. The power given to congress is not merely "to define and punish piracies;" if it were, the words "to define" would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime. And it has been very justly observed, in a celebrated commentary, that the definition of piracies might have been left, without inconvenience, to the law of nations, though a legislative definition of them is to be found in most municipal codes. The *Federalist*, No. 42, p. 276. But the power is also given "to define and punish felonies on the high seas and offenses against the law of nations." The term "felonies" has been supposed, in the same work,

not to have a very exact and determinate meaning in relation to offenses at the common law committed within the body of a county. However this may be in relation to offenses on the high seas, it is necessarily somewhat indeterminate, since the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law. See 3 Inst., 112; Hawk. P. C., ch. 37; Moore, 576. Offenses, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. In respect, therefore, as well to felonies on the high seas as to offenses against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish; and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question.

But supposing congress were bound, in all the cases included in the clause under consideration, to define the offense, still there is nothing which restricts it to a mere logical enumeration in detail of all the facts constituting the offense. Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term. That is certain which is by necessary reference made certain. When the act of 1790 declares that any person who shall commit the crime of robbery or murder on the high seas shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law. In fact, by such a reference, the definitions are necessarily included as much as if they stood in the text of the act. In respect to murder, where "malice aforethought" is of the essence of the offense, even if the common law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" would remain to be gathered from the common law. There would then be no end to our difficulties or our definitions, for each would involve some terms which might still require some new explanation. Such a construction of the constitution is, therefore, wholly inadmissible. To define piracy, in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name, and determinate extent, or by enumerating the acts in detail upon which the punishment is inflicted.

§ 533. *Piracy is an offense against the law of nations, and is defined by that law as robbery upon the sea.*

It is next to be considered whether the crime of piracy is defined by the law of nations with reasonable certainty. What the law of nations on this subject is may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law. There is scarcely a writer on the law of nations who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur in holding that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. The same doctrine is held by all the great writers on maritime law in terms that admit of no reasonable doubt. (a) The common law, too, recognizes and punishes piracy as an offense, not against its own municipal code, but as an offense against the law of nations (which is

(a) Santerna, lib. 4, note 50, for instance, says: "Inter piratam et latronem, non sit alia differentia, nisi quia pirata depredator est in mari et potest dici fur et latro maris, quia latrocinium et furtum sicut fit in terra, sic fit in mari." And Emerigon, 1 Emerig. Assur., ch. 12, sec. 20, p. 523: "La piraterie est un brigandage sur mer. Le Brigandage, sur terre est appellé vol ou rapine." So Straccha "Piratae sunt latrones maritimi."

part of the common law), as an offense against the universal law of society, a pirate being deemed an enemy of the human race. Indeed, until the statute of 28th of Henry VIII., ch. 15, piracy was punishable in England only in the admiralty as a civil law offense, and that statute, in changing the jurisdiction, has been universally admitted not to have changed the nature of the offense. Hawk. P. C., ch. 37, sec. 2; 3 Inst., 112. Sir Charles Hedges, in his charge at the admiralty sessions, in the case of *Rex v. Dawson*, 5 State Trials, declared, in emphatic terms, that "piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty." Sir Leoline Jenkins, too, on a like occasion, declared that "a robbery, when committed upon the sea, is what we call piracy;" and he cited the civil law writers in proof. And it is manifest, from the language of Sir William Blackstone (4 Bl. Comm., 73), in his comments on piracy, that he considered the common law definition as distinguishable in no essential respect from that of the law of nations. So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offense against the law of nations, and that its true definition, by that law, is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offense is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. We have, therefore, no hesitation in declaring that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth section of the act of 1819.

§ 534. *Acts held to constitute piracy under act of March 3, 1819.*

Another point has been made in this case, which is, that the special verdict does not contain sufficient facts upon which the court can pronounce that the prisoner is guilty of piracy. We are of a different opinion. The special verdict finds that the prisoner is guilty of the plunder and robbery charged in the indictment; and finds certain additional facts from which it is most manifest that he and his associates were, at the time of committing the offense, freebooters upon the sea, not under the acknowledged authority or deriving protection from the flag or commission of any government. If, under such circumstances, the offense be not piracy, it is difficult to conceive any which would more completely fit the definition.

It is to be certified to the circuit court that, upon the facts stated, the case is piracy, as defined by the law of nations, so as to be punishable under the act of congress of the 3d of March, 1819.

MR. JUSTICE LIVINGSTON dissented, on the ground "that there is not to be found in the act that definition of piracy which the constitution requires," and that judgment, therefore, ought to be rendered for the prisoner.

UNITED STATES v. PALMER.

(3 Wheaton, 610-644. 1818.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Massachusetts. Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—In this case, a series of questions has been proposed by the circuit court of the United States for the district of Massachusetts, on

which the judges of that court were divided in opinion. The questions occurred on the trial of John Palmer, Thomas Wilson and Barney Calloghan, who were indicted for piracy committed on the high seas. The first four questions relate to the construction of the eighth section of the "act for the punishment of certain crimes against the United States." The remaining seven questions respect the rights of a colony or other portion of an established empire which has proclaimed itself an independent nation, and is asserting and maintaining its claim to independence by arms.

The eighth section of the act on which these prisoners were indicted is in these words: "And be it enacted, that if any person or persons shall commit, upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offense, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner of any ship or other vessel shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of \$50, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defense of his ship, or goods committed to his trust, or shall make a revolt in the ship,—every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."

§ 535. *Robbery when committed on land is not punishable with death; but if committed at sea it becomes piracy and is so punishable.*

Robbery committed on land, not being punishable by the laws of the United States with death, it is doubted whether it is made piracy by this act, when committed on the high seas. The argument is understood to be, that congress did not intend to make that a capital offense on the high seas which is not a capital offense on land. That only such murder, and such robbery, and such other offense as, if committed within the body of a county, would, by the laws of the United States, be punishable with death, is made piracy. That the word "other" is without use or meaning, if this construction be rejected. That it so connects murder and robbery with the following member of the sentence as to limit the words murder and robbery to that description of those offenses which might be made punishable with death, if committed on land. That in consequence of this word the relative "which" has for its antecedent the whole preceding part of the sentence, and not the words "other offenses." That section consists of three distinct classes of piracy. The first, of offenses which, if committed within the body of a county, would be punishable with death. The second and third, of particular offenses which are enumerated. This argument is entitled to great respect, on every account; and to the more, because, in expounding a law which inflicts capital punishment, no over rigid construction ought to be admitted. But the court cannot assent to its correctness.

The legislature having specified murder and robbery particularly are understood to indicate clearly the intention that those offenses shall amount to piracy; there could be no other motive for specifying them. The subsequent words do not appear to be employed for the purpose of limiting piratical murder and robbery to that description of those offenses which is punishable with

death, if committed on land, but for the purpose of adding other offenses, should there be any, which were not particularly recited, and which were rendered capital by the laws of the United States, if committed within the body of a county. Had the intention of congress been to render the crime of piracy dependent on the punishment affixed to the same offense, if committed on land, this intention must have been expressed in very different terms from those which have been selected. Instead of enumerating murder and robbery as crimes which should constitute piracy, and then proceeding to use a general term, comprehending other offenses, the language of the legislature would have been, that "any offense" committed on the high seas, which, if committed in the body of a county, would be punishable with death, should amount to piracy.

The particular crimes enumerated were undoubtedly first in the mind of congress. No other motive for the enumeration can be assigned. Yet, on the construction contended for, robbery on the high seas would escape unpunished. It is not pretended that the words of the legislature ought to be strained beyond their natural meaning, for the purpose of embracing a crime which would otherwise escape with impunity; but when the words of a statute, in their most obvious sense, comprehend an offense, which offense is apparently placed by the legislature in the highest class of crimes, it furnishes an additional motive for rejecting a construction narrowing the plain meaning of the words, that such construction would leave the crime entirely unpunished.

The correctness of this exposition of the eighth section is confirmed by those which follow. The ninth punishes those citizens of the United States who commit the offenses described in the eighth, under color of a commission or authority derived from a foreign state. Here robbery is again particularly specified. The tenth section extends the punishment of death to accessories before the fact. They are described to be those who aid, assist, advise, etc., etc., any person to "commit any murder, robbery, or other piracy aforesaid." If the word "aforesaid" be connected with "murder" and "robbery" as well as with "other piracy," yet it seems difficult to resist the conviction that the legislature considered murder and robbery as acts of piracy. The eleventh section punishes accessories after the fact. They are those who, "after any murder, felony, robbery, or other piracy whatsoever, aforesaid," shall have been committed, shall furnish aid to those by whom the crime has been perpetrated. Can it be doubted that the legislature considered murder, felony and robbery committed on the high seas as piracies?

If it be answered that, although this opinion be entertained, yet if the legislature was mistaken, those whose duty it is to construe the law must not yield to that mistake, we say that when the legislature manifests this clear understanding of its own intention, which intention consists with its words, courts are bound by it. Of the meaning of the term robbery, as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law. The question whether this act extends further than to American citizens, or to persons on board American vessels, or to offenses committed against citizens of the United States, is not without its difficulties. The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offense against the United States. The only question is, has the legislature enacted such a law? Do the

words of the act authorize the courts of the Union to inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag, nor offending particularly against them?

§ 536. *The act (1 Stats. at Large, 113) is limited to offenses against the United States committed on the high seas, and does not provide for the punishment of offenses by foreigners or on foreign ships. Construction of statutes.*

The words of the section are in terms of unlimited extent. The words "any person or persons" are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them. Did the legislature intend to apply these words to the subjects of a foreign power, who in a foreign ship may commit murder or robbery on the high seas? The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature. The title of this act is, "An act for the punishment of certain crimes against the United States." It would seem that offenses against the United States, not offenses against the human race, were the crimes which the legislature intended by this law to punish. The act proceeds upon this idea, and uses general terms in this limited sense. In describing those who may commit misprision of treason or felony, the words used are "any person or persons;" yet these words are necessarily confined to any person or persons owing permanent or temporary allegiance to the United States.

The eighth section also commences with the words "any person or persons." But these words must be limited in some degree, and the intent of the legislature will determine the extent of this limitation. For this intent we must examine the law. The succeeding member of the sentence commences with the words: "If any captain or mariner of any ship or other vessel shall piratically run away with such ship or vessel, or any goods or merchandise to the value of \$50, or yield up such ship or vessel voluntarily to any pirate." The words "any captain, or mariner of any ship or other vessel," comprehend all captains and mariners, as entirely as the words "any person or persons" comprehend the whole human race. Yet it would be difficult to believe that the legislature intended to punish the captain or mariner of a foreign ship, who should run away with such ship, and dispose of her in a foreign port, or who should steal any goods from such ship to the value of \$50, or who should deliver her up to a pirate when he might have defended her, or even according to previous arrangement. The third member of the sentence also begins with the general words "any seaman." But it cannot be supposed that the legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government, who should lay violent hands upon his commander, or make a revolt in the ship. These are offenses against the nation under whose flag the vessel sails and within whose particular jurisdiction all on board the vessel are. Every nation provides for such offenses the punishment its own policy may dictate; and no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government.

That the general words of the two latter members of this sentence are to be restricted to offenses committed on board the vessels of the United States furnishes strong reason for believing that the legislature intended to impose the same restriction on the general words used in the first member of that sentence. This construction derives aid from the tenth section of the act.

That section declares that "any person" who shall "knowingly and wittingly aid and assist, procure, command, counsel or advise any person, or persons, to do or commit any murder or robbery, etc.," shall be an accessory before the fact, and, on conviction, shall suffer death. It will scarcely be denied that the words "any person," when applied to aiding or advising a fact, are as extensive as the same words when applied to the commission of that fact. Can it be believed that the legislature intended to punish with death the subject of a foreign prince, who, within the dominions of that prince, should advise a person, about to sail in the ship of his sovereign, to commit murder or robbery? If the advice is not a crime within the law, neither is the fact advised a crime within the law. The opinion formed by the court on this subject might be still further illustrated by animadversions on other sections of the act. But it would be tedious, and is thought unnecessary.

The court is of opinion that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States. This opinion will probably decide the case to which it is intended to apply. Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for, its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult.

§ 537. *The relations of the United States to insurgent portions of foreign nations is of exclusively political cognizance. The courts can only follow the co-ordinate branches of the government.*

As it is understood that the construction which has been given to the act of congress will render a particular answer to them unnecessary, the court will only observe that such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are intrusted all its foreign relations; than to that tribunal whose power, as well as duty, is confined to the application of the rule which the legislature may prescribe for it. In such contests, a nation may engage itself with the one party or the other; may observe absolute neutrality; may recognize the new state absolutely; or may make a limited recognition of it. The proceeding in courts must depend so entirely on the course of the government that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. To decide otherwise would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arraign the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department.

§ 538. *That defendants are in the service of a self-declared government may be proved as other facts are proved. The seal of such government does not prove itself.*

It follows, as a consequence, from this view of the subject, that persons on

vessels, employed in the service of a self-declared government, thus acknowledged to be maintaining its separate existence by war, must be permitted to prove the fact of their being actually employed in such service, by the same testimony which would be sufficient to prove that such vessel or person was employed in the service of an acknowledged state. The seal of such unacknowledged government cannot be permitted to prove itself; but it may be proved by such testimony as the nature of the case admits; and the fact that such vessel or person is so employed may be proved without proving the seal.

Opinion by MR. JUSTICE JOHNSON.

The first of these questions arises on the construction of the first division of the eighth section of the act for the punishment of certain crimes. That act comprises two classes of cases, the second of which may again be subdivided into two divisions. In the second class of cases, each crime is specifically described in the ordinary mode of defining crimes, and so far the constitutional power of defining and punishing piracies and felonies on the high seas is strictly complied with. But, with regard to the first class of cases, the legislature refers for a definition to other sources—to information not to be found in that section itself. The words are these: "If any person shall commit upon the high seas, etc., murder or robbery, or any other offense, which, if committed in the body of a county, would, by the laws of the United States, be punishable with death, etc., such person shall, upon conviction thereof, suffer death." Thus referring to the common law definition of murder and robbery alone, or to the common law definition of murder and robbery, with the superadded statutory requisite of being made punishable with death, if committed on land, in order to define the offense, which, under that section, is made capitally punishable.

The crime of robbery is the offense charged in this indictment, and the question is, whether it must not be shown that it must have been made punishable with death, if committed on land, in order to subject the offender to that punishment, if committed on the high seas. And singular as it may appear, it really is the fact in this case, that these men's lives may depend upon a comma more or less, or upon the question whether a relative, which may take in three antecedents just as well as one, shall be confined to one alone. Upon such a question I here solemnly declare that I never will consent to take the life of any man in obedience to any court; and if ever forced to choose between obeying this court on such a point, or resigning my commission, I would not hesitate adopting the latter alternative. But to my mind it is obvious that both the intent of the legislature and the construction of the words are in favor of the prisoners. This, however, is more than I need contend for, since a doubt relative to that construction or intent ought to be as effectual in their favor as the most thorough conviction.

When the intent of the legislature is looked into, it is as obvious as the light, and requires as little reasoning to prove its existence, that the object proposed was, with regard to crimes which may be committed either on the sea or land, to produce an uniformity in the punishment, so that where death was inflicted in the one case it should be inflicted in another. And congress certainly legislated under the idea that the punishment of death had been previously enacted for the crime of robbery on land, as it had in fact been for murder and some other crimes. And in my opinion this intent ought to govern the grammatical construction, and make the relative to refer to all three of the antecedents,

murder, robbery and other crimes, instead of being confined to the last alone. That it may be so applied consistently with grammatical correctness, none can deny; and if so, in *favorem vitæ*, we are, in my opinion, legally bound to give it that construction. Again; there is no reason to think that the word *other* is altogether a supernumerary member of the sentence. To give the construction contended for in behalf of the United States, that word must be rendered useless and inoperative; the sentence has the same meaning with or without it. But if we retain it and substitute its definition, or examine its effect upon the meaning of the terms associated with it, we then have the following results: *other* is commonly defined to mean *not the same*, or (what is certainly synonymous), *not before* mentioned. With this expression, the sentence would read thus: "murder, or robbery, or any offense not before mentioned," for which the punishment of death is by law inflicted. And as the use of the comma is exceedingly arbitrary and indefinite, by expunging all the commas from the sentence the meaning becomes still more obvious. Or if, instead of substituting the words not before mentioned, we introduce the single term unenumerated, in the sense of which the term *other* is unquestionably used by the legislature, the conclusion becomes irresistible in favor of the prisoners. There is another view of this subject that leads to the same conclusion; by supplying an obvious elision, the same meaning is given to this section. The word *other* is responded to by *than*, and the repetition of the excluded words is understood. Thus, in the case before us, by supplying the elision, we make "murder, robbery, or any crime other than murder or robbery," punishable, etc., the signification of which words, had they been used, would have left no doubt.

There are several inconsistencies growing out of a construction unfavorable to the prisoners which merit the most serious consideration. The first is, the most sanguinary character that it gives to this law in its operation; for it is literally true, that under it a whole ship's crew may be consigned to the gallows for robbing a vessel of a single chicken, even although a robbery committed on land for thousands may not have been made punishable beyond whipping or confinement. If natural reason is not to be consulted on this point, at least the mild and benignant spirit of the laws of the United States merit attention. With regard to the mail, this inconsistency actually may occur under existing laws, should the mail ever again be carried by water as it has been formerly. This cannot be consistent with the intention of the legislature.

But, it is contended, if congress had not intended to make murder and robbery punishable with death, independently of the circumstance of those offenses being so made punishable when committed on land, they would have omitted those specified crimes altogether from this section, and have enacted generally that all crimes made punishable with death on land should be punished with death if committed on the seas, without enumerating murder and robbery. This is fair reasoning; and in any case but one of life and death it might have some weight; but in no case very great weight, because, in that respect, a legislature is subject to no laws in the selection of the course to be pursued. In this case the obvious fact is, that they commenced enumerating, and fearing some omission of crimes then supposed subject by law to death, these general descriptive words are resorted to. But every other crime that this division of the section comprises was punishable with death, both those which precede robbery in the enumeration and those which come after. Robbery, except in case of the mail, stands alone; and no doubt was introduced under the idea that that also had the same punishment attached to it. If it had not,

In fact, then it was not the case on which the legislature intended to act, and, according to my views of the grammatical or philological construction of the sentence, it is one on which they have not acted. This construction derives considerable force, also, from the consideration that this act is framed on the model of the British statute, which avowedly had this uniformity for its object.

The second question proposed in this case is one on which, I presume, there can be no doubt. For the definition of robbery under this act we must look for the definition of the term in the common law, or we shall find it nowhere; and, according to my construction, superadd to that definition the circumstance of its being made punishable with death, under the laws of the United States, if committed on land, and you have described the offense made punishable under this section. There are eleven questions certified from the circuit court of Massachusetts; but of those eleven these two only appear to me to arise out of the case. The transcript contains nothing but the indictment and impaneling the jury. No motion, no evidence, no demurrer *ore tenus*, or case stated, appears upon the transcript, on which the remaining questions could arise. On the indictment the first two questions might well have been raised by the court themselves, as of counsel for the prisoners; but as far as appears to this court, all the other questions might as well have been raised in any other case. I here enter my protest against having these general questions adjourned to this court. We are constituted to decide causes, and not to discuss themes or digest systems. It is true, the words of the act respecting division of opinion in the circuit court are general; but independently of the consideration that it was not to be expected that the court could be divided unless upon questions arising out of some cause depending, the words in the first proviso, "that the cause may be proceeded in," plainly show that the questions contemplated in the act are questions arising in a cause depending; and if so, it ought to be shown that they do arise in the cause, and are not merely hypothetical. In the case of *Martin v. Hunter*, 7 Cranch, 603, 1 Wheat., 304, this court expressly acted upon this principle, when it went into a consideration of the question whether any estate existed in the plaintiff in error, before it would consider the question on the construction of the treaty, as applicable to that estate.

§ 539. *Congress cannot make that piracy which is not piracy by the law of nations.*

If, however, it becomes necessary to consider the other questions in this case, I will lay down a few general principles, which, I believe, will answer all: 1. Congress can inflict punishment on offenses committed on board the vessels of the United States, or by citizens of the United States anywhere; but congress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offenses.

§ 540. *Revolted subjects of a foreign state are no more liable to be punished as pirates than loyal subjects.*

2. When open war exists between a nation and its subjects, the subjects of the revolted country are no more liable to be punished as pirates than the subjects who adhere to their allegiance; and whatever immunity the law of nations gives to the ship, it extends to all who serve on board of her, excepting only the responsibility of individuals to the laws of their respective countries.

§ 541. *All that is necessary to exempt parties from prosecution as pirates is to prove that war really exists, and that the vessel is really a belligerent, not affected so for piratical purposes.*

3. The proof of a commission is not necessary to exempt an individual serv-

ing on board a ship engaged in the war, because any ship of a belligerent may capture an enemy; and whether acting under a commission or not, is an immaterial question as to third persons; he must answer that to his own government. It is only necessary to prove two facts: 1. The existence of open war. 2. That the vessel is really documented, owned and commanded as a belligerent vessel, and not affectedly so for piratical purposes.

4. For proof of property and documents, it is not to be expected that any better evidence can be produced than the seal of the revolted country, with such reasonable evidence as the case may admit of to prove it to be known as such; and a seal once proved or admitted to a court ought afterwards to be acknowledged by the court officially, at least, as against the party who has once acknowledged it.

UNITED STATES v. PIRATES.

(5 Wheaton, 184-206. 1820.)

CERTIFICATES OF DIVISION from the U. S. Circuit Courts for South Carolina and Georgia.

STATEMENT OF FACTS.—Three of the indictments in these cases were against Furlong. The first two charged a piratical murder by Furlong, a British subject, from an American vessel, on an English vessel and crew, the person killed being an English subject. The third charged a piratical robbery, on a vessel of the United States, from a vessel of the United States which had been run away with by her captain and crew.

In the case against Brailsford and Griffin, one of the questions certified was, whether an American citizen, who fits out a vessel in an American port, to cruise against a power at peace with the United States, is protected by a commission from a belligerent from punishment for any offense committed by him against vessels of the United States. Another had reference to the situation of the vessel,—whether it was “upon the high seas,”—and to the meaning of the words “out of the jurisdiction of any particular state.”

The indictments against Bowers and Mathews charged piratical robberies, committed in one case upon an American vessel, the *Asia*, and in the other upon a vessel owned by British subjects, the *Sir Thomas Hardy*. The defendants were citizens of the United States and a part of the crew of the ship *Louisa*. The *Louisa* was commissioned by Buenos Ayres, and commanded by Almeida. There was no proof that she was American owned. Her crew put the officers out of the ship and proceeded upon a piratical voyage.

The nature of the questions certified in the several cases will appear sufficiently from the opinion.

Opinion by MR. JUSTICE JOHNSON.

A variety of questions have been referred to this court in these cases; and in the decisions to be certified to the circuit court, it will be necessary to notice each question in every case; but in the opinion now to be expressed, the whole may be considered in connection, as they all depend upon the construction of the same laws.

§ 542. *Individuals, of whatever nationality, embarked on a piratical cruise, are punishable under act of April 30, 1790.*

In the two cases of *United States v. Smith*, 5 Wheat., 153 (§§ 532-534, *supra*), and *United States v. Klintock*, 5 Wheat., 144 (§§ 557, 558, *infra*), it has been already adjudged that the eighth section of the act of 1790 was not repealed by

the fifth section of that of 1819, and that the decision in Palmer's case does not apply to the case of a crew whose conduct is such as to set at naught the idea of thus acting under allegiance to any acknowledged power. From which it follows that, when embarked on a piratical cruise, every individual becomes equally punishable under the law of 1790, whatever may be his national character, or whatever may have been that of the vessel in which he sailed, or of the vessel attacked.

§ 543. — *national character of vessel and crew lost when the crew embark on such a cruise.*

This decision furnishes an answer to all those questions made in the above cases, which are founded on distinctions in the national character of the prisoner, or in that of the vessels, in relation to the piracies committed by the crew of the *Louisa*. The moment that ship was taken from her officers, and proceeded on a piratical cruise, the crew lost all claim to national character, and whether citizens or foreigners, became equally punishable under the act of 1790. It also furnishes an answer to all the exceptions taken in the case of piracy charged against Furlong. For whatever the court might have thought of the effect of the act of 1819, he would have been still punishable under the act of 1790. The indictment against him is general, against the form of the statute in such case made and provided, and it matters not that his offense was committed subsequent to passing the act of 1819, since the other act still remains in force, and reaches his case.

It would seem to be unnecessary to go further in the cases against Furlong, as this conclusion decides his fate; but this court cannot foresee how far it may be necessary to the administration of justice, against accessories or otherwise, that the question in the cases of murder should also be decided. The question, whether murder committed at sea on board a foreign vessel be punishable by the laws of the United States, if committed by a foreigner upon a foreigner, is one which involves a variety of considerations, and which, in the two cases before us, is presented under an obvious distinction; on the one indictment it appears as having been committed simply on board the *Anne*, of Scarborough, a foreign vessel, by a foreigner upon a foreigner; on the other, as committed on board the *Anne*, of Scarborough, from an American vessel, by a mariner of the American vessel. It is obvious that neither case comes within the express words of the decision in Palmer's case. And with regard to the case in which the American vessel is brought in view, there can exist but one difficulty.

§ 544. *A murder committed on the seas by a boat's crew sent for the purpose from a piratical vessel is punishable under act of 1790.*

No difference can be supposed to exist between the case of a murder committed on the seas by means of a gun discharged from a vessel, and by means of a boat's crew dispatched for that purpose, as was actually the case here. And as to the right of the United States to punish all offenses committed on or from on board their own vessels, it cannot be doubted; nor has it been doubted that the act of 1790 extends to such offenses when committed on the seas. But we have decided that in becoming a pirate, the *Mary*, of Mobile, from which the prisoner committed this offense, lost her national character. Could she, then, be denominated an American vessel? We are of opinion that the question is immaterial; for, whether as an American or a pirate ship, the offense committed from her was equally punishable, and the words of the act extend to her in both characters. But if it were necessary to decide the ques-

tion we should find no difficulty in maintaining that no man shall, by crime, put off an incident to his situation which subjects him to punishment. A claim to protection may be forfeited by the loss of national character, where no rights are acquired, or immunity produced by that cause.

§ 545. *Section 8 of the act of 1790 does not extend the punishment for murder to cases where it is committed by a foreigner upon a foreigner in a foreign ship; otherwise as to piracy.*

The other case presents a question of more difficulty. It includes the case of a murder committed by one of a crew upon another, on board a foreign vessel on the high seas. The prisoner is a British subject, the deceased was the same, and the ship also British. This, though not in all its circumstances the same, is, in principle, precisely that of the *United States v. Palmer* (3 Wheat., 610; §§ 535-541, *supra*). The only difference is, that the case of *Palmer* supposes the prisoner and the deceased to belong to different vessels, and the certificate of the court would seem to cover the case of an American as well as a foreigner, who commits an offense on board a foreign vessel.

So far as relates to the point now under consideration, I have no objection to accede to the decision in the case of *Palmer*. I did not unite in the opinion of the court in that case, on this point, because I thought it was carried too far in being extended to piracy as well as murder, and to American citizens as well as foreigners. To me it appears that the only fair deduction from the obvious want of precision, in language and in thought, discoverable in the act of 1790, and insisted on in the case of *Palmer*, is, that in construing it we should test each case by a reference to the punishing powers of the body that enacted it. The reasonable presumption is, that the legislature intended to legislate only on cases within the scope of that power; and general words made use of in that law, ought not, in my opinion, to be restricted so as to exclude any cases within their natural meaning. As far as those powers extended, it is reasonable to conclude that congress intended to legislate, unless their express language shall preclude that conclusion. It is true that the eighth section declares murder as well as robbery to be piracy; but in my view, if anything is to be inferred from this association, it is only that they meant to assert the right of punishing murder to the same extent that they possessed the right of punishing piracy; which would be carrying the construction beyond what I contend for. The contrary conclusion, namely, that they meant to limit the cases of piracy made punishable under that act to the cases in which they might upon principle punish murder, is rebutted by the generality of the terms used; and it would seem that, with this object in view, they ought to have taken the contrary course, and declared piracy to be murder.

It is obvious that the penman who drafted the section under consideration acted from an indistinct view of the divisions of his subject. He has blended all crimes punishable under the admiralty jurisdiction in the general term of piracy. But there exist well known distinctions between the crimes of piracy and murder, both as to constituents and incidents. Robbery on the seas is considered as an offense within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt that the plea of *autrefois acquit* would be good in any civilized state, though resting on a prosecution instituted in the courts of any other civilized state. Not so with the crime of murder. It is an offense too abhorrent to the feelings of man to have made it necessary that it also should have been brought within this universal jurisdiction. And hence, punishing it when committed within the juris-

diction, or (what is the same thing) in the vessel of another nation, has not been acknowledged as a right, much less an obligation. It is punishable under the laws of each state, and I am inclined to think that an acquittal in this case would not have been a good plea in a court of Great Britain. Testing my construction of this section, therefore, by the rule that I have assumed, I am led to the conclusion that it does not extend the punishment ~~for murder~~ to the case of that offense committed by a foreigner, ~~upon a foreigner~~, in a foreign ship. But otherwise as to piracy; ~~for that~~ is a crime within the acknowledged reach of the ~~punishing power~~ of congress.

§ 546. *American citizens in foreign service not exempt from the operation of laws of the United States.*

As to our own citizens, I see no reason why they should be exempted from the operation of the laws of the country, even though in foreign service. Their subjection to those laws follows them everywhere; in our own courts they are secured by the constitution from being twice put in jeopardy of life or member, and if they are also made amenable to the laws of another state, it is the result of their own act in subjecting themselves to those laws. Nor is it any objection to this opinion that the law declares murder to be piracy. These are things so essentially different in their nature, that not even the omnipotence of legislative power can confound or identify them. Had congress, in this instance, declared piracy to be murder, the absurdity would have been felt and acknowledged; yet, with a view to the exercise of jurisdiction, it would have been more defensible than the reverse, for in one case it would restrict the acknowledged scope of its legitimate powers, in the other extend it. If, by calling murder piracy, it might assert a jurisdiction over that offense committed by a foreigner in a foreign vessel, what offense might not be brought within their power by the same device? The most offensive interference with the governments of other nations might be defended on the precedent. Upon the whole, I am satisfied that congress neither intended to punish murder in cases with which they had no right to interfere, nor leave unpunished the crime of piracy in any cases in which they might punish it; and this view of the subject appears to me to furnish the only sufficient key to the construction of the eighth section of the act of 1790.

As to piracy, since the decision that a vessel, by assuming a piratical character, is no longer included in the description of a foreign vessel, no case of difficulty can occur, unless the piracy be committed by the crew of a foreign vessel upon their own vessel, or by persons issuing immediately from shore. If such cases occur under the act of 1790, I shall respectfully solicit a revision of Palmer's case, if it be considered as including those cases, and shall do the same in the case of murder committed by an American in a foreign ship, if it ever occur, under the belief that it never could have been the intention of congress that such an offender should find this country a secure asylum to him.

§ 547. *The character of a vessel may be established as a matter in pais.*

There are a few minor points presented in these cases which it is necessary to notice. It was moved, in favor of the prisoners, that the only legal testimony of the character of the ships plundered must have relation to their register, or rather to the documentary papers which establish their national character. But this we think wholly indefensible. It is obvious that such testimony might be suppressed in various ways by the aggressors. Nor is it at all decisive of the real ownership of a vessel. Our laws recognize the possibility of the register's existing in the name of one, whilst the property is really

in another person. The laws that require such documents to be on board a vessel have relation to financial, commercial or international objects, but are not decisive or necessary in a prosecution for this offense. Property or character is a matter *in pais*, and so to be established. However, it is unnecessary to examine the question further, as we have decided that the national character of the vessels plundered was, in these cases, wholly immaterial to the crime.

§ 548. "*Out of the jurisdiction of any particular state*" refers to states of the Union.

It was also moved, in two of the cases of piracy, that as the offenses charged were committed on vessels then lying at anchor near the shore of the islands of Mayo and Bonavista, in a road, and within a marine league of the shore, the prisoners could not be convicted: 1. Because the words "out of the jurisdiction of any particular state," in the eighth section of the act of 1790, include foreign as well as domestic states. 2. Because a vessel at anchor in a road is not a vessel on the high seas, as charged in the indictment.

On the first point, we think it obvious that out of any particular state must be construed to mean "out of any one of the United States." By examining the context it will be seen that particular state is uniformly used in contradistinction to United States. For what reason, it is not easy to imagine; but it is obvious that the only piracies omitted to be punished by that act are land piracies, and piracies committed in our waters.

§ 549. *A vessel in an open road is at sea.*

On the second point, we are of opinion that a vessel in an open road may well be found by a jury to be on the seas. It is historically known that in prosecuting trade with many places, vessels lie at anchor in open situations (and especially where the trade-winds blow), under the lee of the land. Such vessels are neither in a river, haven, basin or bay, and are nowhere unless it be on the seas. Being at anchor is immaterial, for this might happen in a thousand places in the open ocean, as on the Banks of Newfoundland. Nor can it be objected that it was within the jurisdictional limits of a foreign state; for those limits, though neutral to war, are not neutral to crimes.

§ 550. *Each count in an indictment is a substantive charge; a verdict conforming to any count which in itself will support it is sufficient.*

It was also moved in the same cases that as there were two counts in the indictment, the one charging the offenses as committed on the high seas, the other in a haven, basin or bay, a general verdict of guilty could not be sustained, on account of repugnancy and inconsistency, as both facts could not be true. But on this it is only necessary to remark that each count is a distinct substantive charge. Internal repugnancy in any one is a good exception, but *non constat* as to the whole, taken severally, but each may be for a distinct offense.

§ 551. *A commission to cruise as a privateer does not excuse acts of piracy.*

There is finally another question certified to this court in one of the cases which arose under the captures made by the Louisa. It is, whether an American citizen, fitting out a vessel in an American port, really to cruise against a power at peace with the United States, is protected, by a commission from a power belligerent as to the power against which he undertakes to cruise, from offenses committed by him against the United States? It will be seen that the object of this question is to bring the whole crew of the Louisa under the immunities which it is supposed Almeida might have claimed by virtue of his

commission. But, having decided that the vessel and crew had forfeited all pretensions to national or belligerent character, this question is anticipated. Yet, lest the ingenious views on this point, presented to the court by one of the gentlemen who argued it, should tempt the unwary into practices that may be fatal to them, we think it proper to remark that in *Klintock's* case it has been decided that a belligerent character may be put off, and a piratical one assumed, even under the most unquestionable commission. And if the laws of the United States declare those acts piracy in a citizen, when committed on a citizen, which would be only belligerent acts when committed on others, there can be no reason why such laws should not be enforced. For this purpose the ninth section of the act of 1790 appears to have been passed. And it would be difficult to induce this court to render null the provisions of that clause, by deciding either that one who takes a commission under a foreign power can no longer be deemed a citizen, or that all acts committed under such a commission must be adjudged belligerent and not piratical acts.

UNITED STATES *v.* HOLMES.

(5 Wheaton, 412-420. 1819.)

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—This case comes before the court upon a division of opinion of the judges of the circuit court for the district of Massachusetts. The defendants are indicted for murder committed on the high seas; and the questions adjourned to this court are,

1. Whether the circuit court had jurisdiction of the offense charged in the indictment, unless the vessel on board of which the offense was committed was at the time owned by a citizen or citizens of the United States, and was lawfully sailing under its flag.

2. Whether the court had jurisdiction of the offense charged in the indictment, if the vessel on board of which it was committed, at the time of the commission thereof, had no real national character, but was possessed and held by pirates, or by persons not lawfully sailing under the flag, or entitled to the protection, of any government whatever.

3. Whether it made any difference as to the point of jurisdiction whether the prisoners or any of them were citizens of the United States, or that the offense was consummated, not on board of any vessel, but in the high seas.

4. Whether the burden of proof of the national character of the vessel on board of which the offense was committed was on the United States, or, under the circumstances stated in the charge of the court, was on the prisoner.

§ 552. *The courts of the United States have jurisdiction in cases of murder and robbery on the high seas, except where they are committed on a vessel, in fact and in right, the property of subjects of a foreign power.*

The first two questions have been decided by this court at its present session. In *United States v. Klintock*, 5 Wheat., 144 (§§ 557, 558, *infra*), it was laid down that, to exclude the jurisdiction of the courts of the United States, in cases of murder or robbery committed on the high seas, the vessel in which the offender is, or to which he belongs, must be at the time, in fact as well as in right, the property of a subject of a foreign state, and, in virtue of such property, subject at that time to his control.

§ 553. — *they have cognizance in cases where the vessel is possessed and held by persons not lawfully sailing under the flag of a foreign nation.*

But if the offense be committed in a vessel, not at the time belonging to subjects of a foreign state, but in possession of persons acknowledging obedience to no government or flag, and acting in defiance of all law, it is embraced by the act of the 30th of April, 1790. It follows, therefore, that murder or robbery committed on the high seas may be an offense cognizable by the courts of the United States, although it was committed on board of a vessel not **belonging** to citizens of the United States, as if she had no national character, but was possessed **and held** by pirates, or persons not lawfully sailing under the flag of any foreign nation.

§ 554. *The offender should be considered, pro hac vice, as belonging to the nation under whose flag he sails.*

The third question contains two propositions. 1. As to the national character of the offender, and of the person against whom it is committed; and, 2. As to the place where the offense is committed.

In respect to the first, the court is of opinion, and so it has been decided during the present term, that it makes no difference whether the offender be a citizen of the United States or not. If it be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is to be considered, *pro hac vice*, and in respect to this subject, as belonging to the nation under whose flag he sails. If it be committed, either by a citizen or a foreigner, on board of a piratical vessel, the offense is equally cognizable by the courts of the United States, under the above-mentioned law.

§ 555. *It is immaterial, under the act of congress, whether the offense is committed on board the vessel or in the sea.*

2. Upon this point the court is of opinion that it makes no difference whether the offense was committed on board of a vessel, or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea, though he was not thrown overboard. The words of the above act of congress are general, and speak of certain offenses committed upon the high seas, without reference to any vessel whatsoever on which they should be committed; and no reason is perceived why a more restricted meaning should be given to the expressions of the law than they literally import. In the case of Furlong, for the murder of Sunley, decided during the present term of the court, it was certified that murder committed from on board an American vessel, by a mariner sailing on board an American vessel, by a foreigner on a foreigner, in a foreign vessel, is within the act of the 30th of April, 1790. 5 Wheat., 184 (§§ 542-551, *supra*). It follows from this, and the principles laid down in Klinton's case, that the same offense committed by any person from on board a vessel having no national character, as by throwing a person overboard and drowning him, is within the same law.

§ 556. *Burden of proof, as to the national character of the vessel, on the prisoner under the circumstances.*

It is stated, in the charge of the court below, that it did not appear by any legal proof that the privateers had commissions from Buenos Ayres, or any ship's papers or documents from that government, or that they were ever recognized as ships of that nation, or of its subjects; or who were the owners, where they resided, or when or where the privateers were armed or equipped. But it did appear in proof that the captains and crew were chiefly Englishmen,

Frenchmen and American citizens; that the captains were both domiciled at Baltimore, where the family of one of them resided, and that he was by birth an American citizen. It was also proved that the privateers were Baltimore built.

Under these circumstances, the court is of opinion that the burden of proof of the national character of the vessel on board of which the offense was committed was on the prisoner.

UNITED STATES v. KLINTOCK.

(5 Wheaton, 144-152. 1820.)

CERTIFICATE OF DIVISION from the U. S. Circuit Court for Virginia.

STATEMENT OF FACTS.—Klintock, a citizen of the United States, was indicted for piracy committed on a vessel called the Norberg. It appeared that the vessel on which he sailed, the Young Spartan, was cruising under a commission from one Aury, who styled himself brigadier of the Mexican republic, and generalissimo of the Floridas. The Norberg, a Danish vessel, was seized under the pretext that she carried Spanish papers. An officer from the Spartan was sent on board, carrying Spanish papers concealed in a locker, and then it was pretended that the papers were found on board the Norberg, and she was accordingly seized.

It was contended that Aury's commission protected the prisoner, and that the fraud practiced did not support the charge of piracy. Also that the eighth section of the act of 1790 did not extend to an American citizen committing a piracy upon a foreign vessel exclusively owned by foreigners.

Opinion by MARSHALL, C. J.

The first and second points made by the counsel for the prisoner may be considered together. As judgment can be arrested only for errors apparent on the record, we should feel no difficulty in certifying our opinion of the insufficiency of these on that ground, were we not persuaded that, from some inattention, the questions which arise properly on a motion for a new trial have been stated by the clerk as a motion in arrest of judgment, and that the same points, if undecided now, will recur when judgment is about to be pronounced. In a criminal case, especially, we think it proper to decide the question on its real as well as technical merits.

§ 557. *A commission purporting to have been issued by an officer of an unacknowledged and unknown government will not justify a capture at sea.*

So far as this court can take any cognizance of that fact, Aury can have no power, either as brigadier of the Mexican republic, a republic of whose existence we know nothing, or as generalissimo of the Floridas, a province in the possession of Spain, to issue commissions to authorize private or public vessels to make captures at sea. Whether a person acting with good faith under such commission may or may not be guilty of piracy, we are all of opinion that the commission can be no justification of the fact stated in this case. The whole transaction, taken together, demonstrates that the Norberg was not captured *jure belli*, but seized and carried into Savannah *animo furandi*. It was not a belligerent capture, but a robbery on the high seas. And although the fraud practiced on the Dane may not of itself constitute piracy, yet it is an ingredient in the transaction which has no tendency to mitigate the character of the offense.

The third and fourth errors assigned in arrest of judgment may also be con-

sidered together. The questions they suggest arise properly on the indictment, and require a reconsideration of the opinion given by the court in *United States v. Palmer*, 3 Wheat., 610 (§§ 535-541, *supra*). The question propounded to the court in that case was in these words: "Whether the crime of robbery, committed by persons who are not citizens of the United States, on the high seas, on board of any ship or vessel belonging exclusively to the subjects of any foreign state or sovereignty, or upon the person of any subject of any foreign state or sovereignty, not on board of any ship or vessel belonging to any subject or citizen of the United States, be a robbery or piracy within the true intent and meaning of the said eighth section of the act of congress aforesaid, and of which the circuit court of the United States hath cognizance to hear, try, determine and punish the same?"

The same question was again propounded, so varied only as to comprehend the offense if committed by American citizens in a vessel belonging to foreigners.

The court, in concluding its exposition of the act, thus sums up its opinion: "The court is of opinion that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States." The certificate of the court conforms entirely to this opinion.

This opinion and certificate apply exclusively to a robbery or murder committed by a person on board of any ship or vessel belonging exclusively to subjects of a foreign state. It is, we think, the obvious import of these words, that, to bring the person committing the murder or robbery within them, the vessel on board which he is, or to which he belongs, must be at the time, in point of fact as well as right, the property of the subjects of a foreign state, who must have at the time, in virtue of this property, the control of the vessel. She must at the time be sailing under the flag of a foreign state whose authority is acknowledged. This is the case which was presented to the court; and this is the case which was decided. We are satisfied that it was properly decided.

§ 558. *The act of April 30, 1790, section 8, extends to all persons on board vessels cruising piratically.*

But the reasoning which conducted the court to this conclusion is founded on sections of the act, the general words of which ought to be restricted to offenses committed by persons who, at the time of committing them, were within the ordinary jurisdiction of the United States; and the language employed may well be understood to indicate an opinion that the whole act must be limited in its operation to offenses committed by or upon the citizens of the United States. Upon the most deliberate reconsideration of that subject, the court is satisfied that general piracy, or murder, or robbery, committed in the places described in the eighth section, by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the courts of the United States. Persons of this description are proper objects for the penal code of all nations; and we think that the general words of the act of congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged author-

ity of a foreign state, ought to be so construed as to comprehend those who acknowledge the authority of no state. Those general terms ought not to be applied to offenses committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offenses committed against all nations, including the United States, by persons who, by common consent, are equally amenable to the laws of all nations.

UNITED STATES *v.* DURKEE.

(Circuit Court for California: 1 McAllister, 196-206. 1856.)

STATEMENT OF FACTS.—Indictment for piracy, the act charged being that defendant and others, being engaged in a riot, robbed a vessel in the harbor of San Francisco of a lot of arms, the property of the state, which had been brought for the purpose of suppressing the riot. Further facts appear in the charge of the court.

Charge by McALLISTER, J.

Gentlemen of the jury: We approach, we trust, the termination of this case with the single desire to dispense evenhanded justice between the parties. Each of you, placed upon that panel, has called upon his God to witness that he has neither bias nor prejudice in this case. As for myself, though it is my sworn duty to convict him whom the law condemns, yet to convict improperly under the forms of law would fill me with horror as great as if I were to take into my own hands the issues of life and death, and send down to the grave my fellow-creature without the forms, the guards, and the sanctions which the constitution, the laws, and humanity have thrown around him. Animated by this sentiment, I proceed to state to you the law which, in the opinion of this court, must control your action. In order to fix your attention on the only issue you are sworn to try, it is necessary to separate it from all collateral considerations. The defense is rested upon the ground that, in seizing the arms for the taking of which the prisoner has been indicted, he was acting in obedience to the orders of a body which we charge you was unauthorized by and banded together in violation and defiance of the laws. It is our duty to say to you that no orders emanating from such a source can vary the character of the act charged against the prisoner, if it be established that he is guilty of it under the law and testimony in this case.

§ 559. *The accused must be acquitted unless found guilty of the offense charged.*

Again, gentlemen, the prisoner may have been guilty of a crime or crimes other than that for which he is indicted; he may, in what he has done, have acted with those who deserve execration as unfeeling violators of the laws of their country, or merit approbation as patriotic citizens. In a word, he may have transgressed every precept of the moral or municipal law. Those, and all other like considerations, must be dismissed from your minds. He is on trial for a single offense—piracy. Any other crime he may have committed; but if you shall find he is innocent of the one now charged against him, he must go free. This is demanded by an immutable principle of justice. No man can be held responsible for an act unless, after having been confronted with his accuser and an impartial trial had, he has been found guilty; and then his responsibility must be confined to the specific crime that has been proved against him. This is a right guarantied even to a malefactor. It has been truly said by a distinguished author that “the law withdraws its protection from a malefactor

while actually engaged in illegal acts; but at any other moment, it protects his person and property as impartially as it does yours or mine. For instance, if a burglar breaks into my house, I may then and there cut him down like a dog. If a pickpocket puts his hand into my pocket, I may knock him down. But if I break into a notorious felon's house, and rob him, I am just as great a felon in the law's eye as if I so robbed an honest citizen; and so, if I attack a burglar's or a pickpocket's person and life at any moment when he is not feloniously engaged, I am none the less a villain in the law's clear eye, because my villainy is aimed at an habitual villain. And here the law is not only just but expedient; for were such fatal partialities admitted, we should soon advance from doing acts of villainy upon villains to calling any one a villain whom we wished to wrong, and then wronging him." Thus vigilant and just is law; it views every man before judgment innocent, so far as affording him an opportunity to defend himself surrounded by those guards which the law has prescribed. To deal differently with an accused party would violate alike the precepts of municipal law and the dictates of natural justice. We repeat, then, your duty is to limit your attention to the single inquiry whether the prisoner is guilty or not of the specific crime for which he is indicted.

The indictment is founded upon the third section of the act of May 15, 1820. 3 Stats. at Large, 600. So much of it as is necessary to be considered is in the following words: "That if any persons shall upon the high seas, or in any open roadstead, or in any haven, basin or bay, or in any river where the sea ebbs and flows, commit the crime of *robbery* in and upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate, and being thereof convicted before the circuit court of the United States for the district into which he shall be brought or in which he shall be found, shall suffer death." The power of congress thus to legislate is derived from that clause in the constitution which declares that the judicial power shall extend to "all cases of admiralty and maritime jurisdiction." Originally, the states had exclusive jurisdiction of all crimes committed within the limits of their respective counties. Then came the clause in the constitution referred to. In relation to this, the supreme court of the United States have said, "It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power." *United States v. Bevens*, 3 Wheat., 358 (§§ 1616-19, *infra*).

§ 560. *Concurrent jurisdiction.*

The legislation of congress prior to the passing of the act under consideration has been limited in its enactments to offenses committed on the high seas, and to places the exclusive jurisdiction over which had been ceded to the general government. Finding it necessary and proper, in order to carry out fully the power vested in them in all cases of admiralty and maritime jurisdiction, congress passed the act under which this indictment is framed; which, while it accomplishes the contemplated object, impinges no further upon the jurisdiction of the states than was absolutely necessary to achieve the object which, under the grant by the constitution, it was in their power to effect. The *proviso* to the act declares "That nothing in this section contained shall be so construed as to deprive any particular state of its jurisdiction over such offenses when committed within the body of a county; or authorize the courts of the United States to try any such offenses after conviction or acquittance

for the same offense in a state court." The jurisdiction of the federal and state judiciary is therefore concurrent in this case, and the familiar principle intervenes, that where there are concurrent jurisdictions the one who first obtains possession of the case must exert it.

§ 561. *The jurisdiction of the federal courts depends upon acts of congress. Reference to the common law for the definition of offenses.*

In the exercise of this jurisdiction, the court has no unwritten criminal code to which it can resort as a source of jurisdiction; nor can it look to the common law, further than as a guide in its exercise of the jurisdiction conferred upon it expressly by statute. The legislative authority must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense, before cognizance can be taken of it. *United States v. Hudson*, 7 Cranch, 32. The act on which this indictment is founded declares robbery committed on the high seas and in certain places shall be deemed to be piracy. To become a pirate under this law, a man must have committed robbery. Of the meaning of the term "robbery," we think there can be no doubt. It must be understood as it was recognized and defined to be at common law. Although the common law is not a source of jurisdiction in the courts of the United States, it is necessarily referred to for the definition and application of terms.

§ 562. *The essential requisite of larceny or robbery is the *lucri causa*.*

The only inquiry, then, is, what was robbery at common law at the time of the separation of the American colonies from the parent country? *United States v. Palmer*, 3 Wheat., 610 (§§ 535-541, *supra*). In robbery, which is larceny accompanied by intimidation or force, the *felonious intent* in taking constitutes the offense. Blackstone tells us the taking and carrying away must be done *animo furandi*, or, as the civil law expresses it, *lucri causa*. Lord Coke, in his "Institutes," and Hawkins, in his "Pleas of the Crown," gives the same definition. 1 Hawk., 93. Archbold states that "larceny, as far as respects the intent with which it is committed, is where a man knowingly takes and carries away the goods of another without any claim or pretense of right, with intent wholly to deprive the owner of them and to appropriate or convert them to his own use." In *Pear's Case*, East's P. C., tit. Larceny, § 2, Baron Eyre defines larceny to be "the wrongful taking of goods with intent to spoil the owner of them *causa lucri*."

The foregoing authorities all include in larceny, as an essential element, what is termed the *lucri causa*. A similar view is taken by the supreme court of Missouri in the case of *State of Missouri v. Conway*, 18 Mo., 321. "The taking [say the court] must be done *animo furandi*, or, as *lucri causa*. The felonious intent is the material ingredient in the offense." To constitute this offense, therefore, in any form, there must be a taking from the possession, a carrying away against the will of the owner, and a felonious intent to convert it to the offender's use. Again, in the state of Delaware, it was ruled that, if the party indicted for larceny, where he took a horse for the stealing of which he was indicted, intended to appropriate him to his own use by selling or retaining him to his own use, it was felony; but if he only took him to aid him in his escape as a runaway slave, it was no more than a trespass. 2 Harr., 529.

In Alabama the supreme court considered the doctrine at common law to be "that the criminal intention constitutes the offense, and is the only criterion to distinguish a larceny from a trespass. That, according to the common law writers, to constitute the offense of larceny, it was not sufficient that the goods

be taken for the purpose of destroying them to injure his neighbor, and actually destroying them. Such offense would be malicious mischief; but it would want one of the essential ingredients of larceny — the *lucri causa* — the intention to profit by the act by the conversion of the property.” *State v. Hawkins*, 8 Port., 461. In that case, although it was evident the prisoner had secreted the slave from her owner with a view to do the owner an injury by aiding the slave to obtain her freedom, still, as there was no intention to convert the slave to his own use, the party was held to be not guilty of larceny.

The courts, then, of Missouri, of Delaware and of Alabama, in the three cases cited, consider the doctrine of the common law to be that, to constitute larceny, there must be, as an essential ingredient and a necessary element, the *animus furandi* or *lucri causa*. There are decided cases in England which sustain a similar doctrine. Thus, in *Rex v. Holloway*, 5 Carr. & P., 524, decided in 1833, the prisoner was indicted for stealing a gun from the prosecutor, who was a game-keeper. The latter, knowing him to be a poacher, seized him. A companion of the prisoner rescued him; and the latter, getting free, wrenched the gun from the prosecutor and ran off with it. It was proved that the prisoner said he would sell the gun, and it was not afterwards found. The jury returned that they did not think that the prisoner, at the time he took the gun, had any intention of appropriating it to his own use. “Then [said the court] you must acquit him. It is a question peculiarly for your consideration. If he did not, when he took it, intend its appropriation, it is not felony; and his resolving afterwards to dispose of it will not make it such.”

In *Rex v. Crump*, 1 Carr. & P., 658, the prisoner was indicted for stealing a horse, three bridles, two saddles, and a bag; and the court left it to the jury to say whether the prisoner intended to steal the horse; for if he intended to steal the articles, and only to use the horse to convey the articles away, he would not be guilty of stealing the horse. The case of *Rex v. Wright* was that of a servant indicted for stealing his master's plate; and it appeared that, after the plate was missed but before complaint was made, the prisoner replaced it. It was in proof that the plate had been pawned, and the pawnbroker testified that the prisoner had, on previous occasions, pawned plate and redeemed it. The court left it to the jury to say whether the prisoner took the plate with intent to steal it, or to raise money on it and then return it; for in the latter case it was no larceny. The prisoner was acquitted.

In *Rex v. Van Muyen*, 1 Russ. & Ry., 118, the prisoner, who was master of a Prussian vessel captured by the British and carried into a home port, was indicted for stealing certain articles from the ship. There was no evidence to prove whether the prisoner had taken the articles for his own use or that of his owners. Chambers, J., reserved the point for the opinion of the judges; and a majority of them were of the opinion that if the prisoner had taken the articles for his own use, it was larceny; otherwise it was not. In *Regina v. Godfrey*, 8 Carr. & P., 563, it was decided that, where a person from curiosity, either personal or political, opens a letter addressed to another person, and keeps the letter (this in the absence of a statute), it is a trespass, not a larceny, even though a part of his object may be to prevent the letter from reaching its destination.

The foregoing decisions embody, in a practical form, the principle enunciated in the definitions given by the text-writers. We will now advert to three or four recent English decisions which seem to qualify the doctrine. In the year 1815, two decisions were made in England, which were subsequently followed by two others, without comment or discussion. The first is that of *Rex v.*

Cabbage, 1 Russ. & Ry., 292. The principle enunciated was, "that if the intent be to destroy the article taken, it will be sufficient to constitute the offense of larceny, if done to serve the prisoner or any other person, though not in a pecuniary way." The case was this: The prisoner, to screen his accomplice, who was indicted for stealing a horse, broke into the prosecutor's stable and took away the horse, which he backed into a coal pit and killed. A majority of the judges decided this was larceny. At such a decision we are not surprised to find Lord Abingdon exclaiming, in 1838, when that case was cited in his presence, "I cannot accede to that!"

The second English case on this point is *Rex v. Morfit*, 1 Russ. & Ry., 307, decided on the authority of the former. There A and B, servants, opened the granary of their master by means of a false key, and took two bushels of beans to give to their master's horses, in addition to the quantity allowed; and it was held to be larceny. Some of the judges alleged that the additional quantity of beans would diminish the work of the men who had to look after the horses, and this diminution in their labor was considered a *lucri causa*. The astuteness with which the *lucri causa* was sought for and discovered in that case is strong proof of the stringency of the rule which requires it as an essential ingredient in the crime of larceny. This case is referred to by a recent writer as a "singular case on this point." Archb. Cr. L., ed. 1853. Such it undoubtedly is, as in effect it destroyed the distinction which had existed from an ancient period between larceny and trespass, unless we can, with some of the judges, detect the existence of the *lucri causa* in that case. Looking into the cases last cited, and the grounds on which they were decided, we deem the observations made in relation to them by the supreme court of Alabama not inappropriate. "It appears to us [they say] that these cases cannot be considered authority in this country. The shadowy and almost imaginary distinctions upon which they rest are at war with that precision and certainty which are the boast of the criminal law of England." 8 Port., 465.

These cases stand in direct opposition to the numerous authorities, English and American, above cited. They introduced a change into the common law as it existed at the time of the emigration of our ancestors to this country; and we cannot recognize modifications recently made in the common law of England as controlling this court. If an authority could have been found emanating from an American court, adopting these hair-breadth distinctions, it certainly could not have eluded the search of the profession.

After a careful examination of the law, we give you, gentlemen, the instructions which follow:

1. That if you believe from the evidence that the prisoner took and carried away the arms, with the intent to appropriate them, or any portion of them, to his own use, or permanently deprive the owner of the same, then he is guilty.

2. But if you shall believe that he did not take the arms for the purpose of appropriating them, or any part thereof, to his own use, and only for the purpose of preventing their being used on himself or his associates, then the prisoner is not guilty. (Verdict, not guilty.)

§ 563. In general.—A pirate is one who acts solely on his own authority, without any commission or authority from a sovereign state, seizing by force, and appropriating to himself, without discrimination, every vessel he meets with. The difference between a pirate and a robber is that the former acts on the sea and the latter on the land. *Davison v. Seal-skins*, 2 Paine, 333. See § 512.

§ 564. Piracy, by the law of nations, is robbery upon the sea; and the act of congress punishing with death any person who shall, "upon the high seas, commit the crime of piracy, as defined by the law of nations," defines the crime with reasonable certainty. *United States v. Chapels*,* 2 Wheeler, 205.

§ 565. Any aggression of an armed ship which is unauthorized in its character, wanton and cruel in its commission, and utterly without any sanction from any public authority or sovereign power, whether done *animo furandi* or *lucris causa* or not, is piracy, and subjects the vessel to forfeiture whether the armament was for a legitimate or an illegitimate purpose. *United States v. Brig Malek Adhel*, 2 How., 210.

§ 566. At the common law the offense of piracy consists in committing on the high seas those acts of robbery and depredation which, if committed on land, would have amounted to a felony there. There need be no violence used to the master or owner of the vessel, or any putting in fear, as would be required to constitute robbery on land. *United States v. Tully*,* 1 Gall., 247.

§ 567. Law applies to citizens and foreigners, when.—The act of congress of May 15, 1820, which provides "that if any person shall, upon the high seas, . . . commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate," applies to all persons, whether citizens or foreigners. *United States v. Baker*,* 5 Blatch., 6.

§ 568. The ninth section of the act of April 30, 1790, declaring that "if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high seas, under color of any commission from any foreign prince or state, or on pretense of authority from any person, such offender shall, notwithstanding the pretense of any such authority, be deemed, adjudged and taken to be a pirate, felon and robber," applies only to citizens of the United States, and not to foreigners. *Ibid.*

§ 569. Piracy, as punished by act of April 30, 1790, must be committed by citizens of the United States, or upon board of vessels of the United States. *United States v. Howard*,* 3 Wash., 340.

§ 570. Capture in time of war.—The capture of a Spanish vessel, made by an armed cruiser of the Province of Carthagena, while that province was at war with Spain, cannot be considered as piracy by our courts. *The Neustra Senora de la Caridad*, 4 Wheat., 497.

§ 571. A capture made by a regularly commissioned vessel of an unacknowledged power, which is engaged in maintaining a contest for independence, is not piracy. *The Josefa Segunda*, 5 Wheat., 338.

§ 572. Privateers.—The act of June, 1812, respecting privateers, is confined to the conduct of persons on board of privateers, and is intended for their government. For piratical acts committed upon others, no punishment or mode of trial by a court martial is prescribed. If piracy is committed by the officers of a privateer, the offense is punished by the proper civil tribunal of the United States, as in case of other piracies. *United States v. Jones*,* 3 Wash., 209. See § 526.

§ 573. A commission as privateer affords no ground of protection to a charge of piracy. *Ibid.*

§ 574. The principle that, in a state of war between two nations, a commission to a private armed vessel from either of the belligerents affords a defense, according to the law of nations, in the courts of the enemy, against a charge of piracy or robbery on the high seas, of which they might be guilty without such authority, did not apply to a private armed vessel commissioned by the Confederate States, the United States, in its political capacity, not having recognized those states as a separate government. *United States v. Baker*,* 5 Blatch., 6.

§ 575. Where punished.—Piracy is an offense against the law of nations and may be punished by the nation first capturing the offenders. *United States v. Darnand*, 8 Wall. Jr., 160.

§ 576. If a prize be found to be a pirate, the officers and crew, and all others on board having any agency in the ship, are to be prosecuted in the circuit court of the United States, according to the laws of the United States, without respect to the nation to which each individual may belong. *Prize Ship and Crew*,* 1 Op. Att'y Gen'l, 85.

§ 577. Robbery defined.—For the interpretation of the word "robbery" as used in the act of May 15, 1820, punishing robbery committed upon the high seas, we must look to the common law. By this standard the offense consists in feloniously taking the goods or property of another, of any value, from his person, or in his presence, against his will, by violence, or putting him in fear. The taking must be felonious; that is, with a wrongful intent to appropriate the goods of another. It need not be a taking which, if upon the high seas, would amount to piracy by the law of nations. *United States v. Baker*,* 5 Blatch., 6. See §§ 529-531.

§ 578. It is clear that robbery on the high seas is declared to be felony and piracy by the

eighth section of the act "for the punishment of certain crimes." The words, "which, if committed within the body of a county," etc., relate not to "murder or robbery," but to the words immediately preceding, "or any other offense." For the meaning of the word *robbery*, the common law definition of the term may be resorted to. *United States v. Jones*,* 3 Wash., 209.

§ 579. **Robbery — Punishment.**—Under an act of congress declaring that "if any person shall, upon the high seas, or in any haven, bay, or river, out of the jurisdiction of any particular state, commit murder, robbery, or any other crime or misdemeanor, which, if committed in the body of a county, would, by the laws of the United States, be punished with death, it shall amount to piracy," it is not necessary that robbery should be punished with death when committed on land, in order to amount to piracy when committed on the ocean. *United States v. Hutchings*,* 2 Wheeler, 543.

§ 580. **Must act feloniously.**—A taking upon the high seas, in order to be piracy, must be felonious. A commissioned cruiser by exceeding his authority does not thereby become a pirate unless he acts feloniously with intent to commit a robbery, and the *quo animo* may be inquired into. *Davison v. Seal-skins*, 2 Paine, 333.

§ 581. **Kidnapped Africans** regaining their liberty by killing the captain and taking possession of the vessel on which they were carried, on the high seas, are not pirates or robbers. *United States v. The Amistad*, 15 Pet., 518.

§ 582. **Augmenting force.**—Our treaty with Spain declares that no citizen of the United States "shall apply for, or take any commission or letters of marque, for arming any ship or ships to act as privateers" against the king of Spain, or his subjects, or their property, from any prince or state with which said king shall be at war, and if any person of either nation shall take such commission or letters of marque, he shall be punished as a pirate. It is held that, under this treaty, a foreign public ship of war, augmenting its force in our ports, is not a piratical vessel. *The Santissima Trinidad and St. Ander*, 7 Wheat., 283.

§ 583. **Punishment.**—Congress has power, under its authority "to define and punish piracies as felonies committed on the high seas, and offenses against the law of nations," to declare that piracy, as defined by the law of nations, shall be punished with death. *United States v. Chapels*,* 2 Wheeler, 205.

§ 584. **Mistake.**—An apparent piratical aggression, made under a mistake and not from motives of revenge or malignity, or from abuse of power and a settled purpose of mischief, is not piracy. *The Marianna Flora*, 11 Wheat., 1.

§ 585. **Innocence of owner of ship.**—Under section 4 of the act of March 3, 1819 (3 Stat. at L., 518), the innocence of the owners of a ship guilty of piratical aggressions does not save the ship from forfeiture although it saves the cargo. *United States v. Brig Malek Adhel*, 2 How., 210.

§ 586. **Confederating.**—In order that a person be guilty of the crime of confederating, corresponding, combining and consulting with pirates, it must be shown that he acted with criminal intent. *United States v. Howard*,* 3 Wash., 340.

§ 587. It would be corresponding, combining and confederating with pirates for a pilot boat, knowing a vessel to be a pirate, to allow it to follow such pilot boat to harbor, and then demand pilotage, and request a donation of the piratical boat and cargo, which was about to be abandoned by the pirates. *Ibid*.

§ 588. **Cargo of prize.**—The eighth and ninth sections of the law for the government of the navy, which inflicts punishments upon those who shall take from a vessel captured at sea any part of her cargo, or embezzle the same, or who shall maltreat any of the persons, relates expressly to prizes, or to vessels seized as prizes, and not to acts of piracy. It does not repeal the former act of congress punishing robbery on the high seas. *United States v. Jones*,* 3 Wash., 209.

§ 589. **Liability of crew of privateer.**—In order to convict inferior officers of a commissioned privateer of piracy committed under the orders of their captain, it must be established that the prisoners knew, or ought to have known, at the time they acted, that robbery, and not a seizure as a prize, was contemplated by the captain or themselves. It is in this point of view only that the orders of the captain can, in any manner, afford a shield to those whose duty it was to obey them. The conduct of the captain in dividing the plunder with the crew, ordering the plundered vessel to proceed on her voyage, and failing to take steps to obtain a condemnation of the property seized, would be sufficient to make a case of piracy against him; but acceptance of a part of the spoils by the crew does not fix a charge of felonious taking upon them, where the orders of the captain were not inconsistent with the taking of the vessel as a prize, and the crew may have obeyed these orders in the belief that such was the intention of the captain. *United States v. Jones*,* 3 Wash., 233.

§ 590. It is no excuse for piracy that it was committed under the orders of a superior offi-

cer of the vessel, where the prisoner knew or ought to have known that the act was wrong. *United States v. Jones*, * 3 Wash., 209.

§ 591. **Running away with vessel.**—Under the statute declaring that “if any captain or mariner of any ship or other vessel shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of \$50, etc., every such offender shall be deemed, taken and adjudged to be a pirate and a felon, and, being convicted thereof, shall suffer death,” there need be no violence or putting in fear. The running away with the vessel by the captain or mariner piratically and feloniously are the only facts necessary to constitute the crime. Piratically and feloniously running away with the vessel within the meaning of the act is running away with it with the wrongful and fraudulent intent thereby to convert the same to the taker's own use, or to make the same his own property, against the will of the owner. *United States v. Tully*, * 1 Gall., 247.

VII. HOMICIDE.

[See §§ 500, 1247, 1729, 1733, 2612.]

SUMMARY—*Murder defined*, § 592.—*No intent to kill*, § 593.—*Resort to common law for definition*, § 594.—*Malice defined*, §§ 595, 600; *express and implied malice*, §§ 596-599.—*Malice aforethought, distinguishes murder from homicide*, §§ 600, 601; *need not exist for any definite period before the act*, § 601.—*Burden of proving malice; presumed from circumstances*, § 602.—*Manslaughter defined*, §§ 603, 605, 606, 621; *involved in the crime of murder*, § 604.—*Justifiable and excusable homicide*, §§ 607-610, 617, 625; *whether threats will justify*, §§ 609, 610.—*State law controls in a case against a United States officer on removal from state court*, § 611.—*Killing by an officer in case of resistance*, § 612.—*Accidental killing*, § 613.—*Killing of a soldier by a sergeant on duty*, § 614.—*Unlawful act in obedience to orders of superior*, § 615.—*Duty of officer of the guard in a fort*, § 616.—*Words will not justify a killing*, § 617.—*Failure of master to save a sailor who falls overboard*, §§ 618-622.—*Death from omission to perform duty*, § 619; *proof of past life and character*, § 620.—*Neglect by captain of a steamboat*, §§ 623, 624.—*Presumption as to character of assault by deceased; burden of proof*, §§ 625, 626.—*Manslaughter on the high seas*, § 627.

§ 592. Murder is the wilful killing of a human being in the peace of the country, with malice aforethought, either express or implied. *United States v. Outerbridge*, §§ 628-635. See § 671.

§ 593. If a person with malice aforethought fires a gun at another, not intending to kill him, but only to do great bodily harm, and the shot is fatal, it is murder. *United States v. Carr*, §§ 643-653.

§ 594. The act of congress punishing murder committed on board of an American vessel upon the high seas, not having defined the crime, nor established any degrees in the turpitude of the offense, resort must be made to the common law for its definition. *United States v. Outerbridge*, §§ 628-635.

§ 595. Malice, as a constituent of murder, includes not merely hatred and revenge, but every bad and unjustifiable motive. *Ibid.* See § 683.

§ 596. Express malice exists when one, with deliberate premeditation and design formed in advance, kills another, such premeditation and design being manifested by external circumstances capable of proof. *Ibid.*

§ 597. Malice is implied by law from any deliberate and cruel act committed by one person against another. *Ibid.*

§ 598. The terms “express and implied malice” indicate the same state of mind, but they are established in different ways; the one by circumstances showing premeditation of the homicide, and the other being inferred only from the act committed. *Ibid.*

§ 599. Malice is implied in every case of intentional homicide. If there are any circumstances of excuse or palliation which will rebut the implication of malice, it is for the defendant to show them. *Ibid.*

§ 600. Malice aforethought is the exact criterion which distinguishes murder from homicide. It is not so much spite or malevolence to the deceased as the dictate of a wicked, depraved and malignant heart. Such malice may be either express, as where it is evidenced by such acts as lying in wait, threats and grudges; or implied, as if one kills another without provocation, or on insufficient provocation; for in such a case the law implies malice, for the act is one which could not be done except from the dictates of a wicked and depraved heart. *United States v. Carr*, §§ 643-653.

§ 601. Although the malice which distinguishes murder from homicide is called malice aforethought, yet there is no particular period of time during which it is necessary that it should have existed, or the prisoner have contemplated the homicide. If, for example, the intent to kill or do other great bodily harm is executed the instant it springs into the mind, the offense is as truly murder as if it had dwelt there for a long period. *Ibid.*

§ 602. While it is true that, in an indictment for murder, it is necessary for the prosecution to prove a malicious killing, and that mere proof of a killing is insufficient to shift the burden of proof to the defendant, yet the presumption of malice may be raised by the circumstances under which the killing was effected, and the law will in the proper case imply it from the circumstances, without direct proof of its existence. *United States v. Armstrong*, §§ 665-669. See § 713.

§ 603. Manslaughter is the unlawful killing of a human being without malice, express or implied. It may be voluntary or involuntary. It is voluntary when committed with a design to kill, under the influence of a sudden or violent passion, caused by great provocation, which the law considers such a palliative of the offense as to rebut the presumption of malice which would otherwise arise. It is involuntary when committed by accident, or without any intention to take life. *United States v. Outerbridge*, §§ 628-635. See §§ 680, 691.

§ 604. The crime of manslaughter is involved in that of murder; and so if a jury, in a prosecution for murder, finds that the homicide was without malice, they may find the defendant guilty of manslaughter alone. *United States v. Carr*, §§ 643-653.

§ 605. A killing of a person not done wilfully, but upon a sudden heat provoked by an assault, and not by words, is manslaughter. *Ibid.* See §§ 680, 691.

§ 606. Manslaughter is the unlawful killing of a human being without malice. *United States v. Armstrong*, §§ 665-669. See § 680.

§ 607. When a person apprehends that another, manifesting by his attitude a hostile intention, is about to take his life, or to do him enormous bodily harm, and there is reasonable grounds for believing the danger imminent that such design will be accomplished, he may, if no other practicable means of escape are at hand, oppose force by force, and may even kill his assailant, if that be necessary to avoid the apprehended danger; but he must act and decide as to the necessity and the force of the circumstances at his peril, and with the understanding that his conduct is subject to judicial investigation and review. (Per CLIFFORD, J., dissenting.) *Wiggins v. People, etc., in Utah*, § 670. See § 699.

§ 608. To make homicide justifiable, the intent must be to commit a felony; such intent must be apparent. And it must also appear that the danger was imminent, and the species of resistance used necessary to avert it. By imminent danger is meant immediate danger—one that must be instantly met—one that cannot be guarded against by calling on the assistance of others or the protection of the law. *United States v. Outerbridge*, §§ 628-635.

§ 609. Mere threats against the person or life of another, without any attempt at execution, will not justify homicide; nor even when such attempt is made, unless the danger be so imminent as not to admit of any delay in meeting it on the part of the assailed. *Ibid.*

§ 610. On a trial for murder, where the question is as to what was the attitude of the deceased toward the plaintiff at the time of the fatal encounter, recent threats are admissible to show that this attitude was one hostile to the defendant, even though such threats were not communicated to the defendant. Such evidence is not admissible to show the *quo animo* of the defendant, but may be relevant to show that at the time of the fatal meeting the deceased was seeking defendant's life. *Wiggins v. People, etc., in Utah*, § 670.

§ 611. Upon the trial of an officer of the United States for murder in executing process, upon an indictment found in a state court but removed to the federal court under the act of congress providing for such removals, the law which is to govern is the law which prevails in the state. *United States v. Rice*, §§ 636-642.

§ 612. Where the defendant, a United States deputy marshal, fired upon and killed the deceased, the court, upon the trial, instructed the jury that, if the prisoner was a known officer of the law and had in his hands, at the time of the homicide, legal process authorizing and commanding him to arrest the deceased, and the deceased made resistance to the execution of legal process with a gun in his hands, and had manifested and continued to entertain a purpose to use such gun if an arrest was attempted, the defendant was not guilty. They were further instructed that if resistance was made but had entirely ceased, and the deceased had yielded himself quietly and completely into the custody of the officer, and no longer had any purpose of resistance, the defendant was guilty of manslaughter; and if sufficient time had elapsed for the prisoner to get over the excitement caused by the resistance, then he was guilty of murder. *Ibid.* See § 688.

§ 613. If, on an indictment for murder, it appears that the act which resulted in the homicide was accidental on the part of the defendant, and he was engaged in no unlawful act at the time, the defendant must be acquitted. *United States v. Carr*, §§ 643-653. See § 715.

§ 614. The killing of a soldier by a sergeant on duty is not necessarily a justifiable homicide, and if with malice it is murder. *Ibid.*

§ 615. The orders of a superior officer will not themselves justify the killing of a soldier. No one is bound to perform an unlawful act on the order of his superior, and if he does so it makes such superior an accomplice in the crime. *Ibid.*

§ 616. It is the duty of the officer of the guard in a fort to preserve the peace and suppress disorderly and mutinous conduct, and he may use all reasonable and necessary means to that end, provided the force used is proportionate to the necessity of the case. But the officer in such a case is not bound to weigh with scrupulous nicety the exact amount of force necessary to suppress the disorder. The exercise of a reasonable discretion is all that is required. *Ibid.*

§ 617. No words applied by one man to another will justify the use of a deadly weapon, nor can they be the lawful occasion of that "heat" which would reduce the act of killing from murder to manslaughter. If a man returns provoking language by a blow from an instrument calculated to produce death, and death follows, the act will be murder. *Ibid.*

§ 618. It is not murder, but only manslaughter, for the captain of a vessel to wilfully omit to stop the ship and lower the boats or make other attempt to save the life of a member of the crew, who has fallen overboard by accident while on duty, by which omission of duty the seaman is drowned. *United States v. Knowles*, §§ 634-653. See § 709.

§ 619. Where death is the direct and immediate result of the omission of a party to perform a plain duty imposed upon him by law or contract, he is guilty of a felonious homicide. *Ibid.*

§ 620. Where the commander of a vessel is charged with allowing a sailor falling overboard to perish, without any effort to save him, when by proper efforts he could have been saved, and there is any doubt as to the conduct of the defendant, his past life and character are entitled to consideration. *Ibid.*

§ 621. Where a passenger or a seaman falls overboard from a ship at sea, and is not killed by the fall, it is the duty of the captain, both by law and contract, to do everything consistent with the safety of the ship and of the other passengers, necessary to rescue the person overboard. Any neglect to make such efforts is criminal; and if followed by the loss of the person overboard, when by them he might have been saved, the commander is guilty of manslaughter. *Ibid.* See § 680.

§ 622. Where the captain of a vessel is indicted for wilfully omitting to attempt to rescue a seaman who has fallen overboard from the ship, it is upon the defendant to prove beyond a reasonable doubt that the seaman was killed by the fall. But to convict, the jury must come to a conclusion beyond a reasonable doubt that the seaman could have been saved by proper efforts, and that his death was the consequence of the defendant's neglect. *Ibid.*

§ 623. Section 12 of the act of July 7, 1838 (5 Stat. at L., 306), provides that "the captain . . . of any steamboat, . . . by whose negligence or inattention to his . . . duties the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter." *Held*, that on an indictment under this section it was not necessary to prove wilful mismanagement or misconduct. The inquiry is only whether he did something that is forbidden by law, and whether the loss of life charged in the indictment arose from such cause. The misconduct, negligence or inattention in the management of the vessel, mentioned in the statute, is the omission or commission of any act which may naturally lead to the consequences made criminal. It is no matter what may be the degree of misconduct, whether it be slight or gross, if the proof shows that the accident was the probable result of it. *United States v. Farnham*, §§ 659-664.

§ 624. Section 7 of the same act provides a penalty against the captain for neglecting to raise the safety-valve when stopping. *Held*, on an indictment under section 12, that it was proper to show that the safety-valve had not been raised during the stoppage of the boat at which the explosion took place, and if such failure was the proximate cause of the explosion, such evidence is sufficient to support the indictment. *Ibid.*

§ 625. Where a person is indicted for murder and there is evidence tending to show that an assault was made by the deceased upon the defendant immediately prior to the killing, the defendant is not entitled to the benefit of a presumption that the assault was of a character sufficient to excuse or justify the homicide. The law presumes every man innocent till he is proved guilty, and this presumption applies as well to the act of the deceased as of the defendant. The misconduct of the deceased must be proved as a matter of fact and will not be presumed without evidence. *United States v. Armstrong*, §§ 665-669.

§ 626. Because a homicide takes place immediately after an assault by the deceased upon the defendant it does not necessarily follow that the killing was not malicious. There must be some reasonable proportion between the provocation given and the act of resentment. It is not every blow which will excuse the use of a deadly weapon; but in order to repel the pre-

sumption of malice the provocation must be such as would account for the deadly blow without imputing to the defendant any more than that infirmity of passion which belongs to men in general, and if the fatal blow resulted, not from such common infirmity of passion, but from a cruel and relentless disposition, then the defendant is guilty of murder notwithstanding the assault. *Ibid.*

§ 627. An act of congress provided for the punishment of manslaughter on the high seas, but did not define the offense. *Held*, that where a fatal stroke was given on the high seas and the victim died on land, the manslaughter was not committed on the high seas, and consequently the defendant could not be punished under the act in question. *Ibid.*

[NOTES.— See §§ 871-715.]

UNITED STATES v. OUTERBRIDGE.

(Circuit Court for California: 5 Sawyer, 620-625. 1868.)

Charge by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—Gentlemen of the jury: The facts of this case lie in a very narrow compass, and the principles of law applicable to them are very simple and can be readily understood. You are the exclusive judges of the facts; that is to say, it is your province to pass upon the evidence, to give to it such weight as you may deem it entitled, and determine therefrom all disputed questions of fact. The duty of the court will end when it states to you the law by which the offense charged is to be considered, and the principles by which the evidence is to be weighed. The prisoner at the bar is indicted for the crime of murder. The indictment charges that the defendant did, on the 1st of April of the present year, on the high seas, on board of the American vessel *Jenny Prince*, belonging to citizens of the United States, feloniously, wilfully, and of malice aforethought, make an assault upon one William Anderson, then aboard of said vessel, and by a capstan bar, an instrument of wood, of four feet in length and six inches in circumference, inflict several mortal wounds upon his head and neck, of which he, on the same day, died. The charge here is of the murder of William Anderson, upon the high seas, on the 1st of April last.

§ 628. *Laws of the United States respecting murder on the high seas, etc. The common law definitions must be resorted to. What is murder at common law.*

The act of congress under which the indictment is found provides what the punishment shall be for this crime; it declares that the punishment shall be death. But it does not define the crime itself, nor establish any degrees in the turpitude of the offense, as does the law of the state. There is no such designation made in the laws of the United States as murder in the first, or murder in the second or any other degree. The statute simply enacts that if any person upon the high seas, or in any arm of the sea within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, shall commit the crime of wilful murder, such person shall, upon conviction thereof, suffer death. We must therefore resort to the common law for a definition of the crime. In the absence of statutory provisions, the federal courts are obliged to resort to that law for guide in the construction of legal terms and phrases. By that law murder is defined to be the wilful killing of a human being in the peace of the country, with malice aforethought, either express or implied.

§ 629. *Malice defined.*

The term malice is here used in a technical sense, and includes not merely hatred and revenge, but every bad and unjustifiable motive. Express malice exists when one, with deliberate premeditation and design formed in advance,

kills another, such premeditation and design being manifested by external circumstances capable of proof, such as lying in wait, antecedent threats, and concerted schemes to do the party bodily harm. Malice is implied by the law from any deliberate and cruel act committed by one person against another. Thus it is implied when one man kills another without provocation, or where the provocation is not great, for no person except one of an abandoned heart could be guilty of such an act without cause, or upon any slight cause. The terms express and implied malice, in truth, indicate the same state of mind, but they are established in different ways; the one by circumstances showing premeditation of the homicide, and the other being inferred only from the act committed.

§ 630. *Manslaughter defined.*

Manslaughter is the unlawful killing of a human being without malice, express or implied. It may be voluntary or involuntary. It is voluntary when committed with a design to kill, under the influence of a sudden and violent passion caused by great provocation, which the law, in its tenderness to the infirmity of human nature, considers such a palliative of the offense as to rebut the presumption which would otherwise arise of malice. Manslaughter is involuntary when committed by accident, or without any intention to take life. As you will thus perceive, the difference between murder and manslaughter consists in the existence of malice, express or implied, in the one case, and the absence of malice in the other.

§ 631. *When malice is implied.*

Now, malice is implied in every case of intentional homicide; that is to say, when once it is established that a person was intentionally killed, the law implies that malice existed in the party who caused the death. If there are any circumstances of excuse or palliation which will rebut the implication of malice, it is incumbent upon him to show them. The burden of proof rests upon him, for the law presumes that every person intends to produce the results which are the usual consequences of his acts. A man cannot strike another violently with a bar of iron without inflicting bodily pain; if, therefore, he does thus strike another, the law presumes that he intended thus to inflict pain. The usual effect of a leaden ball fired from a loaded pistol of the common size, at a distance of a few feet only, striking the head or back of a person, is to kill such person; the law therefore presumes that every one who thus fires a loaded pistol within a few feet of the object intends to kill; it therefore implies malice in him. In the present case there is no question as to the homicide charged, nor is there any question that the homicide was committed by the prisoner, nor is it denied that the blows which caused the homicide were intentionally given. The instrument used was of such magnitude and weight that it would, in all probability, have broken the skull, had it been applied with slight force, but the evidence shows that great force was used. There is no element in the case which can bring the homicide within the definition of manslaughter. There was here no sudden and violent passion produced by great provocation, which, for the moment, overpowered the reason of the prisoner. He does not rest his defense upon any such ground. His defense is that he was justified in taking the life of Anderson; that the homicide was required for the preservation of his own life.

§ 632. *The right of self-defense.*

Now upon this subject of justification the law is explicit. A man may repel force by force in the defense of his person, his family or property, against any

one who manifestly endeavors by violence or surprise to commit a felony, as murder, robbery, or the like. The right to oppose force to force in such case is founded upon the law of nature, and is not and cannot be superseded by the law of society.

§ 633. *What is justifiable homicide.*

In the definition of justifiable homicide the following particulars, says Mr. Justice Washington, "are to be attended to. The intent must be to commit a felony. If it be only to commit a trespass, as to beat the party, it will not justify the killing of the aggressor. No words, no questions however insulting and irritating, not even an assault, will afford such justification; although it may be sufficient to reduce the offense from murder to manslaughter. In the next place the intent to commit a felony must be apparent, which will be sufficient, although it should afterwards turn out that the real intention was less criminal, or was even innocent. This apparent intent is to be collected from the attending circumstances, such as the manner of the assault, the nature of the weapons used, and the like. And, lastly, to produce this justification, it must appear that the danger was imminent, and the species of resistance used necessary to avert it." *United States v. Wiltberger*, 3 Wash., 521.

You will observe from this language that the intent to commit the felony must be apparent; that is, in the process of execution, so that the movement towards the execution becomes cognizable by the senses. For example, if a man declares that he will kill another, and moves towards him with a heavy weapon raised in the position to strike, or with a pistol cocked and directed towards him, the intent to commit a felony would be apparent, although in point of fact the party may never have intended to strike, or the pistol may have been unloaded. As observed by Mr. Justice Washington, this apparent intent is to be collected from the attending circumstances, such as the manner of the assault, the nature of the weapons used, and the like.

§ 634. *Imminent danger defined.*

You will observe from the language cited that the intent to commit a felony must not only be apparent, it must also appear that the danger was imminent, and the species of resistance used necessary to avert it. By imminent danger is meant immediate danger — one that must be instantly met; one that cannot be guarded against by calling on the assistance of others or the protection of the law. And the species of resistance used, that is, the means to prevent the threatened injury, must be such as were necessary to avert it. Tested by these rules, the defense utterly fails. We will not even presume to suggest that the threats of the deceased were the mere coarse vaporings of a brutal sailor, never intended to be carried out. We will assume that, at the time they were uttered, they were the expression of a determined purpose on the part of the deceased. There is no evidence of any subsequent attempt to carry them into execution; nor is there any evidence that there was not adequate means with the captain and the rest of the crew for the protection of the defendant. The danger, if any ever existed, that the threats would be carried into effect, was not imminent. The deceased was at the time asleep, covered by a sail on the deck. If it had been reasonable to believe that on awakening he would have proceeded at once to the execution of his threat, even then the means to secure him and prevent him should have been resorted to. There was sufficient force on board to control him.

§ 635. *Threats do not justify homicide.*

Mere threats against the person or life of another, without any attempt at

execution, will not justify homicide, nor even when such an attempt is made, unless the danger be so imminent as not to admit of any delay in meeting it on the part of the assailed. No other rule could exist with proper security to human life in society. The case is in your hands. As already said, you are the exclusive judges of the facts; that is to say, it is your exclusive province to pass on the evidence, and to give it such weight as you may judge it entitled to receive. (Verdict, guilty of murder.)

UNITED STATES *v.* RICE.

(Circuit Court for North Carolina: 1 Hughes, 560-568. 1875.)

STATEMENT OF FACTS.—Defendant, a deputy marshal, was indicted for the murder of Woody, whom he was seeking to arrest for a violation of the internal revenue laws. Woody was armed, his demeanor was hostile, and his behavior such as impressed Rice with the belief that he intended to shoot him. Thereupon Rice shot Woody.

Charge by DICK, J.

As this is a case of considerable importance to the defendant, and also to the due administration of justice, I have deemed it proper to commit to writing my instructions to the jury upon the questions of law involved. In this court, in a trial for crime before one judge, defendants have no right to appeal, and the only remedy which they can have for misdirections to the jury on the part of the judge is a motion for a new trial to be heard before the other judges of the court who were not present at the trial; then, upon a certificate of a division of opinion between the judges upon questions of law, the case may be carried to the supreme court for review. In all capital felonies tried by me, sitting alone, I will allow defendants who may be convicted the benefit of these remedies; and I will always reduce to writing my instructions to the jury, so that if I commit an error it may be corrected by the other judges who are authorized to preside in this court. All persons whose lives are put in jeopardy by a trial in court ought to have the benefit of all remedies afforded by law to guard against error and injustice. The humane and remediable provisions of the law ought to be fully afforded by courts of justice, in favor of human life.

The defendant in this case is charged with murder by an indictment found in the state court, and removed under the provisions of an act of congress to this court. This court has no original jurisdiction of the offense charged, but the case must be tried in the same manner as cases originating in this court; that is, the forms and modes of proceeding and the rules of evidence must be regulated by the course and practice of this court in criminal trials. The law which defines the offense is the criminal law which prevails in this state. This indictment is not founded upon a state statute, but is for an offense at common law. The laws of this state declare that the common law, with certain specified modifications, shall be in full force in this state. If the indictment was founded upon a state statute, we would be bound to regard the construction and exposition placed upon such statute by the supreme court of the state as a rule of decision. As it is founded upon the common law, we will look to the decisions of the state supreme court as highly important guides, but not as absolute authorities. We are at liberty to derive information as to the principles of the common law from the decisions of all the courts of England and this country, which profess to administer criminal justice according to that wise,

just and time-honored system of law. It is conceded that the alleged homicide was committed by the defendant, and he places his defense upon the ground that he was a regularly constituted officer of the United States, and had in his hands at the time of the homicide the process of law which authorized and commanded him to arrest the deceased for a crime against the United States; that the deceased resisted the execution of such process with a deadly weapon in his hands, and had manifested a purpose to use such deadly weapon in resistance; and that the homicide was necessarily committed in the attempt to make an arrest.

§ 636. *The protection afforded by the common law to ministerial officers in the discharge of their duties. Their right to repel force by force.*

This defense necessarily leads us to inquire what protection the common law affords to ministerial officers, and how far they are authorized to go in the performance of their public duties. Social order and political government are dependent upon the observance of law by the citizen. The mandates of the law are executed by officers provided for such purposes, and such officers are invested by the law with the authority necessary to execute its mandates, and it affords them all the protection possible in the rightful performance of the duties imposed. This rule is absolutely necessary for the advancement of justice, and is founded in wisdom and equity and in the principles of social and political order. The law must be supreme within the sphere of its operation, or its influence would be nugatory, and there would be no certain rule to regulate human conduct in society and government, and all the rights and liberties of citizens would soon be lost in a chaos of anarchy. Mr. Justice Foster says: "Ministers of justice while in the execution of their offices are under the peculiar protection of the law." Foster, 308. If an officer is killed while performing his duty, the law deems such killing murder of *malice prepense*. This protection is not confined to the precise time when the officer is performing his official duty, but extends over him while going to, remaining at, and returning from, the place of action. Any opposition, obstruction or resistance intended to prevent an officer from doing his official duty is an indictable offense at common law, and the punishment is regulated by the nature of the offense.

§ 637. — *rights of private persons in assisting in the execution of the law.*

An officer is authorized to summons as many persons as may be necessary to assist him in the performance of his legal duties, and such persons are bound to obey such summons, and they are under the same protection afforded to officers, as they are for the time officers of the law. The law imposes upon private persons the duty of suppressing affrays, preventing felonies from being committed in their presence, and arresting such offenders and bringing them to justice; and such private persons, while performing their duties, are under the protection of the law. We may confidently lay down the broad general principle, that, when any person is performing a public duty required of him by law, he is under the protection of the law. An officer of the law who has legal process in his hands is bound to execute it according to the mandate of the writ. If he is resisted in the performance of this duty, he must overcome such resistance by the use of such force as may be necessary for him to execute his duty. If necessary, the law authorizes him to resort to extreme measures, and if the resisting party is killed in the struggle the homicide is justifiable. *Garrett's Case*, N. C. R., 144, Winston.

§ 638. — *rights and liabilities of the officer in making an arrest.*

If unnecessary and excessive force is used, after resistance has entirely ceased and the defendant in the writ has manifested his willingness to submit to the mandates of the law and be arrested, then if the said defendant is killed the officer will be guilty of manslaughter; and if the blood had time to cool, the killing would be murder. 2 Whart. Cr. L., 1030-31, and authorities referred to in note. If, however, the defendant in the writ only ceases his resistance upon the officer desisting from his attempt to arrest, and still keeps himself in a condition to renew the resistance with a deadly weapon, if the officer should renew the effort to arrest, and the officer cannot make the arrest without great personal danger, he would be justified in killing the defendant. The submission of the defendant in such a case is not complete, and as long as he refuses to be arrested he is in a state of resistance; and if he is armed with a deadly weapon, and has manifested an intent to use it, and still keeps the weapon in his possession convenient for an emergency, and the officer has reasonable grounds for believing that the weapon will be used if an arrest is attempted, the officer is not required to risk his life in a rencounter, or desist from an effort to perform his duty. When a person puts himself in an armed and deadly resistance to the process of the law, he becomes virtually an outlaw, and officers are not required to show him the courtesy of a chivalrous antagonist and give him an open field and fair fight. It is only when a criminal submits to the law that it throws round him the mantle of protection and administers justice with mercy. It is the duty of every offender charged with crime in due process of law to quietly yield himself up to public justice. *State v. Bryant*, 65, 327; *Garrett's Case*, *Winst.*, 144.

§ 639. — *officer must show his warrant, when.*

A known officer, in attempting to make an arrest by virtue of a warrant, is not bound to exhibit his warrant and read it to a defendant before he secures him, *if he resists*; if no resistance is offered, the officer ought always, upon demand made, show his warrant to the party arrested or notify him of the substance of the warrant, so that he may have no excuse for placing himself in opposition to the process of the law. This is only a rule of precaution. A defendant is bound to submit to a known officer; to yield himself immediately and peaceably into the custody of the officer before the law gives him the right of having the warrant read and explained; when in resistance, the law shows him no favor. A defendant, knowing the arresting party to be an officer, is bound to submit to the arrest, reserving the right of action against the officer in case the latter be in the wrong. When a person acts in a public capacity as an officer, it will be presumed that he was rightfully appointed. 1 Whart. Cr. L., secs. 1289, 2925; *Cooley's Case*, 6 Gray (Mass.), 350. One who is not a known officer ought to show his warrant and read it, if required; but it would seem that this duty is not so imperative as that a neglect of it would make him a trespasser *ab initio*, when there is proof that the party subject to be arrested had notice of the warrant, and was fully aware of its contents, and had made up his mind to resist its execution at all hazards. *Garrett's Case*, *supra*.

§ 640. — *unnecessary force not allowed.*

The law, in its humanity and justice, will not allow unnecessary force to be used in the execution of its process. If a defendant, without any deadly weapon or manifestation of excessive violence, makes resistance, an officer is not justified in wilfully shooting him down; but if a defendant has a deadly

weapon, and has manifested a purpose to use it if an arrest is attempted, the officer is not bound to wait for him to have an opportunity of carrying his purpose into effect. If the warrant is for a misdemeanor and a defendant attempts to avoid an arrest by flight, the officer has no right to shoot him down to prevent escape, nor even after an arrest has been made and defendant escapes from custody. *Forster's Case*, 1 L. C. C., 187. The rule is different in cases of felony. *Bryant's Case*, *supra*. If an officer has process in his hands issuing from a court of competent jurisdiction over the subject-matter, authorizing and commanding him to arrest a defendant, he is entitled to the protection which the laws afford officers acting under process, although the process in his hands is informal and irregular. If the process is illegal and void on its face, or is against the wrong person, or its execution is attempted out of the district in which it can alone be executed, then the officer would not be under the protection of the law; but it would seem that if he kills a resisting party under such circumstances, he would only be guilty of manslaughter, unless he had actual knowledge of his want of authority, or acted from express malice. I have stated to you many points of law which do not directly arise in the case before us; but it is important that they should be known and well understood in the country, where, in recent years, so much violence has been committed — *violence in the name of law and violence in defiance of law*.

The principles of law involved in this case having been explained to you by the court, it is now your duty to ascertain the facts from the testimony and apply them to the law as laid down by the court. In performing this important and solemn duty there are three points worthy of your special inquiry: 1st. Whether the prisoner on trial was a known officer of the law and had in his hands, at the time of the homicide, legal process authorizing and commanding him to arrest the deceased. 2d. Whether deceased made resistance to the execution of legal process with a gun in his hands, and had manifested and continued to entertain a purpose to use such gun if an arrest was attempted. 3d. Whether the resistance, if made, had entirely ceased, and the deceased had yielded himself quietly and willingly into the custody of the officer, and no longer had any purpose of resistance.

§ 641. *The court recognizes its regular officers and process.*

Upon the first point I will state, as a conclusion of law, that it is the duty of a court to recognize its regular officers and process. I therefore instruct you that the defendant was a regularly constituted officer of this court and the process under which he professed to act was due process of law. The only questions left for you to determine on this point are, Did the prisoner have such process in his hands at the time of the homicide? Was he endeavoring to execute such process? Was he a *known officer* of the law? And did the deceased have good reason to believe that there was an indictment against him which made him amenable to legal process? The second and third points presented involve questions of fact which you must ascertain and determine from the testimony in the case. To aid you in the performance of this duty I will now, in obedience to the requirements of the law, proceed to recapitulate the testimony, and will carefully endeavor not to express an opinion on the subject. I solemnly warn you not to allow your verdict upon questions of fact to be influenced by any impressions that you may form as to the conclusions of my mind. You must form your opinions upon questions of fact

from the testimony, and allow no prejudice or outside influence to control your action.

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§ 642. *Doubts to be resolved in favor of defendant.*

From this recapitulation and your own recollection you will perceive that the testimony is very conflicting. It is your duty carefully to consider the whole testimony and reconcile, as far as you can, any apparent conflicts; and when this cannot be done, you must believe that which you think, under all the circumstances, is entitled to the most credit. If, upon any question, you have a reasonable doubt as to the truth of the matter, you must render this doubt in favor of the defendant. This is the humane rule of the law in all criminal trials, but it is specially important and imperative in trials for capital felonies. There are some circumstances connected with this case which I feel it to be my duty to call to your special attention in order that they may not have an improper influence upon your action. The revenue laws have been the subject of much exciting discussion. Some persons advocate their rigorous enforcement, while others denounce such laws as unjust, inexpedient and oppressive. All persons engaged in the execution of these laws have their warm friends and bitter opponents. No such influences should enter into and control your deliberations. A citizen on trial for crime is entitled to be confronted in court by his accusers and have them solemnly sworn to tell the truth. He is also entitled to be tried by a *jury of his peers*, who are free from all prejudices, and who in their action will have an eye single to justice and truth. These rights are as old as the common law; they constitute fundamental principles of English and American freedom, and have been secured in the federal and all state constitutions. They extend to all trials for crime, but they ought to be especially regarded as sacred and inviolable where human life is put in jeopardy.

You, gentlemen of the jury, acting under the solemn obligations of your oath, and as fair-minded and impartial men, should discard all opinions and prejudices which you may have formed for or against the defendant, and try him as all citizens charged with crime ought to be tried — *according to the law and the testimony*. Gentlemen of the jury, if you come to the conclusion, after weighing all the testimony, that the deceased made resistance to the execution of legal process with a gun in his hands, and had manifested and continued to entertain, a purpose to use such gun if an arrest was attempted, then you will find the defendant not guilty.

2d. If you find that resistance was made but had entirely ceased, and the deceased had yielded himself quietly and completely into the custody of the officer, and no longer had any purpose of resistance, then the prisoner is guilty of manslaughter; and if sufficient time had elapsed for the prisoner to get over the excitement caused by the resistance, then he is guilty of murder. If you have any reasonable doubts upon these questions, then the defendant is entitled to the benefit of these doubts. (Verdict, not guilty.)

UNITED STATES v. CARR.

(Circuit Court for Georgia: 1 Woods, 480-487. 1872.)

Charge by Woods, J.

STATEMENT OF FACTS.—The prisoner stands at the bar of this court charged with the crime of wilful murder. The indictment is based upon the third sec-

tion of the act of congress, approved April 30, 1790 (1 Stat., 113), which reads as follows: "That if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on conviction thereof shall suffer death."

It charges that the prisoner, on the 13th of July, 1872, at and within Fort Pulaski, on Cockspur Island, within the southern district of Georgia, the said fort being at that time under the sole and exclusive jurisdiction of the United States, did, upon the person of one Harmon E. Jordan, commit the crime of wilful murder by shooting him with a musket. To this indictment the prisoner has pleaded not guilty, and has put himself upon the country.

§ 643. *Burden of proof on the prosecution.*

He comes to the bar under the protection of that humane maxim of the law, that every man is presumed to be innocent until the contrary is shown. In other words, the burden of proof is on the United States to establish the prisoner's guilt. Until this is done, in the eye of the law he is innocent. The prosecution must prove to your satisfaction every material ingredient of the offense of wilful murder before you would be justified in returning a verdict of guilty. Counsel for prisoner do not deny that on the 13th of July last at Fort Pulaski, within the southern district of Georgia, Harmon E. Jordan was killed by a shot fired from a musket held in the hands of the prisoner. Nor do they deny that the United States has sole and exclusive jurisdiction over Cockspur Island, on which Fort Pulaski is situate. There is, therefore, no question raised as to the jurisdiction of this court to try the accused.

§ 644. *Murder defined.*

It is not every killing of a human being that is criminal. Many homicides are of such a nature as to be no crimes at all. This makes it necessary for the court to instruct you what constitutes the crime of wilful murder as known to the law. Murder is defined to be "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, express or implied." 3 Coke's Inst., 47. In the case on trial it is not denied that the deceased, Harmon E. Jordan, was killed by a musket ball fired from a musket held in the hands of the prisoner, nor is it denied that the prisoner was of sound memory and discretion at that time, nor that Jordan was under the peace and protection of the law, so that the wilful killing of him would be a crime. Therefore, according to the definition just quoted, the only points for you to pass upon in deciding whether the prisoner at the bar is guilty of murder are: *first*, Was the killing unlawful? and *second*, Was it done with malice aforethought, express or implied?

§ 645. *Accidental killing.*

Upon the point whether or not the killing was unlawful, you will first inquire whether the act of the prisoner which resulted in the death of Jordan was intentional or unintentional. If it was unintentional, if the prisoner had no purpose to fire his piece, but it was discharged by him accidentally, and at the time of its discharge the prisoner was engaged in no unlawful act, then the act of killing is a homicide by misadventure, and is no crime. Therefore, if you shall be of opinion that the musket of the prisoner was accidentally discharged, and he was at the time engaged in no unlawful act, it would be your duty without further inquiry to return a verdict of not guilty. If, however, on the other hand, you believe the prisoner discharged his piece purposely, you will then inquire further whether the killing was lawful or unlawful.

§ 646. *Killing a soldier by a sergeant on duty not necessarily justifiable.*

The simple fact, if such you find to be the fact, that the prisoner, on the 13th of July last, was sergeant of the guard at Fort Pulaski, and the deceased was at the same time and place a private soldier, does not of itself make the killing a lawful homicide. The wilful killing of a soldier by a guard may be as clearly murder as the wilful killing of one citizen by another.

§ 647. *Orders of a superior officer will not of themselves justify the killing of a soldier.*

Nor will any order of a superior officer to an inferior in rank justify the wilful killing of a person under the peace and protection of the law. A soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor his oath to do it. So far from such an order being a justification, it makes the party giving the order an accomplice in the crime. For instance, an order from an officer to a soldier to shoot another for disrespectful words merely would, if obeyed, be murder, both in the officer and soldier.

§ 648. *Discretion to be exercised in suppressing riotous or mutinous behavior.*

It was the duty of the prisoner as officer of the guard to preserve the peace within the fort, and to suppress disorderly and mutinous conduct. He was authorized to use all proper and reasonable means to accomplish this end. But the means used and the force applied should be measured by the necessity of the case. For instance, the law would not justify the killing of a single unarmed soldier, even though drunken, riotous or even mutinous, when he could be arrested without resort to such extreme means. The means used must be proportioned to the end to be accomplished. In order to determine whether the homicide, now under investigation, was lawful or unlawful, you should consider what, under the circumstances of the case, would appear to a reasonable man to be the demands of duty. Place yourselves in the position of the prisoner at the time of the homicide. Inquire whether at the moment he fired his piece at the deceased, with his surroundings at that time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened speedily to ripen into mutiny. If he had reasonable ground so to believe, and did so believe, then the killing was not unlawful. But if, on the other hand, the mutinous conduct of the soldiers, if there was any such, had ceased, and it so appeared to the prisoner, or if he could reasonably have suppressed the disorder without the resort to such violent means as the taking of the life of the deceased, and it would so have appeared to a reasonable man under like circumstances, then the killing was unlawful. But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required.

§ 649. *Malice aforethought defined.*

If you shall reach the conclusion under these instructions that the homicide under consideration was lawful, it will be your duty without further inquiry to return a verdict of *not guilty*. If, however, you shall be of opinion that the killing was unlawful, you will then proceed to inquire whether it was attended with malice aforethought, express or implied. "Malice aforethought is the grand criterion which distinguishes murder from other homicide, and it is not so properly spite or malevolence to the deceased in particular, as any evil de-

sign in general; the dictate of a wicked, depraved and malignant heart; a purpose to do a wicked act; and it may be either express or implied in law. Express malice is when one with a sedate, deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces or former grudges, and concerted schemes to do him some bodily harm. So in many cases, when no malice is expressed, the law will imply it, as when a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable, provocation, the law implies malice; for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause." 4 Black. Com., 198.

"Although the malice in murder is what is called malice aforethought, yet there is no particular period of time during which it is necessary it should have existed, or the prisoner should have contemplated the homicide. If, for example, the intent to kill or do other great bodily harm is executed the instant it springs into the mind, the offense is as truly murder as if it had dwelt there for a long period." 2 Bishop on Crim. Law, sec. 677. If you are satisfied that the prisoner at the bar when he fired upon the deceased intended not to kill him, but only to do him some great bodily harm, if his act was unlawful and was done with malice aforethought, as it has been explained to you, still he is guilty of murder.

§ 650. *One prosecuted for murder may be found guilty of manslaughter.*

A recent act of congress declares that in all criminal causes the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment. Section 9, Act of June 1, 1871 (17 Stat., 198). We instruct you that the crime of manslaughter is included in the crime of wilful murder, with which the prisoner is charged in the indictment. So that if, after a careful investigation, you should conclude that the prisoner is not guilty of wilful murder, you may still find him guilty of manslaughter.

§ 651. *Manslaughter defined.*

"Manslaughter is defined to be the unlawful killing of another without malice, express or implied, which may be either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act." 4 Black. Com., 191. If you shall be of opinion that the killing of the deceased was unlawful, you must decide whether the offense of the prisoner is murder or manslaughter. It is not claimed in this case that the firing of the prisoner's musket was done involuntarily while the prisoner was in the commission of an unlawful act. So that if the prisoner is guilty of manslaughter at all, it must be because he is guilty of a killing voluntarily upon a sudden heat.

§ 652. *Words will not justify the use of a deadly weapon.*

No words applied by one man to another will justify the use of a deadly weapon, nor can they be the lawful occasion of that "heat" which would reduce the act of killing from murder to manslaughter. If a man returns provoking language by a blow from an instrument calculated to produce death, and death follows, the act will be murder. *State v. Merrill*, 2 Dev., 269; 1 Bish. Cr. L., secs. 872, 873. If you find the killing of the deceased was unlawful, but without malice, as we have defined malice, if it was done upon a sudden heat, not caused by the words merely of the deceased, but by an as-

sault, then the prisoner is guilty of manslaughter and not of murder, and such should be your verdict.

§ 653. *Reasonable doubt defined.*

Before you can find the prisoner guilty of either murder or manslaughter, you must be satisfied, beyond reasonable doubt, that every ingredient necessary to the offense has been established by the proof. A reasonable doubt is not a remote and far-fetched or fanciful doubt. It must be suggested by the evidence in the case, and of such strength as would influence a reasonable man in the conduct of his own affairs. If you are satisfied beyond any reasonable doubt of the guilt of the prisoner of either murder or manslaughter, you will return a verdict of guilty accordingly. If, on the other hand, you are convinced of the prisoner's innocence, or have reasonable doubt of his guilt, it will be your pleasant duty to say, Not guilty.

In your retirement, remember the great magnitude of this case to the public and the prisoner; bring your best ability to bear upon the investigation, and acquit yourselves of your solemn duty like good and lawful men.

UNITED STATES *v.* KNOWLES.

(District Court, Northern District of California: 4 Sawyer, 517-523. 1864.)

Charge by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—Gentlemen of the jury: The defendant is charged in the indictment with the crime of murder upon the high seas. The district attorney does not, however, seek from you a conviction of the defendant for this offense. He asks only a conviction for manslaughter, and the trial has been conducted as if the indictment charged only this lesser offense. Indeed, the facts it alleges as a foundation for the charge would not warrant a conviction of any greater offense. It alleges that the defendant was, on the 1st day of April, 1864, captain of the American ship *Charger*, belonging to citizens of the United States; that the ship had on board ten mariners, and among them one John P. Swainson; that the ship was provided with three boats for the protection and safety of the lives of the persons on board in case of accident; and that it was the duty of the defendant to manage and control the ship and boats so as to insure such protection and safety; that, on the 1st of April, 1864, the said Swainson was employed as seaman upon the royal-yard-arm of the mainmast of the ship in furling the royal sail; that whilst thus employed he accidentally fell into the sea; and that the defendant wilfully omitted to stop the ship, or to lower either of the boats, or to make any attempt to rescue and save Swainson, as was his duty to do; that Swainson would have been rescued and saved had the defendant stopped his ship and lowered either of his boats, and from his negligence and omission in this respect Swainson was drowned. As you will thus perceive, gentlemen, the charge is that the death of Swainson was occasioned by the wilful omission of the defendant to stop the ship, lower the boats and rescue him, or to make any attempt for his rescue. In the majority of cases where manslaughter is charged the death alleged has resulted from direct violence on the part of the accused. Here the death is charged to have been occasioned by the wilful omission of the defendant to perform a plain duty.

§ 654. *When omission of duty amounts to a felonious homicide.*

There may be in the omission to do a particular act under some circumstances, as well as in the commission of an act, such a degree of criminality as to render

the offender liable to indictment for manslaughter. The law on the subject is this: that where death is the direct and immediate result of the omission of a party to perform a plain duty imposed upon him by law or contract, he is guilty of a felonious homicide. There are several particulars in this statement of the law to which your attention is directed. In the first place the duty omitted must be a plain duty, by which I mean that it must be one that does not admit of any discussion as to its obligatory force; one upon which different minds must agree, or will generally agree. Where doubt exists as to what conduct should be pursued in a particular case, and intelligent men differ as to the proper action to be had, the law does not impute guilt to any one, if, from omission to adopt one course instead of another, fatal consequences follow to others. The law does not enter into any consideration of the reasons governing the conduct of men in such cases, to determine whether they are culpable or not.

In the second place, the duty omitted must be one which the party is bound to perform by law or contract, and not one the performance of which depends simply upon his humanity, or his sense of justice or propriety. In the absence of such obligations, it is undoubtedly the moral duty of every person to extend to others assistance when in danger; to throw, for instance, a plank or rope to a drowning man, or make other efforts for his rescue, and if such efforts should be omitted by any one when they could be made without imperiling his own life, he would, by his conduct, draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society.

In the third place, the death which follows the duty omitted must be the immediate and direct consequence of the omission. There are many cases in the reports in which this doctrine of liability for negligence resulting in death is asserted. In one case a defendant had been employed to give signals to railway trains of obstructions on the road. Having on one occasion neglected to give the proper signal of an obstruction, a collision followed, causing the death of a passenger. The negligence was held to be criminal, and the defendant was convicted of manslaughter. *Regina v. Pargeter*, 3 Cox C. C., 191. In another case, the defendant was employed as the ground bailiff of a mine, and as such it was his duty to cause the mine to be ventilated, by directing air-headings to be placed where necessary. By his omission to do this in a particular place, the damp in the mine exploded, and several persons were killed. The defendant was indicted for manslaughter, and the court instructed the jury that if they were satisfied that it was the ordinary and plain duty of the prisoner to cause the air-heading to be made in the mine, and that a person using reasonable diligence would have had it done, and that by the omission the death of the deceased occurred, they should find the prisoner guilty. *Regina v. Karmes*, 2 Carr. & K., 368. In these cases, you will perceive that the omission which resulted fatally was of a plain personal duty, and that the accident was the immediate and direct consequence of the omission.

§ 655. *Duty of the captain of a ship when a man falls overboard.*

Now in the case of a person falling overboard from a ship at sea, whether passenger or seaman, when he is not killed by the fall, there is no question as to the duty of the commander. He is bound, both by law and by contract, to do everything consistent with the safety of the ship and of the passengers and crew, necessary to rescue the person overboard, and for that purpose to stop the vessel, lower the boats, and throw to him such buoys or other articles which

can be readily obtained, that may serve to support him in the water until he is reached by the boats and saved. No matter what delay in the voyage may be occasioned, or what expense to the owners may be incurred, nothing will excuse the commander for any omission to take these steps to save the person overboard, provided they can be taken with a due regard to the safety of the ship and others remaining on board. Subject to this condition, every person at sea, whether passenger or seaman, has a right to all reasonable efforts of the commander of the vessel for his rescue, in case he should by accident fall or be thrown overboard. Any neglect to make such efforts would be criminal, and if followed by the loss of the person overboard, when by them he might have been saved, the commander would be guilty of manslaughter, and might be indicted and punished for that offense. In the present case it is not pretended that any efforts were made by the defendant to save Swainson, nor is the law as to the duty of the commander, and his liability for omitting to perform it under the conditions stated, controverted by counsel. The positions taken in the defense of the accused are: 1. That Swainson was killed by his fall from the yard; 2. That if not killed, it would have been impossible to save him in the existing condition of the sea and weather; 3. That to have attempted to save him would have endangered the safety of the ship and the lives of the crew. If in your judgment either of these positions is sustained by the evidence, the defendant is entitled to an acquittal.

§ 656. *What is a reasonable doubt.*

The killing of Swainson from his fall is alleged from the distance he must have fallen, and the absence of any appearance of subsequent motion on his part in the water. The distance was one hundred and ten feet, as stated by one of the witnesses from actual measurement. Another witness says that Swainson struck the water on his back or front; a third witness states that the feet of Swainson struck the water first, but that the position of the body was somewhat inclined. From the noise made in falling, the mate was of the opinion that Swainson struck the channels on the side of the vessel in his fall. You can judge of the probabilities of the man being alive after a fall of this kind. If you believe from the evidence that he was killed by the fall, that is an end of this case, and you need not pursue your inquiries further. But more, if you have any reasonable doubt, by which I mean a doubt founded upon a consideration of all the circumstances and evidence, and not a doubt resting upon mere conjecture or speculation, whether he was killed by the fall, you need not go further.

§ 657. *The presumption of law as to human life. Burden of proof to create a reasonable doubt.*

The prosecution proceeds upon the ground that he was not thus killed, the district attorney relying upon the general presumption of the law that a man known to be alive at a particular time continues alive until his death is proved, or some event is shown to have happened to him which usually, in the experience of men, proves fatal. The fall of a person into the sea from a height of one hundred and ten feet is not an event which is necessarily fatal. Nor can it be said that in the experience of men it is usually so. Its effect depends very much, if not entirely, upon the manner in which the party falling strikes the water, and the existence of obstacles breaking the force of the fall. The fact, therefore, that the fall of Swainson appears in the evidence presented by the prosecution does not change the presumption of the law which I have mentioned. The burden still remains upon the defendant of showing that the

fall was fatal, or of showing such attending circumstances as to create a reasonable doubt whether such was not the fact. You will not take the fall itself as conclusive on this point, but will consider it in connection with the evidence of the manner in which the party fell, and particularly of the manner in which he struck the water in falling.

If you are satisfied that the fall was not immediately fatal, the next inquiry will be whether Swainson could have been saved by any reasonable efforts of the captain, in the then condition of the sea and weather. That the wind was high there can be no doubt. The vessel was going, at the time, at the rate of twelve knots an hour; it had averaged, for several hours, ten knots an hour. A wind capable of propelling a vessel at that speed would, in a few hours, create a strong sea. To stop the ship, change its course, go back to the position where the seaman fell overboard, and lower the boats, would have required a good deal of time, according to the testimony of several witnesses. In the meanwhile, the man overboard must have drifted a good way from the spot where he fell. To these considerations, you will add the probable shock and consequent exhaustion which Swainson must have experienced from the fall, even supposing that he was not immediately killed.

It is not sufficient for you to believe that possibly he might have been saved. To find the defendant guilty, you must come to the conclusion that he would, beyond a reasonable doubt, have been saved if proper efforts to save him had been seasonably made, and that his death was the consequence of the defendant's negligence in this respect. Besides the condition of the weather and sea, you must also take into consideration the character of the boats attached to the ship. According to the testimony of the mate, they were small and unfit for a rough sea.

§ 658. *If there is doubt as to the conduct of a person charged with crime, evidence of his good character is entitled to consideration.*

During the trial much evidence was offered as to the character of the defendant as a skilful and able officer, and as a humane man. The act charged is one of gross inhumanity; it is that of allowing a sailor falling overboard, whilst at work upon the ship, to perish, without an effort to save him, when by proper efforts, promptly made, he could have been saved. If there be any doubt as to the conduct of the defendant, his past life and character should have some consideration with you.

With these views, I leave the case with you. It is one of much interest, but I do not think that, under the instructions given, you will have any difficulty in arriving at a just conclusion. (Verdict, not guilty.)

UNITED STATES v. FARNHAM

(Circuit Court for New York: 2 Blatchford, 523-541. 1853.)

Charge by BETTS, J.

STATEMENT OF FACTS.—The indictment in this case is founded on the twelfth section of the act of July 7, 1838, which is in these words: "And be it further enacted, that every captain, engineer, pilot or other person employed on board of any steamboat or vessel, propelled in whole or in part by steam, by whose misconduct, negligence or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof, before any circuit court in the United States, shall be sentenced to confinement at hard

labor for a period of not more than ten years." The seventh section of the act is to be taken in connection with the twelfth, as indicating the particular act of negligence on which the indictment is based. That section is as follows: "And be it further enacted: That whenever the master of any boat or vessel, or the person or persons charged with navigating said boat or vessel, which is propelled in whole or in part by steam, shall stop the motion or headway of said boat or vessel, or when said boat or vessel shall be stopped for the purpose of discharging or taking in cargo, fuel or passengers, he or they shall open the safety-valve, so as to keep the steam down in said boiler as near as practicable to what it is when the said boat or vessel is under headway, under the penalty of \$200 for each and every offense."

§ 659. *What must be proved to convict a captain of a steamboat of manslaughter under section 12 of the act of July 7, 1838.*

The indictment charges on the master of the Reindeer the crime of manslaughter, because by his misconduct, negligence or inattention at the time and place alleged, the lives of many persons on board were destroyed. The question at issue on the indictment is, whether the government has, by legal and sufficient proof, convicted the defendant of the crime of manslaughter. The law does not require the public prosecutor to prove wilful mismanagement or malconduct by the accused. The inquiry is not whether he was guilty of intentional negligence or inattention, but only whether he did what is forbidden by the law, and whether the explosion and destruction of life charged in the indictment arose from either of those causes. To resolve that question, you must have a clear and accurate understanding of the meaning of the terms used by congress in the law. By misconduct, negligence or inattention in the management of steamboats, mentioned in the statute, is undoubtedly meant the omission or commission of any act which may naturally lead to the consequences made criminal; and it is no matter what may be the degree of misconduct, whether it be slight or gross, if the proof satisfies you that the explosion of the boiler was the necessary or most probable result of it.

§ 660. *The captain of a steamboat is responsible for the proper performance of their duties by the pilot, engineer, etc.*

In order to possess a satisfactory apprehension of the language of the act, it is important to understand what are the duties of the captain of a steamboat — what responsibility he incurs personally — when his duty is merged in the duties of the other officers — and when the responsibilities of the other officers are independent of his. Was it the duty of the master to see to the state of the boiler, or that proper precautions were taken to relieve it from the pressure of steam when the boat was running or had stopped, or did that duty belong exclusively to the engineer? The practice and opinions of experienced officers and engineers on the subject have been testified to. It appears that a practice has grown up and become very common to allot to the different officers separate and independent trusts and commands; and it is a general notion that it belongs to the pilot to navigate the vessel independently of the captain, and that the engineer is, in his special department, not subordinate to the captain in the performance of his duties. If that were the true construction of the law, the captain would stand discharged of responsibility for all acts of the engineer appertaining to his particular department. There is no foundation in law for such distinction and restriction in the duties of officers of steamboats. They are the same in law as those of the officers of other vessels. The master is commander-in-chief. The law intrusts him with the control of the vessel

and of every department of service on board; and the engineer has no more right to refuse obedience to his orders than has the mate. The captain is charged with responsibility for the right performance of all duties which appertain to the command and management of the propelling power of the vessel. If there be misconduct or neglect in the engineer's department the captain is, by the maritime law, responsible civilly, and, by this statute, criminally, for the consequences. But if he procures competent persons, and gives them injunctions to perform the duties, the law will not impute guilt to him, if they, without his knowledge, neglect the duties assigned to them.

Although the captain may not select or engage the engineer, and the owners, as they have a right to do, employ him and fix the amount of his compensation, yet that circumstance in no way withdraws from the captain the rightful control over him in every particular of his service on board, unless his authority is expressly made independent of the captain. This must manifestly be so, or there could be no unity of command or action in working the vessel. The notion expressed by some of the witnesses, that an engineer holds his place independently of the authority of the master, and that the latter has no power to restrain him, even if he is crowding the machinery with a head of steam beyond what the master deems to be safe or prudent, has no foundation in law. The master has supreme command in all respects in directing the navigation of the boat, including control over the head of steam to be used. He is responsible for every misuse or neglect of that authority, and is, by the law in question, made a wrong-doer, answerable criminally on indictment, if he omits to interpose and suppress the danger. He is bound to see that all persons under his command do their duty properly; and this statute especially compels him, at his personal peril, to be actively awake to the safety of his passengers. It makes no difference in his favor if the engineer be the more skilled and competent man in respect to the management of steam. The supremacy of authority is with the master on general principles; and, in respect to specific duties imposed on him by law, he is responsible that proper measures be taken for their performance.

§ 661. *There is no difference between the responsibility of a captain of a steamer navigating inland waters and those of the like officers on sea-going steamers.*

There is no distinction, in law or maritime usage, between the relative duties and responsibilities of different officers who serve on vessels propelled by steam, whether such vessels navigate inland waters exclusively or are sea-going vessels. The pilot cannot, at his discretion, take a course differing from that directed by the master. Nor can the engineer raise the steam to or keep it at a gauge beyond what is prescribed by the master, whatever may be the desire or judgment of the pilot or engineer in those respects. It belonging to the master, of right, to dictate to his subordinate officers, it will be presumed that what is done by them, under his observation, is so done by his direction or assent, unless he proves his ignorance or that his directions have been disregarded.

§ 662. *It is the duty of the captain of a steamer to see that the safety-valve is raised when the boat stops.*

The great question in this case is, whether the omission to raise the safety-valve when the vessel stopped at the dock at Bristol was an act of misconduct, inattention or negligence in the captain, within the meaning of the twelfth section of the statute. This question arises on the seventh section of the same statute, which I have already read to you. The statute does not charge the

engineer with the duty of raising the safety-valve, but it is imperative in respect to the master, and imposes the duty on him to see that the safety-valve is raised when the boat stops. The omission to do so thus becomes, in respect to him, a direct violation of the law, and has an important bearing upon the meaning and application of the twelfth section.

§ 663. *It is imperatively required that the safety-valve shall be raised when the boat stops. No other mode of lowering the pressure of steam will do.*

It is not a correct interpretation of the law to understand it as requiring the safety-valve to be raised only in the contingency that the boiler has acquired, while stopped, a higher pressure of steam than was upon it when the boat was under headway; for that would permit the captain, without regard to danger, to keep the head of steam, during stoppage, the same as it was before coming to the dock. This would be, manifestly, in violation of the whole policy of the enactments, because a boat might thus be running under any head of steam, no matter how extreme and perilous, and yet the steam might be maintained at the same height while at the dock. The law was framed to promote the safety of the vessel and of the property and passengers on board. The whole purpose aimed at would be frustrated if the boat could be allowed to retain, when stopped, any pressure of steam she could generate whilst in motion. The object of the law was to secure a low state of steam, at all events, when the boat stopped; and, to effect this, the safety-valve is required to be opened, so as to keep the steam down, at all events, to what it was when the vessel was under headway. This presupposes that she is running with no more steam than is safe and prudent in the condition of her boiler. It would be in itself an act of misconduct to keep at any time a gauge of steam on the boiler beyond its fair capacity to bear; and, in addition to that plain obligation implied in the provisions of the twelfth section, congress superadded, in the seventh section, the express duty of raising the safety-valve on stopping the boat.

The course of the defense would seem to imply that the accused was justified in carrying any amount of steam within the range of fifty pounds to the square inch, which the certificate of the inspectors suggests the boiler would bear. But the inspectors have no authority, under the act, to dictate what amount of steam, whether forty or fifty pounds, more or less, may be used, or to compel steamboat owners or masters to follow their advice in that respect. It was wise and prudent in them to counsel parties on that subject. But this was only advisory and cautionary. They had no power to compel obedience. Nor was their opinion backed by facts which could give to it any special importance with the engineer or master. They had no authority to test the sufficiency of the boiler by steam or hydraulic pressure to ascertain whether it could bear fifty pounds or ten pounds pressure to the inch. Moreover, these inspections are only periodical, and are required to be made at six months intervals. In this instance the period for re-inspection had nearly come around, and that should have been a further caution to the officers of the Reindeer to be vigilant and prudent, and not to rely upon the opinions of inspectors, given months previously, as to the present safety and sufficiency of the boiler.

The testimony also affords reason to believe that, during the time since the last inspection, the boat had been running in active competition with others, which would have tended to overstrain and weaken the boiler, and to render less and less reliable and trustworthy the opinion of the inspectors upon its former condition and strength. This condition of things is necessarily incident, in a greater or less degree, to all boats in use; and, therefore, it is not to be

implied that congress intended to take the height of steam put upon a boiler whilst a boat is running as the measure of what may be retained when she is stopped. It would be to abrogate the beneficial object of this feature of the law, so to construe it. The whole scope of the enactment shows that congress intended that steam vessels should be, at all times, restrained to the use of no more steam than is compatible with entire safety; and the particular provision in question aims to fulfil that general intention, by guarding against an accumulation of steam when the vessel is at rest. Masters and engineers would be responsible, under the common and local law, for putting on an unsafe amount of steam in running boats. And congress, without giving further sanction to that law, by inflicting a fine or punishment, under the United States authority, for its violation, has applied its positive enactments, in this particular, by an absolute injunction that the safety-valve shall be raised whenever the vessel is stopped. It is hoped that the provisions of the new law, which goes into effect in a few days (Act of August 30, 1852, 10 U. S. Stat. at Large, 61), will prove more efficacious, both in ascertaining the actual strength of boilers, and in compelling a prudent use of them when the boat is in motion, than has been secured under the existing law; but its regulations have no application to this case.

The special question for the jury to consider and determine is, whether the vessel was under a prudent and safe head of steam at the time she was stopped at the landing, and whether the boiler had a sufficient supply of water; and next, whether the omission to open the safety-valve at that time was the cause of the explosion.

A ground of defense taken on this branch of the case is, that the safety-valve is required to be raised only as a means for lowering the steam in the boiler, and that the method pointed out in the act need not be adopted, if other and better means are employed for effecting the same end. In this view, it is contended that the accused has clearly proved, from universal practice and the judgment of skilful and experienced men, that, when coal is used for fuel, the steam in the boiler is more speedily and certainly reduced and made safe, by opening the furnace and flue-doors, than by raising the safety-valve. I do not, however, interpret the statute as leaving it optional with the master to adopt the course prescribed by the statute, or to substitute another. I think the statute is peremptory, and that the master has no right to deviate from its particular requirement. The plain language of the act must govern, and the master is bound to obey it. Congress has the like power to dictate in this particular as in that of the enrollment or inspection of steam vessels before they are allowed to run, and, in either case, to subject owners and masters to penalties for disobeying the prohibition.

The propriety of this enactment, or its fitness to secure the end proposed, or its inutility or inferiority to other methods, could not be determined with certainty by the opinions or theories of experts, if it were left an open question. This has been clearly evinced by the evidence on this trial. The statute is designed to obviate all obscurity or speculations on this point, and to supply a plain and determinate rule of action for the avoidance of a special hazard and peril, and, what is equally important, to insure implicit obedience to its regulations. Engineers, like other professional men, naturally incline to give slight heed to legislative directions which stand in conflict with their own opinions and practices. But it cannot be necessary to say more on this head, than that theories and speculations can have no place here. Congress has the power to

give the rule, and we must accept the national will, as expressed in the law, as fixing the method which must be observed and adhered to, without regard to its abstract reasonableness or usefulness. Besides, it is far from being made clear, upon the evidence, that the usage of opening the doors of the furnaces relieves the boiler sufficiently, or that the idea is an erroneous one which induced congress to require the safety-valve to be always opened for the discharge of steam when the boat is stopped. After an experience of twelve or thirteen years, congress appears to adhere to the same opinion; and, in a few days, a law will go into operation compelling steamboats to have, not only one but three safety-valves ready for use, one of which must be self-acting and out of the control of the captain or engineer, so that it shall open at a particular point of steam, no matter what other means are in use to keep the steam below that point. Nor do I think that the engineers express themselves decidedly of opinion that opening the doors of the furnaces and flues can always be relied upon as sufficient, nor but that, under many circumstances, it will be necessary to open the safety-valve also, especially if there be a deficiency of water in the boiler.

It seems to the court plain that the object congress had in view, in the provision, was to compel the master to have the safety-valve opened when the boat stops, without regard to other measures which may be employed to prevent an explosion. If experience has demonstrated the law to be useless or improvident, and that additional danger is incurred by raising the safety-valve, the legislature should have been appealed to for a repeal or modification of the law, so that masters need not be compelled to use means calculated to increase danger instead of warding it off. The legislative will must govern; and that declared by this law must be obeyed until a different one is substituted by congress. But, if we may judge by the late enactment on the subject, there has been no change of legislative opinion. It is no matter what may be the inconvenience or expense to the owners, or what delay it may cause in the progress of the boat. It is your duty, equally with that of the court, to hold captains of steamboats to a strict obedience to the direction of the legislature, and to regard an intentional deviation from it as a fault. Whether such neglect or misconduct be of a criminal character will be more particularly considered hereafter. The excuse set up for the master, in this instance, that he was occupied with other duties of his command, cannot avail as a defense, because it was in no way necessary that he should be personally at the engine and raise the valve with his own hand. He would stand acquitted of blame if he had laid express commands on the engineer and his assistants to see that it was done at every stoppage. He is not permitted to leave this duty to the judgment and discretion of the engineer, even if satisfied the latter has more skill and experience than himself.

§ 664. *The omission of the captain of a steamboat to give orders that the safety-valve shall be raised when the boat stops is legal evidence that will support an indictment against him under section 12 of the act of July 7, 1838.*

The crime created by the statute does not rest upon any wrong intention of the officer who is subjected to indictment. As regards the defendant in this case, he is not accused of any wilful misconduct, or of any design to injure the vessel or any person on board, or to put either in danger. The indictment is not placed upon that ground. You will examine the evidence, and see whether you can fairly imply from it that the captain had given proper orders for the safety-valve to be raised when the boat was stopped; and, if not, you must

regard his omission to take that precaution as legal evidence of misconduct, negligence and inattention, tending to support the indictment. In order to convict him, the district attorney must prove some act of negligence or omission. It must be shown that the accused omitted to do something which it was incumbent upon him to do in fulfillment of his duty, or that he did something in violation of his duty. The mere circumstance of the valve's not having been raised is not to be taken by itself as full proof of the crime charged against the captain. The essential question is, not whether the evidence shows that the captain was negligent of his duty, but whether the explosion was caused by the particular negligence proved; that is, whether the proof satisfies your judgment that the omission to raise the valve was the proximate cause of the explosion and of the death of the persons destroyed. And, in examining this point, it is important to ascertain what was the actual state of the boiler. If it was insufficient, from some inherent defect, at the time it was inspected, or had afterwards become so from ordinary use, and there was nothing discernible, by reasonable attention and diligence, to indicate any defect; and if, furthermore, it appears that such occult defect was the cause of the explosion, then the defendant cannot be made responsible criminally for consequences arising out of that condition of things. It is necessary that this branch of the case be carefully considered, and if it appears upon the evidence that the boiler must most probably have exploded under a cautious use of steam, and that it was intrinsically unsafe under such circumstances, the omission to raise the valve on stopping the boat should not be regarded as adequate evidence that such omission caused the explosion, and the accused ought to be acquitted of the crime charged upon him by the indictment.

It is incumbent upon the jury to weigh considerably the proofs bearing upon this point, and to be satisfied there was no more than a reasonable head of steam upon the boiler at the time of the explosion; because latent defects in that will afford the master no protection, if he allowed an improvident and unsafe pressure of steam to be then generated. The accused is called on to answer for his negligence or misconduct in allowing the boiler to be under a dangerous gauge and pressure of steam, but not for an explosion arising from other causes. The only direct proof of any act of misconduct, negligence or inattention by the defendant is his omission to have the safety-valve raised at the time it was, by statute, made his duty to raise it; but you must connect with that and consider all other circumstances in evidence attendant upon the catastrophe, or directly preceding it, and judge from the whole evidence whether that omission was the productive cause of the explosion and homicide charged upon him. If, on consideration of all the facts and circumstances laid before you by the testimony, you are unable to determine, to the clear satisfaction of your judgment, what was the immediate cause of this disaster, and of the appalling destruction of life which attended it, or if, on such review, it remains doubtful in your minds whether the explosion was occasioned by any culpable inattention or negligence or misconduct of the defendant, then he is entitled to your acquittal.

The court, at the request of the jury, gave the following charge on the meaning of sections 7 and 12:

The command of the seventh section being positive, that the master shall open the safety-valve on the stoppage of the boat, it is a culpable omission in him to leave it to the option of the engineer to open the valve or not, at his

discretion. It is the duty of the master to give explicit orders that the statutory direction in this respect be strictly obeyed. The true construction of the law does not authorize the master to keep the safety-valve down while the boat is stopped, although the steam is no higher during the stoppage than when the boat was under headway, provided the pressure before she stopped was an unsafe one. The law does not authorize the master to keep on a head of steam when the boat is stopped which was dangerous when she was under headway.

The twelfth section does not declare that the particular act of misconduct or neglect, in keeping down the safety-valve when the boat is stopped, is a criminal offense; but it becomes so, under that section, if the omission to open the valve at that time causes the explosion of the boiler. If the jury are satisfied, upon all the evidence, that an improper and unsafe pressure of steam was kept on the boiler, and that it exploded from that cause, and of the further fact, that, if the safety-valve had been opened when the boat was stopped, the danger would have been avoided, then, as before remarked, the master's disobedience of the seventh section in that respect would be legal evidence against him under the twelfth section. That disobedience is not declared to be of itself a crime; but yet if it causes the death of a person on the boat it is competent evidence in proof of the misconduct or negligence which is made criminal by the twelfth section.

UNITED STATES v. ARMSTRONG,

(Circuit Court for Massachusetts: 2 Curtis, 446-452. 1855.)

STATEMENT OF FACTS.—Proceedings had upon the indictment of the defendant for wilfully and maliciously striking one Thompson with a hatchet on board the bark Kelly, while on the high seas, of which wound Thompson afterwards died in the United States, on shore. Thompson and the defendant were respectively mate and cook of the bark Kelly; on the morning of the 22d of July, 1855, Thompson reprimanded defendant for not having the coffee ready, and told him that if he failed to have it ready by five the next morning he would give cause to complain to the master. At this time the mate was outside of the galley and the defendant within. Defendant then said to Thompson: "You had better not commence with me, sir; if you do, it will be the worse for you." Thompson then put his head and one foot in the galley, and immediately backed out, grappling with the defendant, who had his arm around the mate's neck; defendant then struck the mate on the head with a hatchet which he carried in his right hand, and was about to repeat the blow when he was overpowered by the crew, one of whom remarked at the time: "You have killed that man;" and defendant answered: "Let him die; he had no business to kick me." The wound inflicted by defendant penetrated Thompson's skull; he was put ashore at Boston, where he lingered for a few days, when he died.

§ 665. *The burden of proving a malicious killing is upon the prosecution; the evidence need not be direct, but may be implied from the circumstances under which the killing was effected.*

Charge by CURTIS, J.

In the case, *United States v. Mingo*, 2 Curt., 1, tried here at the May term, 1855, this court, after careful consideration, laid down the rule that, whether the crime be murder or manslaughter, is not to be decided upon any presumption arising from the mere fact of killing; but that the government, besides proving the homicide, must offer sufficient legal evidence that the killing was

malicious. And if, upon the whole evidence, the jury have reasonable doubt whether the killing was from malice, they cannot find the accused guilty of the crime of murder. To those principles we now adhere. But you will observe that they go no further than this; that the burden of proof is on the government to prove a malicious killing, and that proof of the mere fact of killing does not change this burden nor support it by raising a presumption of malice. But this is entirely consistent with such a presumption being raised by the circumstances under which the killing was effected. Mere homicide does not imply malice. But circumstances may attend a homicide, which, in point of law, stamps it as malicious, without other evidence of malice. For malice may be, and is, implied by law, as well as expressly proved by direct evidence. And one ground for the implication of malice is the nature of the act of the accused. If the prisoner, without such provocation or excuse as the law deems sufficient, intentionally struck a hatchet into the head of the deceased, and thereby killed him, the law deems this a malicious killing, and the offense is murder. In such a case, no other evidence of malice is required than that furnished by the act itself. That being wicked, cruel and barbarous, the law considers that it proceeded from a wicked and depraved heart, fatally bent on mischief.

§ 666. *The accused is not entitled to the benefit of a conjecture which would tend to presume misconduct by the deceased.*

If, therefore, you find the prisoner intentionally struck the mate on the head with a hatchet, the blow being calculated to produce and actually producing death, you should find him guilty of murder, unless there be some other circumstance in the case which should control this implication of malice, and account for the act without its existence. The prisoner's counsel insist that there is. They urge that there is evidence tending to prove that the mate assaulted the cook in the galley, and that moreover, as no one saw what passed there, you ought to presume that the assault by the mate was of such a character as to excuse, if not to justify, the homicide. But we do not think you can make any such presumption in the absence of proof showing what was done by the mate. It is true the prisoner is entitled to the presumption that he is innocent till his guilt is proved. But the same presumption exists in favor of the mate. The law will not presume, without proof, that he wrongfully assaulted the cook, any more than it will presume, without proof, that the cook assaulted him. It presumes no misconduct by either; misconduct must be proved. But when it has been proved, he who apparently was a wrong-doer cannot escape upon a suggestion not supported by any evidence, that another, and not himself, was guilty, and therefore you cannot, consistently with the rules of law, allow the prisoner the benefit of any mere conjectures of what might probably have happened in the galley. If the evidence points to any thing as having there happened, you are to consider it, but you are not to assume, without evidence, that the mate's misconduct excused or extenuated the act of the prisoner. *Rex v. Oneby*, 2 Ld. Raym., 1500.

§ 667. *The provocation must be very great to be sufficient to extenuate the offense of an assault with intent to kill.*

It is urged that the evidence shows the mate kicked the cook. It is true the cook so declared immediately after the affray, and his declaration is before you to be weighed in connection with the other evidence. You will consider the position in which the mate stood, leaning forward, the upper part of his body and one foot in the galley and the other on deck; the time which elapsed, the positions of the parties when they came out of the galley, and then you

will say, if you are satisfied, the mate kicked the cook. If he did not, this ground wholly fails. If he did, still it does not necessarily follow that the killing was not malicious. Because there must be some reasonable proportion between the provocation given and the act of resentment. It is not every blow given which will account for the use of a deadly weapon. If the evidence in this case had described the provocation, it would be the duty of the court to declare, as matter of law, whether it would or would not be sufficient to remove the presumption of malice arising from the fatal use of a deadly weapon. But it is not practicable to do so in this instance, because we do not know what you may consider to have been done by the mate to the prisoner. We can, therefore, only say that, if a blow of considerable violence excites the passions of the one assailed and so causes him, in the heat of blood, to kill his assailant, the killing is not, in general, malicious; but that if a deadly weapon is used, the provocation should be very great to be sufficient to extenuate the offense.

§ 668. — *the act complained of by the defendant must have been such as would naturally produce retaliation by a fatal blow with a deadly weapon.*

If, from the evidence, you can find that the mate inflicted such a blow on the prisoner as would account for his returning it with a blow on the head with a hatchet, without imputing to the prisoner any more than that infirmity of passion which belongs to men in general, then the act is not, in law, malicious. But the law allows for the infirmity of our common nature, not for those violent and wicked passions which exist in some men; and if the act of the mate was such as to produce retaliation by a fatal blow with a deadly weapon, not by reason of the common passions of humanity, but from a cruel and relentless disposition, then the defendant is guilty of a malicious killing, notwithstanding you may find the mate assaulted him. (Verdict, guilty of manslaughter.)

Motion in arrest of judgment by the accused on the ground that no act of congress made punishable a mortal stroke on the high seas, without malice, followed by death on shore.

§ 669. *Under the act of congress, manslaughter is not punishable as such where the assault takes place on the sea, but death follows on shore.*

Opinion by CURTIS, J.

The twelfth section of the act of April 30, 1790 (1 Stats. at Large, 115), makes the crime of manslaughter on the high seas punishable by fine and imprisonment. It does not define the offense otherwise than by the use of the term manslaughter. It thus remits us to the common law for its definition. Manslaughter is the unlawful killing of a human being without malice; and there is not such a killing on the high seas, if the death takes place on land. In accordance with this, Judge Washington, in *United States v. Magill*, 1 Wash., 463, decided in 1806, held that a killing with malice from a stroke on the sea which produced death on shore was not murder on the high seas. No doubt the fourth section of the act of March 3, 1825 (4 Stats. at Large, 115), under which this prisoner was indicted, was passed to remedy this defect of jurisdiction. But it applies only to a malicious killing on shore by a stroke at sea. The verdict of the jury negatives malice, which is an essential ingredient in this statutory offense. It is true, the offense described in the statute is not strictly murder; for it punishes the malicious stroke, given at sea, when the death occurs on land. But it is an offense of which one necessary ingredient is malice, and that is shown by the verdict not to have existed in this case. The district judge concurs in this opinion. Judgment arrested.

WIGGINS v. PEOPLE, ETC., IN UTAH.

(3 Otto, 465-486. 1876.)

ERROR to the Supreme Court of the Territory of Utah.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—Section 3 of the act of congress of June 23, 1874 (18 Stat., 254), allows a writ of error from this court to the supreme court of the territory of Utah, where the defendant has been convicted of bigamy or polygamy, or has been sentenced to death for any crime. The present writ is brought under that statute to obtain a review of a sentence of death against plaintiff in error for the murder of John Kramer, commonly called Dutch John, in Salt Lake City. The only error insisted upon by counsel, who argued this case orally, was the rejection of testimony offered by the prisoner, as shown by the following extract from the bill of exceptions:

"The defendant, on the trial of this cause, called Robert Heslop as a witness in his defense, who testified:

"That just a short time before the shooting the deceased showed him a pistol, which he (deceased) then had upon his person. Deceased, at this time, was sitting on a box on the opposite side of the street from the Salt Lake House, and in front of Reggels' store.

"The prosecuting attorney admitted that this was after the deceased was ejected from defendant's saloon.

"Whereupon the counsel for the defendant asked witness the following questions:

"What, if any, threats did the deceased make against the defendant at this time? which was objected to by the prosecuting attorney, for the reason it was immaterial.

"The objection was sustained by the court, and the defendant, by his counsel, then and there duly excepted.

"Defendant's counsel then asked witness, what, if anything, did deceased then say concerning the defendant?

"(Objected to by prosecuting attorney as incompetent.)

"Defendant's counsel thereupon stated that they expected to prove by this witness that in that conversation, a short time prior to the killing, the deceased, in the hearing of said witness, made the threat that he would kill the defendant before he went to bed on the night of the homicide, which threats we cannot bring home to the knowledge of the defendant.

"Which was objected to by the counsel for the prosecution, because it was incompetent.

"The objection was sustained by the court, to which the defendant then and there excepted.

"This witness and several others testified that the deceased's general character was bad, and that he was a dangerous, violent, vindictive and brutal man."

§ 670. *Recent threats of deceased against the prisoner, not communicated to the latter, are competent testimony.*

Although there is some conflict of authority as to the admission of threats of the deceased against the prisoner in a case of homicide, where the threats had not been communicated to him, there is a modification of the doctrine in more recent times, established by the decisions of courts of high authority, which is very well stated by Wharton, in his work on Criminal Law, § 1027:

"Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that, at the time of the meeting, the deceased was seeking defendant's life." *Stokes v. People of New York*, 53 N. Y., 174; *Keener v. State*, 18 Ga., 194; *Campbell v. People*, 16 Ill., 18; *Holler v. State*, 37 Ind., 57; *People v. Arnold*, 15 Cal., 476; *People v. Scroggins*, 37 id., 676. Counsel for the government, conceding this principle to be sound, sustains the ruling of the court below, on the ground that there is no evidence in the case to show any hostile movement or attitude of the deceased towards the prisoner at the time of the fatal shot, and that there is conclusive evidence to the contrary. In support of this latter position, he relies on the testimony of Thomas Dobson, the only witness of the meeting which resulted in the death of deceased by a pistol-shot from defendant.

Before criticising Dobson's testimony, it is necessary to state some preliminary matters. It appears that, on the night of the homicide, the deceased and a man of similar character, called Bill Dean, got into a quarrel in a drinking saloon kept by defendant, in which they both drew pistols. Defendant interposed, and took their pistols from them, and turned them out of his saloon by different doors. He gave Dean his pistol as he turned him out, and asserts that he also returned the deceased *his* pistol; but of this there is doubt. Shortly after this, he started homewards, and fell in company with Dobson, who was a night watchman of Salt Lake City. As they went along the street, Dean was discovered in the recess of a doorway on the sidewalk with a pistol in his hands, and defendant went up to him, took it away from him, and he ran down the street. Passing on, Dobson and defendant came in front of a hotel, the Salt Lake House, where the homicide occurred, of which Dobson, the only witness, tells his story thus:

"As I came down street, about 2 o'clock in the morning, I saw Dutch John sitting on the carriage steps of the Salt Lake House, with his face resting on his hands, apparently in a stupor or asleep. Wiggins, the defendant, was with me. He (Wiggins) jumped to my rear, and immediately the firing commenced. I do not know, and cannot tell, who fired the first shot. At the first report, I turned round and saw the blaze of the second shot from a pistol in the hands of Wiggins. I had advanced to the carriage steps and said, 'Jack, don't kill him.' Wiggins then jumped on carriage steps and fired another shot, which passed right by in front of me and into the body of Dutch John. Dutch John grabbed me around the legs, and we fell over the steps into the street. When I turned and saw the first shot from Wiggins' pistol, I saw Dutch John's hands raised, and heard him cry out, 'Don't kill me; I am not armed.' Immediately after the firing ceased, Wiggins stooped down as if to pick up something, and when he raised up he had something in his left hand; but I cannot tell whether it was a pistol or not. At the same time, Wiggins made the remark to the deceased, 'You wanted to kill me,' or 'You tried to kill me.' I am not sure which expression was used."

If we are to believe implicitly all that is here said by this witness, we do not see in it conclusive evidence that defendant fired the first shot, and that no previous demonstration was made by deceased. On the contrary, he says he does not know, and cannot tell, who fired the first shot. He does say that when the vision of Dutch John met their eyes, the defendant "jumped behind

witness, and *immediately*" (that is, just after) "the firing commenced." He also says that, immediately after the firing ceased, defendant stooped down as if to pick up something, and arose with something in his hand. We do not think that this statement proves at all, certainly not conclusively, that deceased did *not* fire the first shot. Either there must have been some reason for defendant's jumping behind witness, and he must have picked up a pistol which fell from the hands of deceased, or he was guilty of consummate acting, for the purpose of deceiving witness, and making evidence to defend himself from the charge of a murder which he intended to commit.

It is difficult to believe that, on a sudden encounter, any one would have such cool deliberation; and it is much more reasonable to believe that the seeking of safety, by jumping behind the witness, was caused by some movement or other evidence of hostile intent by deceased which escaped the less vigilant eye of witness, and that it was the display of the pistol which the defendant afterwards picked up. This latter view is supported by other testimony, to be presently noticed. But it is pertinent here to remark, that both the effect of this witness' testimony and his credibility were to be weighed by the jury, and that doubt was thrown on the latter by showing that, in the preliminary examination, he had made statements at variance with what he now stated, which were more favorable to defendant. Take all these together, and we think the court had no right to assume that it was beyond doubt that defendant had commenced the assault, which resulted in death, by firing the first shot, without any cause, real or apparent. In this we are confirmed by other parts of the testimony displayed in the bill of exceptions.

It is nowhere asserted that defendant fired more than three shots. A witness, however, who was within hearing, swears positively that he heard four shots. In agreement with this, it is proved, without contradiction, that when defendant was arrested, immediately after the shooting, three pistols were found on him. Of one of these, three barrels were empty; of another, one; and the third was fully loaded. The police-officer who arrested defendant says of these pistols, "The one identified as Dutch John's had one chamber empty; the one identified as Bean's had three chambers empty; and the deringer was loaded." It is a fair inference that the three empty barrels were those he had discharged at deceased, and that the other was the one he had picked up after the shooting, which had been in the hands of deceased. Whence comes the fourth shot, and who emptied the chamber of deceased's pistol? That deceased had a pistol with him is a concession made by the prosecuting attorney on the trial. It will be seen, in the extract from the bill of exceptions first given, that the witness Heslop testifies positively, that, just a short time before the shooting, the deceased showed him a pistol, which he then had on his person, while sitting on a box on the side of the street opposite the scene of the homicide; and the prosecution admitted that this was after the deceased had been ejected from the saloon.

Here, then, was a man who had, a few hours or minutes before, had a difficulty, in which pistols were drawn; who was known to be of desperate and vindictive character; who had shown a witness a pistol within a few minutes preceding the fatal encounter, and that pistol was, after the encounter, picked up on the sidewalk, where it occurred, with a chamber empty. Also, strong evidence to show that one more shot was fired than defendant had fired, and the probability that it came from the pistol of the deceased at that time. Now, when, under all these circumstances, the witness, and the only witness

who was present at the encounter, swears that he cannot tell where the first shot came from, though he knows that defendant only fired three, it must be very apparent that if the person to whom the deceased exhibited that pistol, a few minutes before the shooting, had been permitted to tell the jury that deceased then said "he would kill defendant before he went to bed that night," it would have tended strongly to show where that first shot came from, and how that pistol, with one chamber emptied, came to be found on the ground. This testimony might, in the state of mind produced on the jury by the other evidence we have considered, have turned the scale in favor of defendant. At all events, we are of opinion that in that condition of things it was relevant to the issue and should have been admitted.

Judgment reversed, with directions to set aside the verdict, and grant a new trial.

MR. JUSTICE CLIFFORD dissented, holding that "evidence of previous uncommunicated threats is never admitted in the trial of an indictment for murder, unless it appears that other evidence has been introduced tending to show that the act of homicide was committed in self-defense, and that the evidence of such threats may tend to confirm or explain the other evidence introduced to establish that defense."

§ 671. Murder is the unlawful killing of another with malice. *United States v. Magill*,* 1 Wash., 468. See § 592.

§ 672. State laws defining murder govern courts of the United States in trials for murder within such states. *Georgia v. O'Grady*,* 3 Woods, 496.

§ 673. To constitute the crime of murder it is not necessary that the slayer should have a particular enmity or malevolence against the deceased; it is sufficient if there be either a deliberate malice in the act, or circumstances of cruelty and malignity, carrying in them the plain indications of a depraved, wicked and malignant spirit. *United States v. Ross*,* 1 Gall., 624.

§ 674. If in a fight in hot blood one person receives a wound from which death ensues it is not murder. If the encounter takes place deliberately, as in a duel, it seems that the killing would be murder. *United States v. Mingo*,* 2 Curt., 1.

§ 675. It is not necessary, to constitute murder, that the party should himself inflict the mortal wounds. It is sufficient if he is present, aiding and abetting the act. *United States v. Ross*,* 1 Gall., 624.

§ 676. Under a statute whereby all the elements of murder in the second degree are contained in murder in the first degree, the prisoner has no reason to complain that the jury found him guilty of the lesser crime, where the evidence warranted them in finding him guilty of the greater. *Phillips v. Wyoming Territory*,* 1 Wyom. T'y, 82.

§ 677. It is essential to the crime of murder that the killing should be from malice aforethought. Such malice need not be proved by evidence of previous threats, or preparation to kill, or previously premeditated design to kill, for it may also be implied from the nature of the act of the accused. If a person, without such provocation as the law deems sufficient to reduce the crime to manslaughter, intentionally inflicts, with a dangerous weapon, a blow calculated to produce and actually producing death, the act is deemed malicious and the crime is murder. *United States v. McGlue*, 1 Curt., 1 (§§ 3145-54).

§ 678. Murder is committed where a person of sound memory and discretion unlawfully kills a reasonable creature in being, and in the peace of the United States, with malice aforethought. *Guiteau's Case*, 10 Fed. R., 161 (§§ 3124-44).

§ 679. A homicide committed without lawful authority and with deliberate intent is committed with malice aforethought, although the prisoner bore no ill-will against the deceased. *Ibid.*

§ 680. — or manslaughter. — When an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in the prosecution of a felonious intent, or if in its consequences it naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will amount to manslaughter only. *United States v. Travers*,* 2 Wheeler, 490. See §§ 603, 605, 606, 621.

§ 681. — **provocation.**— Mere words, though reproachful, are no defense in case of homicide, and will not alone constitute a provocation sufficient to free the party killing from the guilt of murder. *Ibid.*

§ 682. If a man attacks another with a dangerous weapon without sufficient provocation, the law implies malice, and if the killing be without other provocation than words, it is murder. *United States v. Mingo*, * 2 Curt., 1.

§ 683. — **malice.**— Malice aforethought distinguishes murder from manslaughter. Such malice is not merely spite or malevolence to the deceased in particular, but an evil design generally. It may be malice *expressed* and manifested by deliberately formed designs or declarations; or malice *implied*, to be inferred from such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. *United States v. Travers*, * 2 Wheeler, 490.

§ 684. — **burden of proof.**— In a prosecution for murder where blows are shown to have been inflicted upon the deceased by the accused and that insensibility and death ensued, the burden to prove some other cause of death is on the accused. *United States v. Wiltberger*, * 3 Wash., 515.

§ 685. In an indictment for murder it is incumbent upon the government to prove a felonious killing, and if upon the whole evidence the government has failed to satisfy the jury beyond a reasonable doubt that such killing was felonious, the verdict must be not guilty. *United States v. Mingo*, * 2 Curt., 1; *United States v. Armstrong*, 2 Curt., 448 (§§ 663-669).

§ 686. — **deceased a violator of the law.**— The fact that a person is an habitual violator of the revenue laws is no defense in a prosecution for murder for killing him. If a revenue officer or any of his posse shall unnecessarily, wantonly or wilfully kill such a man, it is as much murder as if the deceased had been a law-abiding citizen. *Georgia v. O'Grady*, * 3 Woods, 496. See §§ 595-602.

§ 687. — **proximate cause.**— If a person in a weak state of health is beaten by another so cruelly, wilfully and deliberately as to endanger his life, or produce some great bodily harm, and the person beaten dies of a fever, caused by such beating and the state of his health, then the person doing the beating is guilty of murder, if such beating was inflicted with malice aforethought, or of manslaughter if such beating was without malice, unless the fever became mortal from some fault of the deceased or his attendants. *United States v. Woods*, 4 Cr. C. C., 487.

§ 688. — **resisting an officer.**— Where a constable was killed by a tenant while executing an order from the landlord to make a distress for rent, which order did not purport to be an authority to him to act as constable, the court instructed the jury that in executing the order the constable was not acting in discharge of his official duty within the principle of law which makes the killing murder, when it would not have been murder in case of the killing of a man who was not an officer. *United States v. Williams*, 2 Cr. C. C., 438. See §§ 232, 612, 1218, 1468, 2644.

§ 689. When officers, or those having a right to interpose to quell riots and affrays, do interpose for that purpose, and their object is declared and known, and they are resisted and killed in such resistance, it is murder in the persons thus resisting and killing. But even in such a case, there must be sufficient cooling time for the passion arising from the affray to subside, or the circumstances must be such that the prisoner should be reasonably supposed to have sufficient self-possession, notwithstanding the excitement, to know the officers and their object, and the purpose of their interference. *United States v. Travers*, * 2 Wheeler, 490.

§ 690. — **aiding.**— If several persons conspire together to seize a vessel and run away with her, against the will of the master and crew, and mean, in the execution of such conspiracy, to kill, if necessary, whomsoever shall oppose them in executing their object, all who are present on board, aiding and assisting in accomplishing the object, are guilty of murder if an associate kills a passenger in the execution of the unlawful design. *United States v. Ross*, * 1 Gall., 624.

§ 691. **Manslaughter** is the unlawful killing of another, without malice, either express or implied. It differs from murder in the important particular of absence of malice; as where it happens in a sudden heat, when passion has obtained the dominion over reason and the gentler feelings of the heart. Out of respect to human infirmities the law mitigates the offense of murder into manslaughter. The offense is, however, unlawful, for no man is permitted to avenge his own wrongs, unless in a case of great emergency, by the death of the supposed offender. *United States v. Wiltberger*, * 3 Wash., 515. See §§ 603, 605, 606, 621.

§ 692. If upon a sudden quarrel two persons fight, and one of them kills the other, it is manslaughter. *United States v. Travers*, * 2 Wheeler, 490.

§ 693. It is not every trivial provocation which, in point of law, amounts to an assault, or even a blow, that will reduce the crime to manslaughter. If the punishment inflicted by the

party killing be outrageous in its nature or continuance, and beyond all proportion to the offense, it is rather to be attributed to the effect of a brutal and diabolical malignity, the genuine malice of the law, than human frailty; and therefore the crime will amount to murder in such cases, notwithstanding the provocation. *United States v. Cornell*,* 2 Mason, 60.

§ 694. It is no extenuation of the crime of murder that the person killing is very irritable and easily excited to the most ungovernable passion by slight provocation. *Ibid*.

§ 695. Where a tenant was indicted for the murder of a constable while the latter was engaged in levying a distress for rent by order of the landlord, the court was of the opinion that the jury might find a verdict of manslaughter, although they should be satisfied that the constable was not in the execution of his official duty when he was killed. *United States v. Williams*, 2 Cr. C. C., 438.

§ 696. Homicide in resisting an arrest substantially illegal will, at most, amount only to manslaughter. *United States v. Travers*,* 2 Wheeler, 490.

§ 697. Under section 5314 of the Revised Statutes, declaring that "Every captain, engineer, pilot, . . . by whose misconduct, negligence or inattention to his duties the life of any person is destroyed, . . . shall be deemed guilty of manslaughter," destruction of human life is the essence of the offense. The offender is not guilty when the misconduct or negligence occurs, but when that misconduct bears fruit by causing the death of a human being. *In re Doig*, 4 Fed. R., 193 (§§ 3192, 3193).

§ 698. Where, in an indictment for murder upon the high seas, the unlawfulness, wilfulness and maliciousness of the acts are charged, and the acts charged, when proved to have been done wilfully and with malice, would constitute the crime of murder under section 5339 of the Revised Statutes, and when proved to have been done unlawfully and wilfully, but without malice, would constitute manslaughter within section 5341, the prisoner may be found guilty of manslaughter only. *United States v. Leonard*,* 2 Fed. R., 639.

§ 699. **Justifiable or excusable homicide.**—Homicide is either felonious or not felonious. Homicide not felonious is either justifiable or excusable. Justifiable homicide may be committed by requirement of law or in self-defense. Excusable homicide is that which occurs by misadventure, or in self-defense under particular circumstances, distinguishing it from justifiable homicide from a similar motive. The homicide in self-defense which is excusable, rather than justifiable, is that whereby a man may protect himself from an assault, in the course of a sudden casual affray or quarrel, by killing him who assaults him. Felonious homicide is the killing of any human being without justification or excuse, and is either murder or manslaughter. Manslaughter is the unlawful killing of another without malice, express or implied, and it may be either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act. *United States v. Travers*,* 2 Wheeler, 490. See §§ 607-610.

§ 700. Where a man in the lawful pursuit of his business is assaulted, and kills the assailant, it may be manslaughter or excusable homicide, according to the weapon used in the assault, or the danger to be apprehended; but a rightful application of force against the party killing can never be considered as an assault. *Ibid*.

§ 701. The law of self-defense is that a man may oppose force to force, in defense of his person, his family or property, against one who manifestly endeavors, by surprise or violence, to commit a felony, as murder, robbery, or the like. The intent must be to commit a felony. *United States v. Wiltberger*,* 3 Wash., 515.

§ 702. Where the only object on the part of the deceased was to quell a broil, and no felony was threatened or contemplated, and the only injury or inconvenience intended, or which could under the circumstances be apprehended by the prisoner, was arrest and confinement, the killing by the prisoner of the deceased for that cause, or to prevent such a consequence, is not justifiable. *United States v. Travers*,* 2 Wheeler, 490.

§ 703. Where an officer, attempting to make a legal arrest on lawful process, is resisted with such force and violence that his life is in immediate danger, he may kill his assailant, and such killing is justifiable. *United States v. Jailer of Fayette County*, 2 Abb., 279.

§ 704. If several persons advance upon a peaceable party in a threatening manner, with arms drawn, it is an assault. And if the persons so assaulted have good reason to believe, and do believe, that their lives are thereby in danger, and that it is necessary for them to shoot in self-defense, they are justified in shooting, even if they shoot first. *United States v. Doyle*,* 6 Saw., 612.

§ 705. Where a person makes a first attack upon another with a deadly weapon, and is killed, such homicide is not excused as being in self-defense, unless he could reasonably have avoided killing his adversary without certain and immediate danger of his life, or of great bodily injury. He need not act with the utmost coolness and deliberation, provided he did not embrace the opportunity to indulge his passion, and believed at the moment that the

only way to preserve his life or his person from great bodily harm was to inflict the mortal wound. *United States v. Mingo*,* 2 Curt., 1.

§ 706. A soldier employed in aiding revenue officers in raiding illicit distilleries, being in charge of a distillery just captured, and in a neighborhood known to be hostile, and being instructed to guard against surprises, shot at and killed a man approaching the distillery he was guarding. Being indicted for murder, it was held that if the defendant, at the time of the shooting, believed that the deceased, at the time of the shooting, was approaching him with hostile and felonious intent, and that in consequence he stood in peril of his life or great bodily harm, the act was justified, and the defendant must be acquitted. *Georgia v. O'Grady*,* 3 Woods, 496.

§ 707. A soldier, in time of peace, employed as a part of the posse of a revenue officer, has only the same rights of self-defense under the laws of a state as a private citizen. *Ibid.*

§ 708. Where the prisoner, having been severely beaten by the deceased, fled to his master's boat, and warned the deceased that if he came on board he would shoot him, and did shoot him when he jumped on board, the court instructed the jury that, if they should believe from the evidence that the prisoner was a slave, and had the custody and command of the boat by authority of his master; and that the deceased entered upon the boat after being warned by the prisoner not to do so, and with intent to do great bodily harm to the prisoner; and after being in the boat actually assaulted the prisoner with intent to do him great bodily harm; and that the prisoner had good ground to apprehend, and did fear, that the deceased would do him great harm, and that the prisoner then killed the deceased by shooting him, such killing amounted only to excusable homicide. The court further instructed the jury that jumping on board the boat, under the above circumstances, was not an actual assault on board the vessel. *United States v. Frye*, 4 Cr. C. C., 539.

§ 709. — *shipwreck*.— Where a boat is about to go down, and it is necessary to throw some overboard in order to save the balance, the selection should be by lot if there be time. *United States v. Holmes*,* 1 Wall. Jr., 1. See §§ 618-623.

§ 710. Where occupants of a crazy boat have thrown other occupants into the sea, to preserve their own lives, the jury are to determine whether "a case of necessity" has arisen which will excuse the homicide. That the persons accused believed such a necessity to exist is not sufficient excuse. *Ibid.*

§ 711. The case does not become one "of necessity," excusing homicide, unless the ordinary means of self-preservation have been exhausted. The peril must be instant, overwhelming, leaving no alternative but to lose one's own life, or to take the life of another person. The slayer must be under no obligation to make his own safety secondary to the safety of the person destroyed. *Ibid.*

§ 712. Where a ship is lost, and all on board have betaken themselves to the small boats for safety, the sailors are bound to preserve the boat and the passengers. If the emergency is so extreme as to call for the sacrifice of life, the sailor owes more benevolence to the passenger than to himself. He cannot lawfully struggle with a passenger for a plank that will support but one. If there be more sailors in the boat than are necessary to manage it, the supernumerary sailors have no right to sacrifice the lives of the passengers for their own safety. *Ibid.*

§ 713. *Malice presumed*.— Whenever the fact of killing is proved, the law presumes it to be founded in malice until the contrary appears; all circumstances relied on in justification, excuse or mitigation are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him. *United States v. Travers*,* 2 Wheeler, 490. See § 602.

§ 714. *Dangerous weapon*.— In cases of homicide upon provocation much depends upon the instrument employed, and upon the manner of chastisement. *United States v. Cornell*,* 2 Mason, 60. See § 148.

§ 715. *Misadventure*.— If one loads a gun and points it in a dangerous direction, under circumstances which make the act unlawful, and the gun is discharged accidentally and one is killed, the killing is not by misadventure. *United States v. Travers*,* 2 Wheeler, 490. See § 613.

VIII. VIOLATION OF INTERNAL REVENUE LAWS.

[See XXVI, 5, *infra*. Also see REVENUE.]

SUMMARY — Not necessary to prove precise quantity of spirits removed, § 716; nor precise time of removal, § 717; nor that there was a concealment, § 718; nor that defendant was present at the time, § 719.— Failure to pay special tax; receipt has no retroactive effect, § 720.— Who a retail dealer, §§ 721, 722.

§ 716. On an indictment for fraudulent removal of a quantity of spirits it is not necessary to prove the removal of the precise quantity alleged in the indictment. It is sufficient to

prove any quantity more or less than that alleged. *United States v. Nunnemacher*, §§ 723-732. See § 742.

§ 717. It is not necessary to prove that the removals took place at the precise time alleged, but it is necessary to prove that the removals were about that time, so that it may be plain that the proof is not of some other transaction than that alleged. *Ibid.*

§ 718. It is sufficient to insure a conviction that it be shown that there was such a removal, without showing any concealment. *Ibid.*

§ 719. It is not necessary to show that the defendant was actually present at the time of removal. It is sufficient if it be shown that with guilty knowledge or intent he did the act himself, or jointly with others, or that he instigated, encouraged, incited, advised, procured or assisted in the removal. *Ibid.*

§ 720. The revenue law (14 Stat. at Large, 112) provides "that any person who shall exercise or carry on any trade, business or profession, or do any act hereinafter mentioned, for the exercising, carrying on or doing of which a special tax is imposed by law, without payment thereof as in that behalf required, shall, for every such offense, besides being liable to the payment of the tax, be subject to imprisonment for a term not exceeding two years, or a fine not exceeding \$500, or both." Under this section a receipt for the special tax can have no retrospective effect. One selling liquor without a license cannot blot out the offense by afterwards paying the special tax. He is also liable for selling after his license expires, although he sells only liquors bought before the expiration of the license. *United States v. Angell*, §§ 733-737. See §§ 738, 775.

§ 721. One who purchases a barrel of liquor in his own name, although with the money of others for whom he purchases, and parcels it out to them as they desire, is a retail dealer, and liable if he has no license. *Ibid.* See § 770.

§ 722. Where congress has by statute declared what shall constitute a retail dealer in liquors, an instruction, on the trial of an indictment for retailing liquor without a license, which defines who is, and who is not, a retail dealer, in the language of the statute, is proper. *Ibid.*

[NOTES.—See §§ 738-790.]

UNITED STATES v. NUNNEMACHER.

(Circuit Court for Wisconsin: 7 Bissell, 111-124. 1876.)

Charge by DYER, J.

STATEMENT OF FACTS.—The indictment in this case contains four counts. The substance of the first count is, that on the 18th day of December, 1874, the defendant on trial, Jacob Nunnemacher, and the other persons named in the indictment, removed and aided in the removal of three thousand five hundred proof gallons of distilled spirits, on which the tax then due and owing to the United States, and required by law to be paid, had not been paid, from the distillery of the defendant Christian Guenther to the place of business of the defendant August Hauske, and to a place other than the distillery warehouse of the said Christian Guenther, and concealed and aided in the concealment of these spirits.

The second count is like the first, except that the time of alleged removal and concealment of spirits is therein named as the 21st day of December, 1874, the quantity of spirits then alleged to have been removed is stated to be three thousand proof gallons, and the place to which and where they are alleged to have been removed and concealed is stated to be a railroad car in the city of Milwaukee.

The third count is like those that precede it, except that concealment is not charged, and except that the time of alleged removal of spirits is therein named as the 23d day of April, 1875; a railway car in the city of Milwaukee is the place to which these spirits are alleged to have been removed, and the quantity of such spirits is said to be three thousand five hundred proof gallons.

The fourth count charges that on the 18th day of December, 1874, the defendants named in the indictment, including the defendant Jacob Nunne-

macher, conspired together by producing and distilling large quantities of distilled spirits at the distillery of Christian Guenther, and to transport and remove the same from the distillery out of this collection district, without payment of the taxes required by law to be paid on distilled spirits, unlawfully to defraud the United States of the tax on said spirits; and as acts charged to have been done, to carry out the purpose of the conspiracy, it is alleged that, on different days named in the count, the defendants produced and distilled at the distillery of Christian Guenther various quantities of spirits which are enumerated, and did not pay the tax thereon required by law to be paid, and removed such spirits from said distillery to a place and to places other than the distillery warehouse provided by law. This is distinguished from the other counts, as the conspiracy count, in this indictment.

The first three counts are based on section 3296 of the Revised Statutes, which provides that "whenever any person removes or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed," he shall be liable to certain penalties. The fourth count is based upon section 5440 of the statutes, which provides that "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable" to certain penalties.

Both in the testimony and the arguments of counsel you have been informed, not only of the different processes involved in the distillation of spirits, but also of many of the requirements of law that must be regarded in carrying on the business. Among those requirements is one to the effect that there shall be a distillery warehouse connected with every distillery, where all spirits manufactured at the distillery shall be deposited and kept under the charge of a government officer, until the tax thereon has been paid and until it may be lawfully removed therefrom for sale or other disposition; and it is, as we have seen from a statutory provision I have quoted, an offense for any person to remove or aid in the removal of any distilled spirits upon which the tax has not been paid, to a place other than the distillery warehouse provided by law.

§ 723. *What must necessarily be established to support an indictment charging a defendant with having removed spirits from a distillery to a place other than a distillery warehouse.*

To establish the offenses charged in the first three counts in this indictment, as against the defendant on trial, it must be shown: As to the first count, that on the 18th day of December, 1874, or at about that time, there were spirits at the distillery in question upon which the government tax had not been paid; that they were removed to the place of business of August Hauske, or after such removal were there concealed; that this was a place other than a distillery warehouse provided for or authorized by law; and that the defendant removed, or concealed after removal, or aided in or abetted the removal or concealment of, such spirits.

As to the second count, the same state of facts must be shown, except that the alleged removal or concealment of spirits must be proved to have taken place on the 21st day of December, 1874, or about that time; that the alleged removal was made to a place other than a distillery warehouse in the city of Milwaukee; and that the place of concealment was a railway car. As to

the third count, again the same state of facts must be shown, except that the alleged removal of spirits must be proved to have taken place on or about the 23d day of April, 1875, and that the place to which the spirits were removed, if at all, was a railway car in the city of Milwaukee. Concealment, as I have stated, is not alleged in this count. The offense here charged is simply the act of removal.

§ 724. — *proof of the removal of any quantity, whether less or more than is alleged, upon which no tax has been paid, is sufficient.*

In each of these counts particular quantities of spirits are alleged to have been removed — as in the first, three thousand five hundred proof gallons, in the second three thousand proof gallons, and the third three thousand five hundred proof gallons. Nevertheless, it is not necessary to prove that these precise quantities were so removed. So far as quantity is concerned, proof of any quantity removed, less or more than is alleged, upon which the tax had not been paid, is sufficient. You will bear in mind that it is essential that it be proved that the spirits, if any, removed or concealed as alleged in the first and second counts, and removed as alleged in the third count, were spirits upon which the government tax had not been paid, that the places of removal and concealment were as alleged, and that the defendant Jacob Nunnemacher was a party to or aided in or abetted the commission of the acts charged.

§ 725. — *as to the particular time of removal, it is necessary at least to prove that the illegal removal took place at or about the time stated.*

Particular times of removal, and removal and concealment of spirits, are alleged in these three counts. It is not, however, indispensable that the prosecution prove that these alleged transactions took place at the precise times stated. If it be shown that the removal of spirits alleged in any one of these counts, or the concealment of spirits alleged in the first and second counts, were made at or about the time therein stated, this is sufficient. The time to be proved must be at or about or near the time stated, so that it may be plain that the proof is not of some other transaction than that alleged. Evidence has been introduced tending to show removals of spirits from the distillery mentioned, to places other than the distillery warehouse, at periods considerably anterior and even several years prior to the times stated in either of these three counts in the indictment. Concerning this evidence, I have to say that it was only permitted to be given in support of the fourth or conspiracy count in the indictment, and that evidence is not to be considered by you as at all bearing upon the first three counts or either of them. Evidence of removals of spirits in previous years would not support the allegations in either of those counts. To use it for such purpose would be to accept proof of one offense to convict of a different offense, and this could not be permitted. Conviction on either of the first three counts must be of the specific offense therein charged, and the evidence to establish such offense must be of the transaction or transactions alleged and occurring at or about the time stated.

§ 726. *It is not necessary to prove a concealment of the spirits after illegal removal.*

I have said that to convict this defendant on either of these counts it must be shown that he was a party to, or aided in, or abetted the commission of, one or more of the acts charged. In this connection I may say that, although the first two counts allege both removal and concealment, if it be proved that the defendant removed, or aided in or abetted the removal from the distillery, of spirits upon which the tax had not been paid, to the place or places stated, at

or about the time or times alleged, conviction may be had upon the count under which removal may be proved, if at all, though concealment be not shown.

§ 727. *It is not necessary to prove that the party indicted should have actually been present at the time of the alleged removal, provided he directed it or aided or abetted therein.*

Now, gentlemen, the three counts in question allege the commission of illegal acts. This defendant is charged with committing those acts. I may first state to you as a general proposition that to establish this charge there must be shown participation in or connection with the alleged removal or concealment of spirits on the part of the defendant, with intent to accomplish or forward the commission of the act. If he personally, with guilty knowledge or intent, did the act either for or by himself, or jointly with others, that of course ends the question. To instigate, encourage, incite, advise, procure or assist in the removal of spirits on which the tax has not been paid from the distillery to a place other than the distillery warehouse, with a design to accomplish or promote or facilitate such removal, is to aid in and abet the commission of the act. With these general propositions in mind, let us come to more particular statements. And what I now say you will keep in mind when we come to consider the count for conspiracy, for the same general rules or principles apply under that count as under those we are now considering.

If this defendant was a party in interest in the business of this distillery, or was a party participating in the profits of the business, and for himself or with others, directed, prescribed, ordered or set on foot the alleged removal or removals of spirits, then he may be convicted of such removal or removals, and that, too, though he may not have been personally present at the time. *United States v. Blaisdell*, 3 Ben., 140. If he was not such a party in interest, but personally and knowingly participated in the act or acts of alleged removal, then his relation to the transaction would be the same in point of responsibility as before. If he leased his distillery or furnished, for hire or otherwise, teams and teamsters for the purpose or with the intent of providing the means or affording the opportunity to facilitate or accomplish the removal of spirits upon which the tax had not been paid, from this distillery to a place other than the distillery warehouse, or with knowledge that such instrumentalities were to be so used, and with such instrumentalities so furnished and employed, the alleged removals or either of them were made, then it could be said that he was influenced by an unlawful purpose, that he derived profit or advantage from the prosecution of that purpose, and he would be in that case a guilty participant in the act or acts. In other words, gentlemen, in such case, where a person with unlawful purpose or intent designs the commission of a criminal act, and, to carry out that purpose or effect the unlawful object, another is employed to do the act, that act becomes the act of the principal, and he, as well as the agent, is criminally accountable. This is upon the principle that "he who commands or procures a crime to be done, if it is done, is guilty of the crime." So too, if these spirits were removed as alleged, and the defendant knew them to be spirits upon which the tax had not been paid, though he had no interest in the distilling business or in the spirits alleged to have been unlawfully removed, if he intentionally aided in or abetted the removal within the meaning of those terms, as I have before stated it to you, then he offended within the meaning of the statute.

I have said that intentional participation in or connection with the alleged

unlawful acts must be shown. From this it follows that proof of mere suspicion or bare knowledge that the act is being done by others, without such participation in it or connection with it, is not sufficient. If, therefore, the defendant leased this distillery and let his teamsters and teams, without knowledge that they were to be employed for the purpose of making or accomplishing unlawful removals of spirits, and without any purpose, intent or design of furnishing the means for such removals, but leased and let them, so far as his intent was concerned, in good faith for the transaction of lawful business, and did not participate either as a party in interest, or otherwise, in the alleged removals, or intentionally aid in or abet such removals, I do not think that, while such original letting of the distillery and teams and teamsters was continuing, mere subsequently acquired knowledge that the alleged unlawful transactions were in progress would justify conviction under either of the first three counts in this indictment. Knowledge of the commission of unlawful acts may, however, be taken into consideration by the jury, in connection with whatever facts and circumstances may be proved, to aid in determining whether or not the defendant was a participant in or a party to the alleged unlawful acts, if such acts or either of them be shown.

Now it is claimed on the part of the government, that, at the times stated in the first three counts of the indictment, this defendant was in fact a party in interest in the distilling business at the Kinnikinnic distillery, although others were having the active management; that the connection of Guenther with the business as a manager was a mere cover or subterfuge adopted to facilitate the manufacture and removal of illicit spirits from the distillery, for the benefit of Jacob and Hermann Nunnemacher; that this defendant, whether directly a party in interest in the business or not, leased the distillery and furnished teamsters and teams for the purpose of removing such spirits from the distillery to places other than the distillery warehouse, and had knowledge that they were to be and were so used, and that all the circumstances show his participation and intentional co-operation in the alleged unlawful acts charged in these counts of the indictment. This is the claim on the part of the prosecution.

On the contrary, it is claimed, on the part of the defense, that he was not in any manner interested in the business of distilling; that he had leased the property, and that others operated the distillery and conducted, controlled and had the avails of the business, without any participation therein by him, except that he received, as he claims, rents for the use of the property, stipulated compensation for the employment of his teams and teamsters, and a portion of the slops of the distillery for his cattle and other stock; that he was engaged in carrying on his farm, dealing in cattle and hogs, and that his business was entirely disconnected from the manufacture of spirits, and that he had no interest therein. It is claimed further in his behalf that there was no participation by the defendant with guilty knowledge or intent in the removal or concealment of illicit highwines; that he knowingly rendered no aid, assistance or encouragement in the removal of such spirits, and that his attention to teams owned by him and assisting in the distillery business, was merely to see that they were not overworked and were properly used and cared for; and it is also claimed that the testimony is wholly inadequate and insufficient to establish either of these three counts as against this defendant.

Upon the fourth count in the indictment, the questions requiring your attention are these: 1. Was there such a conspiracy as is alleged, and if there was, were any or either of the overt acts charged in this count committed as alleged,

in execution of the conspiracy, or to carry into effect its object? 2. If such a conspiracy was formed and existed, was the defendant connected with it as one of the conspirators?

§ 728. *Conspiracy, what constitutes.*

A conspiracy is formed when two or more persons agree together to do that which is unlawful — in other words, when they combine to accomplish, by their united action, a criminal or unlawful purpose; and the statutory offense is complete when such agreement is made or such combination is entered into, and one or more of the parties do any act to effect the object of such conspiracy. To illustrate, if two or more persons agree together that by fraudulent practices they will deprive or defraud the government of the tax required to be paid on distilled spirits, and one or more of these persons do any act to effect the object of such agreement, they are guilty of the offense of conspiracy.

"It is not necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme is to be, and the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design." *United States v. Babcock*, 3 Cent. L. J., 144. A mere agreement or combination to effect an unlawful purpose, not followed by any act done by either of the parties to carry into execution the conspiracy, does not constitute the offense. There must be both the corrupt agreement or combination, and an act done by one or more of the parties to effect the illegal object or design agreed upon, to make the punishable offense under the statute. If the conspiracy is formed by all or some of the parties charged, and the act to effect the object of the conspiracy is done by only one of the parties, this constitutes a complete offense as to both or all of the members of the conspiracy, for in that case the act of one becomes the act of both or all. I say to you further, that such connection with or relation to a conspiracy as the law takes notice of and punishes is not dependent upon personal pecuniary interest in the result of the unlawful adventure. Where there is an attempted attainment of an unlawful end by two or more persons, who are actuated by a common design of accomplishing that end, and who, in any way and from any motive, work together in furtherance of the unlawful scheme, each one of the persons becomes a member of the conspiracy. In determining whether the person charged is one of the alleged conspirators, it is obviously proper and important for the jury to inquire whether any interest or motive, pecuniary or of any other character, existed for participation in the unlawful enterprise, and this may oftentimes materially aid in a determination of the question as to whether the person accused was or was not one of the parties to the alleged conspiracy.

To establish the commission by the defendant of the offense here charged, you must be satisfied upon the testimony that a conspiracy was formed to defraud the United States of the tax upon distilled spirits, distilled and produced at the distillery in question; that the defendant Jacob Nunnemacher was a party to that conspiracy, and that, to effect the object of such conspiracy, one or more of the defendants named in the indictment did one or more of the overt acts therein alleged. The overt acts charged in this count are the removals of certain quantities of distilled spirits, upon which the government tax had not been paid, to a place and places other than the distillery warehouse

provided by law. It is not essential that the precise quantity of spirits named in the count should be proven, nor is it necessary that the alleged conspiracy should be shown to have been formed at the precise time alleged. It is sufficient if it be shown that there was a quantity, or were quantities, of spirits distilled and produced at the distillery named, upon which the tax was unpaid; that, at about the time charged in the indictment, there was a conspiracy between any two or more of the persons who are alleged to have conspired together to defraud the government of the tax on such spirits; that the defendant on trial here was connected with, or a party to, such conspiracy, and that the unlawful combination was followed by one or more of the alleged acts done by one or more of the defendants, for the purpose of accomplishing its object. There must be at least two parties to a conspiracy, and the defendant Jacob Nunnemacher may be convicted under the allegations of the fourth count of this indictment, if it be established beyond reasonable doubt that he either conspired with any of the defendants named in the count, or with any person or persons unknown to the government and the jury, or with any of the defendants named, and any person or persons so unknown, to defraud the United States of the tax on the spirits mentioned.

§ 729. *Proof of conspiracy.*

To establish a conspiracy it is not, as I have already said, necessary that there should be "an explicit or formal agreement for an unlawful scheme" between the parties, nor is it essential that direct and positive proof be made of an express agreement to do the act forbidden by law. In such cases it is frequently impossible to produce such proof, because conspiracies are not usually meditated and planned in the presence of witnesses not parties thereto, nor in the terms of express stipulations. Hence it is competent to prove the alleged conspiracy by circumstances. The understanding, combination or agreement between the parties in the given case, to effect the unlawful purpose charged, must be proved, because without the corrupt agreement or understanding there is no conspiracy. But, as I have just said, circumstantial evidence may be resorted to to show the agreement or conspiracy. The acts of parties, the nature of those acts, with the accompanying circumstances, the character of the transaction or series of transactions, as the evidence may disclose them, should be investigated and considered, and are sometimes the only sources from which to derive the evidence of an agreement which may be express or implied to do the act which the law condemns.

§ 730. *The same conspiracy still exists, though it may be increased subsequently by the addition of new members.*

If you find the existence of the conspiracy as alleged, your inquiry upon this count will be narrowed to a single ultimate question of fact, namely: was the defendant one of the conspirators — a fellow conspirator with the officers and other persons named in the indictment? The government affirms it, and must prove it by legal and satisfactory evidence in order to ask a verdict in its favor. . . . In this connection I say to you further, that the identity of a conspiracy is not necessarily destroyed by the connection, at a subsequent period, of new or additional parties therewith. In other words, a conspiracy may be formed between certain persons, other persons may join it in its succeeding stages, and so its existence as one prolonged conspiracy may be continued. As the defendant is indicted for conspiracy with the persons named in the indictment, it is clear that the charge implies that the defendant knew there was such a conspiracy, and, with such knowledge, knowingly aided the

conspirators in their unlawful scheme, and the alleged guilty knowledge and participation must be proved by the government.

§ 731. *The different members of a conspiracy may perform different acts.*

Guilty connection with a conspiracy may be established by showing association by the person accused, with others, in and for the purpose of the prosecution of the illegal object. Each party must be actuated by an intent to promote the common design, but each may perform separate and distinct acts in forwarding that design. "If two persons pursue by their acts the same object, one performing part of an act, and the other another part of the same act, so as to complete it with a view to the attainment of the object they were pursuing, the jury are at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object." 3 Archb. Cr. Pr., 622.

Co-operation in some form must be shown, though that co-operation need not be prompted by personal pecuniary interest. There must be intentional participation in the transaction, with a view to the furtherance of the common design and purpose, though that participation need not be active and may be subordinate. If parties in any manner work together to advance the unlawful scheme, having its promotion in view, and "actuated by the common purpose of accomplishing the unlawful end," they are conspirators. If a person, understanding the unlawful character of the transaction, encourages, advises, counsels, or in any manner, with a view to forwarding the enterprise or scheme, assists in its prosecution, he becomes a conspirator.

§ 732. *Mere knowledge of existence of conspiracy not sufficient.*

Mere knowledge that a conspiracy has been formed or is in progress, unaccompanied by such acts or relation to it as show intentional connection with or participation in the conspiracy, is not sufficient to charge the person with the offense; though in such case, the fact of knowledge, when proved, may be considered in connection with the conduct of the person and all the circumstances, in determining whether or not he is a party to the conspiracy.

UNITED STATES v. ANGELL.

(Circuit Court for New Hampshire: 11 Federal Reporter, 84-47. 1881.)

STATEMENT OF FACTS.—Motion for new trial and in arrest of judgment. Indictment and conviction for selling liquors by retail without having paid the special tax. The motion was founded on ten exceptions saved at the trial.

(The first part of the opinion, which was devoted to questions on the admissibility of evidence, is omitted.)

§ 733. *A receipt for tax for selling spirits has no retroactive effect.*

Opinion by CLARK, D. J.

As to the fifth exception there was evidence to show that between May, 1867, and September, 1867, the respondent exercised the business of a retailer of liquors without a license, and without paying the required tax. September 1, 1867, he paid the tax and received a license, and no attempt was made or proof offered to show that he sold after that time. It was to meet the proof of the sales prior to September 1, 1867, before the respondent had paid his tax and received the license, that the receipt was offered, and it is contended that the receipt has a retroactive effect, and is a full answer to the charge and proof. But it can have no such force. The revenue law (14 Stat. at Large, 112) provides "that any one who shall exercise or carry on any trade, business, or profession, or do any act hereinafter mentioned, for the exercising, carrying on

or doing of which a special tax is imposed by law, without payment thereof as in that behalf required, shall, for every such offense, *besides being liable to the payment of the tax*, be subject to imprisonment for a term not exceeding two years, or a fine not exceeding \$500, or both." Now, if the fine and imprisonment are in addition to the tax, or, as the law expresses it, *besides being liable to the payment of the tax*, how can it be contended that the payment of the tax releases from the fine and imprisonment? Again, the penalty had been incurred before the payment of the tax, and the receipt given could not operate as a pardon. The law makes no provision for such an effect, nor could the collector of taxes confer it. The collector could not pardon the offense. The president alone could do it. If there had been any proof, or any question made, about any sale after the 1st of September, 1867, then the payment of the tax and the license would have been competent, and a full answer to such subsequent sale; but there was none, and it was offered to meet the sales before the payment of the tax, and it was properly rejected.

§ 734. *What constitutes a retail dealer in liquors.*

The instructions here in the sixth exception asked were properly refused, and those given were correct. When the respondent was employed to procure some rum for various parties, he had two courses to pursue. Either he could have purchased for the parties employing him, and in their names, or he could purchase in his own name, and afterwards transfer it to them. He chose the latter course. He purchased for himself (though with their money) and transferred it to them; and he stood exactly in the place of a person selling beforehand and taking pay for what he furnished afterwards. It can make no difference that he did this without a profit. A man often sells without a profit, or at a loss; still it is a sale. Nor is it very material to consider what remedies the principals might have had against their agent if he had not delivered them the rum. But it is very certain no one could have claimed the whole barrel of rum, nor could they all collectively have claimed it; the most that can be said is that each had a claim for a specific part. But the very material question is, to whom was the rum sold actually? How did the respondent purchase it? In his own name or that of his principals? If in his own name, he could not convey it to other parties without a resale; and whenever he delivered a portion of that rum to any person, for money paid either before or afterwards, it was a sale of so much.

Where it does not appear that an agent, making a contract, acted expressly or ostensibly as a public agent, it will be deemed a private contract. *Swift v. Hopkins*, 13 Johns., 313; *Olney v. Wickes*, 18 Johns., 122. A government agent, known to be such, is personally liable on his contracts, unless he discloses that they are made for the government. *Sheffield v. Watson*, 3 Caines, 69. A contract made by an agent for his principal should be in the name of the principal. *Spencer v. Field*, 10 Wend., 87. When he acts in his own name he binds himself. *Bank of Rochester v. Monteath*, 1 Denio, 402; *Wiley v. Shank*, 4 Blackf., 420. There can be no doubt that if the respondent had purchased this rum on credit he would have been liable to the vendor for its amount. Why? Because, not disclosing that he was an agent for others, he had made the purchase to himself, and bound himself, so that when he transferred it from himself to others it must be regarded as a sale. The transaction clearly was that the vendor in Boston sold a barrel of rum to the respondent. He knew nobody else. He did not sell so many gallons to A. and so many to B. and so many to C. Nor did the respondent purchase so many for A. and so many for

B. and so many for C., separately, but he made one purchase of a barrel to himself, and then parceled it out as parties desired it, having taken pay beforehand.

§ 735. *An expired license to sell liquors is no defense.*

Upon exception 7 there can be no reasonable doubt. The instructions prayed for would have been clearly wrong and without law. Congress has the power under the constitution to lay and collect taxes, duties and imposts. Article 1, § 8. It has also power to raise armies, and provide and maintain a navy, and to do various things requiring money; and hence an implied power to raise the money in any proper manner not repugnant to the constitution. This congress has undertaken to do by a tax or duty upon various articles and employments. Among other things, it has imposed a special tax of \$25 upon retail dealers in liquors, and imposed a penalty for exercising the business without paying such tax, if any one attempts it. There was proof that the respondent undertook to retail liquor without paying the tax; and to excuse himself from the penalty the defendant says he was town agent for the town of Sunapee, and while so agent, he had a license from the United States to carry on the business of a retailer, and when that license expired, May 1, 1867, he had some liquors on hand, and he sold afterwards only such liquors, and was not chargeable. The answer to this is that his former license was to exercise the business for a *specific time*, and when that time expired his license expired, no matter what he had on hand. Suppose that while his license lasted he had purchased stock enough to have lasted him five years, could he on that account have continued to sell those liquors for five years? It would be an evasion of the law to have allowed it; and no matter from whom he purchased the liquor, whether from the town or from the state of New Hampshire, neither could confer on him any authority to sell. The law of congress is paramount, and the court gave proper instruction upon the point.

§ 736. *An instruction defining an offense in the language of the statute is proper.*

Upon the eighth and ninth exceptions it is sufficient to say that congress has defined (14 Stat. at Large, 116, 474) what constitutes a retail dealer, to wit: "Every person who shall sell or offer for sale foreign or domestic spirits, wines, ale, beer, or other malt liquors, and whose annual sales, including all sales of merchandise, do not exceed \$25,000, shall be regarded as a retail dealer in liquor." And the court instructed the jury what or who was a retail dealer, in the language of the law. The instructions prayed for were not in accordance with the statute, and could not properly be given.

§ 737. *It is not indispensable that the jury in retiring shall take the indictment with them.*

We come now to the tenth and last exception. In all criminal prosecutions the accused has the right to a trial by jury, and to be informed of the nature and cause of his accusation. Article 6 of the amendments of the constitution. That the trial may be fair the jury must also be informed of the nature of the accusation; and before the trial commences the indictment is read, and the charge generally explained. It was so done in this case. There is no complaint that the jury did not understand the cause, or it had not been stated to them, nor that the indictment was not present at the trial, nor that the respondent had not sufficient opportunity to examine and take exceptions to it. But we are asked to arrest the judgment because, inadvertently, the indictment was not sent with the other papers to the room of the jury while they were

deliberating. There is no doubt the practice is thus to send the indictment with the jury, and in a case where injury resulted to the respondent the court would interfere to shield him from that injury. But the court cannot presume such an injury, and there is no pretense of any here. If the jury had needed the indictment when in their room they could have called for it, but they did not; they did not need it; they knew of what the respondent was accused; they knew they were trying him on the charge in the indictment, and they were not aware of its absence until they came into court. We think such an inadvertence is no cause for arresting the judgment. Judgments are generally arrested for mistakes or defects in the record; and in *Burnett v. Ballun*, 2 Nott & McC., 435, it was held they would only be arrested for error apparent in the record. But they are sometimes arrested for other reasons; as the previous opinion of a juror, misconduct of a juror, or the improper separation of the jury. But here is no error in the record, no suggestion of the want of an impartial jury, or of misconduct, or of unfairness, but a mere inadvertence, working no damage to the respondent. There must be judgment on the verdict.

§ 738. Sale without license.—It is no defense to an indictment in a state court for keeping and maintaining a place for the keeping and sale of intoxicating liquors without a license from the state, that the defendant has procured and paid for a license from the United States under the internal revenue acts of congress. The circumstance that the state prohibition applies to merchandise in its original packages is immaterial. Even in case of importation, that circumstance is available only to the importer. *Pervear v. The Commonwealth*, 5 Wall., 475. See § 720.

§ 739. It is no defense to a prosecution for the sale of liquors without a license that the defendant honestly intended to apply them to the use of the sanitary commission. *United States v. Dodge*, * *Deady*, 186.

§ 740. A prosecution under section 73 of the internal revenue act of June 30, 1894, is sustained by proof of a single act of selling or offering liquor for sale without a license. *Ibid.*

§ 741. A person may be engaged in the retail liquor business under the provisions of that part of the act of June 30, 1861, relating to the sale of liquors without a license, without any particular instance of selling or offering to sell. A person is engaged in the business, within the meaning of the act, when he has the means to do so at his command, and holds himself out to the world in that capacity, or is ready or offers to do a particular act constituting such business. If he should not succeed in securing custom or making sales, this fact is not an excuse for having engaged in the business without a license. The license must first be obtained, and then, and not before, the party is at liberty to offer liquor for sale in quantities of less than three gallons. The liquor may be offered for sale without a special or personal solicitation to any particular person to become a purchaser; it may be done by general advertisement in the press, or by the exhibition of signs or symbols in the vicinity of the place of the alleged business, or by having the article on sale with the intent to dispose of it to any person offering to purchase. *Ibid.*

§ 742. Removing spirits.—Under the internal revenue act of July 13, 1866, removing spirits, and aiding and abetting such removal, are distinct offenses; and a person cannot, for the same specific act, be convicted both of removing, and aiding and abetting in removing, so as to multiply penalties. *United States v. Blaisdell*, * 3 Ben., 192. See §§ 716-719.

§ 743. A person interested in a distillery who prescribes, orders, directs or sets on foot a removal of spirits therefrom contrary to law is guilty of such removal though not personally present; and any person not interested in the running of the distillery, who was actually and personally engaged in the removal, is likewise guilty. Any help or assistance less than this, or any encouragement or assistance, is aiding or abetting such removal. *Ibid.*

§ 744. Where five counts in an indictment were founded on section 30 of the act of March 2, 1867, declaring "that if two or more persons shall conspire . . . to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty," etc., and four counts were founded on the act of July 13, 1866, authorizing the removal of distilled spirits from a bonded warehouse without the payment of the tax, on the execution of a transportation bond, but making it criminal for the officers of the revenue to allow such

a removal upon a bond known by them to be false and fraudulent, the court held that the repeal of the act of 1866 did not affect a subsequent conviction and sentence on the indictment, although the conspiracy consisted in removing spirits on a fraudulent bond, and that the act of 1867 was sufficient to sustain the conviction and sentence. *In re Calicott*,* 1 Am. L. T. Rep., 129.

§ 745. Defendant was indicted under section 3318, Revised Statutes, for omitting to enter on his books (he being a wholesale liquor dealer) a certain lot of spirits which were consigned to him, and which he sold after paying the freight, and gave the buyer an order for the spirits, which were accordingly delivered to the buyer by the carrier. *Held*, a removal within the meaning of section 3318. *United States v. Miller*,* 14 Blatch., 93.

§ 746. On an indictment against several persons jointly, for removing spirits from a bonded warehouse with intent to defraud the government, the defendants cannot be convicted except on proof of facts occurring before the alleged removal. Evidence of acts occurring afterwards are admissible only to explain and give character to acts proved which occurred before the removal. *United States v. Harries*,* 2 Bond, 311.

§ 747. On an indictment for removing spirits from a bonded warehouse contrary to law, it is not necessary to prove that the bonded warehouse named in the indictment and from which the spirits were removed was a bonded warehouse sanctioned and authorized by the proper officer of the government. It is sufficient if it appears that it was known and recognized as such by the defendants. *Ibid*.

§ 748. On an indictment for removing spirits from a bonded warehouse with intent to defraud the government, if the defendants, though not personally present at the removal of the spirits, were aware of the removal and in any way aided or abetted it by any concert or arrangement for that purpose, with intent to evade the tax, they are constructively present and guilty. *Ibid*.

§ 749. Section 3317, Revised Statutes, as amended by the act of March 1, 1879, does not require that spirits alleged to have been unlawfully removed from a distillery to a place other than the distillery warehouse provided by law, and charged to have been received by the defendant, knowing and having reasonable ground to believe that the tax on said spirits had not been paid as required by law, should have been produced at and removed from a registered distillery. The language of the statute applies as well to spirits produced at and removed from an illicit distillery. *United States v. Byrne*,* 19 Blatch., 259.

§ 750. On an indictment for removing spirits from a bonded warehouse between sunset and sunrise, there can be no conviction without proof of a fraudulent intent. *United States v. Harries*,* 2 Bond, 311; *United States v. Smith*, 2 Bond, 833 (§§ 207-214).

§ 751. An indictment for removing spirits from a distillery is sustained by proof of their removal from the bonded warehouse connected with such distillery. As each distiller is required by law to provide such a warehouse, it is, in legal effect, a part of his premises and of his distillery. *United States v. Smith*, 2 Bond, 723 (§§ 207-214).

§ 752. Stamps.—Under the internal revenue law, the stamp on a package of distilled spirits must be effaced or obliterated at the time the package is emptied. *United States v. Adler*,* 15 Am. L. Reg. (N. S.), 45.

§ 753. The neglect or omission of an employee is the neglect or omission of his employer. *Ibid*.

§ 754. The omission to obliterate the stamp constitutes the offense, without reference to the intent. *Ibid*.

§ 755. Receipts given by a common carrier for goods received for transportation were, in effect, inland bills of lading, and not subject to stamp duty under the act of 1834. *United States v. Railroad Co.*,* 7 Am. L. Reg. (N. S.), 757.

§ 756. It seems that a corporation is liable to indictment for the acts of its officers and agents in violation of the revenue law. *Ibid*.

§ 757. Defendant was indicted under section 3324 of the Revised Statutes, for failure to obliterate the stamp on a cask of spirits after it had been emptied. It appeared that his wife attempted to empty the cask, and after removing what could be obtained through the faucet had removed the cask to another room with a view to drawing off what spirits remained through the bung-hole. *Held*, that the defendant was not criminally liable if the intention was to obliterate the stamp as soon as the cask was emptied, and there was no unreasonable delay. *United States v. Buchanan*,* 4 Hughes, 487; 9 Fed. R., 689.

§ 758. A man is liable for the act of his wife in failing to obliterate the stamp on a cask of spirits after removing the contents, the cask being owned by the husband in his business and the wife acting as his agent. *Ibid*.

§ 759. The intent is the essence of the offense created by the act of July 13, 1866, declaring "that any person who shall make . . . or issue any instrument, document or paper, of any kind or description whatsoever, . . . for the payment of money, without the same

being duly stamped, . . . with intent to evade the provisions of this act, shall for every such offense forfeit the sum of \$50." Upon the trial of an indictment for this offense, no judgment can be rendered on a special verdict which does not find the intent. *United States v. Buzzo*,* 18 Wall., 125.

§ 760. Every man is presumed to intend the necessary legal or legitimate consequences of his acts. So the omission to obey the law, the defendant being supposed to know the law, must be presumed, in the absence of explanations, to have been with intent to violate its provisions. *United States v. Learned*,* 1 Abb., 483.

§ 761. It is an offense against the revenue laws to issue due bills to an employee, payable in merchandise out of the employer's store, without affixing thereto a revenue stamp. *Ibid.*

§ 762. An indictment under section 3376 of the Revised Statutes, for having in possession revenue stamps previously used, is not sustained by proof of possession of parts of stamps previously used. *United States v. Loup*,* 1 McC., 168.

§ 763. On an indictment for not stamping a receipt for the payment of money, the proof was that the receipt was drawn for board and horse hire. *Held*, that this was a receipt for the payment of money, and not for the payment of a debt, within the meaning of the statute. *United States v. Moore*,* 11 Fed. R., 243.

§ 764. Under the act of congress requiring a stamp upon a receipt for the payment of more than \$20, it is not the payment which requires the stamp, but the receipt, and, though several payments are made in less sums, still if the receipt exceeds that sum it must be stamped. *Ibid.*

§ 765. To affix to a box of domestic cigars upon which the internal revenue tax has been paid, a stamp in the similitude of a customs stamp required to be affixed to imported cigars, is an offense under section 3397 of the Revised Statutes. *United States v. Jacoby*,* 12 Blatch., 491.

§ 766. Liability of all concerned.—On an indictment for illegally carrying on a distillery, if it is shown that the defendants were in any way connected with the distillery as owners, partners or employees, during the time it was running illegally, it is sufficient to convict them, for they were bound to know whether all the lawful prerequisites had been complied with. *United States v. Dobbs*,* 13 Int. Rev. Rec., 9.

§ 767. On an indictment for illegally carrying on a distillery, if it is shown that one of the defendants was present while the distillery was running illegally, although that fact is a circumstance to be weighed in connection with other testimony, yet alone it is insufficient to convict. *Ibid.*

§ 768. Lottery.—A person may be punished by imprisonment under the thirteenth section of the act of March 3, 1865, as amended by the act of July 13, 1866, for engaging or being concerned in the business of a lottery dealer, without paying a special tax therefor. There is nothing in the seventy-third section of the act of June 30, 1864, as amended by the act of March 2, 1867, inconsistent with the above acts. *In re Lindauer*,* 7 Blatch., 249.

§ 769. Running distillery unlawfully.—To support a charge of violating section 44 of the act of July 20, 1868, providing a penalty against "any person who shall carry on the business of a distiller . . . without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bonds as required by law," it is not necessary to aver or prove that the accused had registered his still, or given notice of his intention to distill, but only that he was engaged in the business of a distiller in any of the ways or by any of the means specified in the definition of a distiller as given by section 59 of the same act, without having paid the special tax or given bond as required by law. *United States v. Mathoit*,* 1 Saw., 142.

§ 770. Retail liquor dealer.—A few instances of selling liquor in small quantities by persons having no bar-rooms, and none of the usual appliances of retail liquor dealers, with no intention apparent of defrauding the revenue, do not constitute a carrying on the business of retail liquor dealing, within the meaning and objects of section 3242 of the Revision. *United States v. Jackson*,* 1 Hughes, 533. See §§ 721, 722.

§ 771. No sign on distillery.—Section 3279 of the Revised Statutes provides a punishment for the offense of working in a distillery on which no sign is placed and kept. *United States v. Flynn*,* 15 Blatch., 802.

§ 772. Mistake of law.—In a prosecution under the revenue law it is no defense to say that the alleged criminal act was done under a mistaken construction of the law. If with full knowledge of all the facts and the consequences of the violation of the law the defendant chose to run the risk of construing the law for himself, he must abide the consequences of his misconstruction. *United States v. Learned*,* 1 Abb., 493.

§ 773. Limitations.—Section 5440 of the Revised Statutes, providing a penalty against any two or more persons who "conspire either to commit an offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of said par-

ties do any act to effect the object of the conspiracy," is a part of the revenue laws, and prosecutions under it are not barred until the expiration of five years, as provided in section 1046, limiting the time in which prosecutions may be brought for crimes arising under the revenue laws. *United States v. Fehrenback*,* 2 Woods, 175.

§ 774. **Act not repealed.**—The act of July 13, 1868, § 23, punishing the carrying on of the business of a distiller without paying a special tax, is not impliedly repealed by the fifth section of the act of March 31, 1868, punishing a distiller who attempts to defraud the government of the tax on the liquors distilled by him, on the theory that the offenses are the same and the latter act provides a heavier penalty. The offenses are not the same, although the extent of the business carried on is made, by the former act, the measure of the lowest fine. *United States v. Cushman*,* 1 Low., 414.

§ 775. **Payment of tax after arrest.**—Where a person has been arrested for carrying on a certain business without the required license, and the offense, to some extent, examined into, the acceptance from the prisoner, by the officers of the internal revenue, of an application for a license, and the acceptance from him of the amount of the special tax, does not work a pardon for the offense previously committed. *United States v. Devlin*,* 6 Blatch., 71. See § 720.

§ 776. **Neglect of officer does not excuse citizen.**—The neglect or failure of the officer of the revenue to perform the duties which the law requires of him does not excuse the citizen for a violation of the law caused by such neglect. Failure of the officer to register the application of a citizen for license to carry on a certain business will not make it lawful for the citizen to proceed without a license. *Ibid.*

§ 777. **Distiller in default, when.**—Under the twenty-third section of the internal revenue act of July 13, 1868, a distiller is not in default for the mere non-payment of his special tax of \$100, until ten days after the receipt by the collector of the assessment list, in which the special tax is to be inserted, and he cannot be held guilty of the offense created by this section, unless he carries on the business after he is in default for non-payment of the tax. *United States v. Shea*,* 5 Blatch., 546.

§ 778. **What tobacco liable under act of 1868.**—In the statute of July 20, 1868, which provides that any person who shall use, sell, or offer for sale, or have in his possession, except in the manufactory or in a bonded warehouse, any manufactured tobacco, or snuff, without proper stamps affixed and canceled, shall on conviction thereof be liable to a penalty therein prescribed, there is no exception of refuse or worthless tobacco, or tobacco to be re-manufactured, or of tobacco upon which a tax has been paid. Such kinds of tobacco are all included within the act, and one having such in his possession is liable to the penalty, wherever he would be liable to the penalty for having in his possession other manufactured tobacco. *United States v. Keyes*,* 10 Fed. R., 876.

§ 779. **As to date of manufacture of tobacco.**—By section 79 of the laws of July 30, 1868, declaring that "after the 1st day of January, 1869, all smoking, fine-cut chewing tobacco, or snuff, and after the 1st day of July, 1869, all other manufactured tobacco of every description, shall be deemed and taken as having been manufactured after the passage of this act," such tobacco, if on hand after the date fixed by the act, must be taken to have been manufactured since the act, whether such be the actual fact or not; and the court cannot instruct the jury that a defendant is not liable for having such tobacco in his possession contrary to a clause in the same act, if it was manufactured before the act. *Ibid.*

§ 780. **Sale of tobacco at retail.**—Section 3363 of the Revised Statutes, which declares that "no manufactured tobacco shall be sold or offered for sale unless put up in packages and stamped as provided in this chapter, except at retail, by retail dealers, from wooden packages stamped as provided in this chapter," and punishing those selling such tobacco not so put up and stamped, does not require that a sale at retail must be made directly and literally from the package, and thereby render a sale of a part after it has been separated from the whole unlawful. One who has paid a special tax as a dealer in tobacco, and purchased plug tobacco in wooden packages, put up and stamped as required by the internal revenue laws, may keep the packages in the back room and sell the plugs from his show window, without becoming liable to the penalty of this section. *United States v. Veazie*,* 6 Fed. R., 867.

§ 781. **Manufacturers of tobacco** are not exempt from criminal prosecution for violation of the internal revenue laws. The government may proceed by indictment as well as *in rem*. *United States v. McGinnis*, 1 Abb., 120 (§§ 2429-30).

§ 782. **Assault upon revenue officers.**—Where a party of internal revenue officers, all of whom held commissions as deputy collectors of internal revenue for the district of Georgia, were, while in search for illicit stills, fired upon by distillers in ambush, and they returned the fire, killing one of the distillers while he was in ambush and at or immediately after the time of the discharge by himself and his comrades of their weapons at the revenue officers, the court, upon the preliminary examination of the charge against the revenue officers, dis-

charged them from custody, under section 4733 of the code of Georgia, on the ground that there was no "sufficient reason to suspect the guilt of the accused." *State v. Port*,* 8 Fed. R., 124.

§ 783. **Possession of cigars.**—An indictment under section 3307 of the Revised Statutes, charging that the defendant "did buy, receive and have in his possession" cigars on which the tax to which they were liable had not been paid, is divisible, and conviction may be had on proof of possession alone, the statute using the words, "buys, receives or has in possession." *United States v. Millard*,* 13 Blatch., 534.

§ 784. **A peddler was indicted under section 73 of the act of 1861, for carrying on business without a license.** He had applied in April to pay the tax for the year beginning May 1st, but the assessor was not ready to receive the tax, and did not present the bill until May 20th. In the mean time defendant had sold out his business, having carried it on for a few days in May, and refused to pay the tax. *Held*, that an indictment would not lie. *United States v. Pressy*,* 1 Low., 319.

§ 785. **Rectifier of spirits.**—Upon an information prosecuted under section 3317 of the Revised Statutes, as amended by the act of March 1, 1879, charging the defendant with having carried on the business of a rectifier of distilled spirits, with intent to defraud the United States of the tax on distilled spirits rectified by him, proof of partial rectification, and that the defendant had in his possession a rectifying apparatus, and that illicit spirits had been conveyed to said apparatus in ale barrels, and, in the presence of the defendant, poured into the receiving tub of said apparatus, on two different occasions, and under suspicious circumstances, is sufficient to justify the jury in finding him guilty. *United States v. Byrne*,* 19 Blatch., 259.

§ 786. **Setting out means of fraud.**—Under the third section of the act of congress of March 3, 1863 (12 Stat. at Large, 739), the means employed to effect the fraud on the revenue may be set out in the indictment or information or not, at the option of the pleader. *United States v. Ballard*,* 13 Int. Rev. Rec., 195.

§ 787. **Fraudulent bonds.**—A deputy collector who accepts bonds, knowing them to have been fraudulently signed, is guilty of conniving at the fraud in their execution. *United States v. Allen*,* 7 Int. Rev. Rec., 164.

§ 788. **Material fit for distillation.**—Any mash, wort or wash from which alcohol may be evolved, whether profitably or not, is fit for distillation, within the meaning of the revenue law of July 20, 1863, and the production and use of such wash, wort or mash in the manufacture of vinegar is a violation of the law. *United States v. Prussing*,* 2 Biss., 344.

§ 789. **Use of excess of material, etc.**—Under an indictment charging fraud on a distiller, in using more material and manufacturing more spirits than he had returned, the government is bound to exclude every other conclusion in order to convict. *United States v. Furlong*,* 2 Biss., 97.

§ 790. **Place where spirits are distilled.**—Under section 45 of the act of congress of July 13, 1866, the "place where spirits is distilled" is the distillery premises, and does not mean the worm or the still itself. *United States v. Blaisdell*,* 8 Ben., 132.

IX. LARCENY.

[See §§ 490, 506, 530, 1730, 2619.]

SUMMARY—*Plundering a wreck; indictment*, § 791, *has no analogy to the crime of larceny of goods on land*, § 792; *casting goods into river*, § 793; *not material whether goods were taken from the wreck or from the water*, § 794; *taking goods from water is prima facie lawful*, § 795.—*Larceny on the high seas; coin and bank-notes are personal goods*, § 796.

§ 791. Section 5358 of the Revised Statutes, punishing "every person who plunders, steals or destroys any money, goods or merchandise, or other effects, from or belonging to any vessel in distress, or wrecked, lost, stranded or cast away upon any sea, . . . or in any place within the admiralty or maritime jurisdiction of the United States," does not define several offenses: one, of *plundering from a vessel*; another, of *plundering goods belonging to a vessel*; another, of *stealing goods from a vessel*, etc. It describes a single offense, which may be charged in the language of the statute. An indictment framed as though the statute created several offenses may, nevertheless, be treated as if it charged the whole as one offense. If the defendant has either plundered, stolen or destroyed the goods mentioned in the indictment, from a vessel wrecked or in distress, in any place within the admiralty or maritime jurisdiction of the United States, he is guilty under this section, without reference to the separation of the allegations into several counts as if the section created several offenses. *United States v. Stone*, §§ 797-803. See § 828.

§ 792. Neither the word "steal," nor other words used in section 5358 of Revised Statutes, punishing the offense of "plundering, stealing or destroying" any goods belonging to any distressed or wrecked vessel, authorize the importation into this statute, from the common or statutory laws of England or any state, the elements of the crime of larceny of goods upon land as known to those laws. No specific intent is necessary to constitute this offense, and any intent is unlawful, except that alone of taking the goods for the purpose of restoring them to the vessel or the owner. The manner of taking is wholly immaterial also, whether by open force, stealth or otherwise. *Ibid.*

§ 793. The casting of goods belonging to a wreck into the river is destroying them within the meaning of section 5358 of the Revised Statutes punishing such an offense; but if the defendant rescued the goods from the river and cast them back again, not for the purpose of depriving the owner of them, but because he thought they were of no value, he is not guilty. *Ibid.*

§ 794. Under section 5359 of the Revised Statutes, punishing the offense of plundering, stealing or destroying any money, goods, etc., "from or belonging to any vessel in distress," etc., it is not material whether the goods be taken from the wreck itself, or from out of the water, or while cast away upon the shore. From the moment of the wreck, or the commencement of the distress, until restored to their rightful owner, the goods are within the protection of this statute, into whosoever possession they may come with knowledge that they belong to the wrecked or distressed vessel. Nor is the smallness of their value material. *Ibid.*

§ 795. The taking of goods belonging to a wrecked vessel from the water is *prima facie* lawful; the presumption is that they were taken with the proper motive, and not for the purpose of stealing, plunder or theft, as punished in section 5359 of the Revised Statutes. *Ibid.*

§ 796. It is held that foreign and domestic coin and bank-notes are "personal goods" within the meaning of section 16 of the crimes act of 1790, chapter 33, providing "that if any person, etc., upon the high seas, shall take and carry away, with intent to steal or purloin, the personal goods of another, the person, etc., shall, on conviction, be fined not exceeding the fourfold value of the property so stolen," etc. *United States v. Moulton*, §§ 804, 805. See §§ 821, 830.

[NOTES.— See §§ 806-830.]

UNITED STATES v. STONE.

(Circuit Court for Tennessee: 8 Federal Reporter, 232-262. 1881.)

STATEMENT OF FACTS.— Stone was indicted for depredations committed on a wrecked steamboat on the Mississippi river. The proof of the prosecution was that Stone and others cut into the Texas of the steamer and took the articles in question from there, and that Stone afterwards confessed to Bennett, a detective, that he had done so. Defendant denied the confession, and, testifying for himself, said that he had taken the articles in question out of the river. Further facts sufficiently appear in the opinion of the court on a motion for a new trial.

The court charged the jury that, if the defendant either plundered, stole or destroyed the goods mentioned in the indictment from a vessel wrecked or in distress, in any place within the admiralty and maritime jurisdiction of the United States, he was guilty under the statute, without reference to the separation of the allegations of the indictment into several counts; that it was not material whether the goods were taken from off the wreck itself, from out the water, or while cast away upon the shore.

On the meaning of the word "steal," the court charged as follows: "We are not authorized by the use of the word 'steal' in this section, nor other words used in describing this offense, to import into this statute from the common or statutory laws of England or the state the elements of the crime of larceny of goods upon land as known to those laws. No specific intent is necessary to constitute this offense, and any intent is unlawful and sufficient for the guilt of the offender, except that alone of taking the goods for the purpose of restoring them to the master or other officer of the unfortunate vessel,

or to their ultimate rightful owner. If a person near the wreck does not intend to restore the goods, or intends to make any other use of them than preserving them for the master or owner of the vessel, or owner of the goods, he must let them alone or he violates this statute. Nor is the time when the unlawful intent is conceived material. If the accused takes the goods with the lawful intent to preserve and restore them, and afterwards yields to the temptation of avarice or cupidity, and converts or destroys them, he violates this statute. Again, the manner of taking is wholly immaterial, whether by open force or stealth or otherwise. The words of this statute are sweeping and comprehensive. They include all unlawful taking, whether on the facts the crime at common law would be piracy, robbery, larceny simple, mixed or compound, malicious mischief, or what not; and include such taking as would, under statutory offenses, be called embezzlement, criminal or fraudulent breach of trust."

The court gave the following, asked by the defendant: "If the jury believe that the defendant rescued the property in question from the river, and afterwards, believing or supposing that said property was not worth preservation, threw it again into the river for the sole reason that he thought it not worth preservation, and not for the purpose of depriving the owners of it, then you will not be authorized to convict him of this offense because of throwing them into the river. If the proof shows that the defendant took goods belonging to the steamer Vicksburgh which had floated from the wreck, the court charges the jury such taking was *prima facie* lawful; that every person has a legal right to save goods which belong to a wreck, and are derelict; and, when he does take goods under such circumstances, no presumption of guilt can arise from such taking *per se*; on the contrary, without more, the fair presumption is that the taking was with a proper motive."

Other instructions were refused, but the questions presented are covered by the instructions given, and by the course of reasoning in the opinion.

§ 797. *Construction of Revised Statutes, section 5358. What offenses are created by it.*

Opinion by HAMMOND, J.

The court is satisfied that the construction put upon the Revised Statutes (section 5358) is the correct one. I cannot consent to emasculate this statute by whittling it down by construction to the paltry proportions of larceny of lost goods on land, as understood at common law; and certainly not to the once still narrower doctrine of our state that there can be no larceny of lost property, which has everywhere been repudiated as unsound, and is now changed by statute. T. & S. (Tenn.) Code, 4635; 2 King Dig. (2d ed.), tit. "Larceny," §§ 1986, 1992; 2 Ben. & Heard, Lead. Cr. Cas. (2d ed.), 409, 426; 1 Cr. L. Mag., 209, 214; 2 Whart. Cr. L. (7th ed.), § 1791 *et seq.*; *id.*, § 1867; 2 Bish. Cr. L. (6th ed.), § 758, note; par. 17, § 838; § 880 *et seq.* I am of opinion, therefore, that the instructions asked by the defendant, defining larceny and the specific intent necessary to constitute that crime, and applying it to goods "floating in the water, at the time when they had escaped from the custody and control of the crew of the steamer," were properly refused.

§ 798. *When goods are and are not "derelict."*

In the first place, goods so situated are neither lost nor abandoned, in the circumstances of this case, while floating near a recent wreck to which they belong, with full knowledge on the part of those who take them that they do so belong. Even in the eyes of the common law they are not lost, but certainly

not in those of the maritime law. 2 Pars. Ship. & Adm., 288, 292; 1 Abb. Dict., word "Derelict." And if they can ever belong to the first finder, it is only when they are both derelict and abandoned. *Weyman v. Hurlbut*, 12 Ohio, 81. Wreck is not properly so called if the real owner is known, and is not forfeited till a year and a day. *Id.*; *Reg. v. Thurborn*, 1 Den., 387; 2 Ben. & Heard, Lead. Cr. Cas., 409, 411. The floating goods are still in the constructive possession of the owner of the vessel, more like those in a house on fire, and are not abandoned because in peril. If one remove them for preservation, intending to keep them for the owner, but afterwards secrete and appropriate them, there is no larceny at common law, but only a breach of trust. *Rex v. Leigh*, 2 East, P. C., 694; 2 Bish. Cr. L., § 837; 2 Ben. & Heard, Lead. Cr. Cas., 426. If, however, the intent at the time of taking had been to appropriate the goods to her own use, the judgment in that case would have been different, nor would the defendant have been excused upon any theory that she entertained a *bona fide* belief that when a house was on fire the goods in it or taken from it belong to any one who secured possession of them, or that she did not think it stealing and did not intend to steal, but only to take what she supposed she might rightfully take. That would have been trying the act of the accused by her own mental characterization of that act. On that theory, if one takes money from under a pillow at night, and by stealth, he might have his crime excused by showing by his own testimony or otherwise his state of mind on the subject, and that he entertained an honest belief that he could do that thing without any wrong to the owner. This seems to me the result of the argument made for the defendant here, when we are asked to hold that, if he believed that he had a right to take these goods for his own use, he is not guilty.

That there is a prevalent belief along this river that goods floating from a wreck may be appropriated by those who "capture" them from the water is, perhaps, true; and it may be that goods so situated are supposed to belong to the first taker by those who know better than to apply the same rule of conduct to goods lost or in peril by fire or other disaster on land. But it seems to me plain that this preposterous claim of right cannot serve to excuse the taking either at common law or under the statute. I do not see how any man whose moral sensibilities are not blunted by the temptation always afforded by such disasters, whether on land or sea, and who is not wholly demoralized in the presence of the temptation, can fail to recognize the wrong in it. The duty of restoring the goods is enjoined by the oldest rules of the moral law. Deut. xxii: 1-3. Every instinct of right and fair dealing suggests their return, and this statute was enacted to enforce that duty. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law; nor will any belief, not even a religious belief, in the right of the act excuse the crime. *Reynolds v. United States*, 93 U. S., 145, 167 (§§ 854-865, *infra*). There is a principle, undoubtedly often misapplied, I think, in the law of larceny that excuses the taking or avoids the criminal intent where there is a fair color of claim or right to the property. For example, in the case already put, if one takes money from under a pillow at night by stealth, with the intention by that means to recover that which had been before in his belief wrongfully taken from him, there would be no larceny, although the money was not in fact the same, nor was there in truth any wrong done to him. *Merry v. Green*, 7 Mees. & W., 627; *State v. Homes*, 17 Mo., 379; *State v. Conway*, 18 Mo., 321; *State v. Deal*, 64 N. C., 272; *Herber v. State*, 7 Tex., 69;

Rex v. Hall, 3 C. & P., 409; 1 Whart. Cr. L., § 83; 2 Whart. Cr. L., §§ 1770, 1785; 2 Bish. Cr. L., § 851. This color of right, however, must come from some claim to the property itself, *dehors* this act of taking, and not, as I apprehend, be solely predicated upon an erroneous belief that what is known to belong to another may be appropriated to one's own use without his consent, or without compensation, because of the situation in which it is found. Nor will any usage or custom justify the taking. 2 Bish. Cr. L., § 852; 1 Whart. Cr. L., § 83e. Mr. Russell mentions the taking of corn by gleanings, under an erroneous notion which universally prevails among the lower classes that they have a right to glean, and differs with Woodfall on his statement that it was larceny. 2 Russ. Crimes (8th Am. ed.), 10. In Com. v. Doane, 1 Cush., 5, however, it was held that a custom by officers to appropriate small parts of the cargo would not establish a claim of right.

§ 799. "*Steal*," "*plunder*," "*destroy*," defined. *Rule of pleading.*

But while I am inclined to the opinion that on the facts of this case a common law indictment for larceny, pure and simple, might be sustained, if the statute had intended only to declare that offense as applicable to wrecks, as the statute was not so interpreted and the jury was not instructed on that theory, the conviction cannot be sustained on that ground, because it was their province to determine whether the facts constituted larceny. It is, then, still necessary to inquire whether the charge has correctly interpreted the statute as one declaring an offense distinct from larceny, or rather one broad enough to cover not only a taking by larceny, but any other wrongful taking. If we admit that the facts in this case do not constitute larceny, or that those do not which are mentioned in State v. Conway, *supra*, where an iron safe belonging to a wrecked vessel was taken from the river and its contents appropriated after notice of their ownership, under circumstances, said by the supreme court of Missouri, to show that the perpetrators were "unmindful of the duties of good and honest men," I am still of opinion that either case falls within this statute, because, if not stealing in the sense of the common law, it was *plundering*, as known to this statute; if not in the Conway Case, certainly in this, where the distressed vessel was almost in sight and the goods were confessedly known to belong to her.

Mr. Stephen says of this word "plunder" that he does not know that it has any special legal signification. Steph. Dig. Crim. Law (St. Louis ed., 1878), 261, 266, and notes. The lexicographers define it as that which is taken from an enemy by force: "spoil;" "rapine;" "booty;" "pillage," etc. Worcest. Dict.; Webst. Dict. In Roget's Thesaurus it will be found grouped with "mutilation," "spoliation," "destruction," and "sack," at section 619; with "harm," "wrong," "molest," "spoil," "despoil," "lag waste," "dismantle," "demolish," "consume," "overrun," and "destroy," at section 619; with "booty," "spoil," and "prey," at section 793; and with "taking," "catching," "seizing," "carrying away," "stealing," "thieving," "depredation," "pilfering," "larceny," "robbery," "marauding," "embezzlement," "filch," "pilfer," and "purloin," at sections 791, 792 (Sears' ed., 1866). In Abbott's Law Dictionary "plunder" is said to be often used to express the idea of taking property without right to do so; but not as expressing the nature of the wrong involved, or necessarily imputing a felonious intent. 2 Abb. Dict., 234, word "Plunder." In Bouvier's Law Dictionary it is limited to the idea of capturing property from a public enemy on land; but "plunderage" is defined as a maritime term for the "embezzlement" of goods on board a ship. The word is used in Rev.

Stat., § 5361, in describing an intent as a synonym of "despoil," this being also a section of the act of 1825, from which the one we are considering was taken. The first English statute of 7 and 8 Geo. IV., c. 29, § 18, used the words "plunder or steal," but contained a proviso that where things of small value were cast on shore and were stolen, without circumstances of violence, the offender might be prosecuted for simple larceny; which shows that the statute was not regarded as declaring the crime of larceny simply, but something more. Indeed, anciently, the common law would take no jurisdiction of theft upon the high seas, but committed the offender to answer in the admiralty. The second English statute of 1 Vict., c. 87, § 8, uses the words "plunder or steal," as does the latest, 24 and 25 Vict., c. 96, § 64, without the proviso, and, with the exception of the word "destroy," the act is the same as our act of 1825, which was enacted before any of the English statutes. 2 Russ. Crimes, 150; 3 Fish. Dig. (Jacob's ed.), 3322; 1 Bish. Cr. L., § 141. In *Carter v. Andrews*, 16 Pick., 1, in a slander case, it was said that though the word "plunder," in its ordinary meaning, imports a wrongful acquisition of property, yet it does not express the precise nature of the wrong done.

"The most common meaning," says Mr. Chief Justice Shaw, "of this term 'plunder' is to take property from persons or places by open force, as in the case of pirates or banditti. But in another and very common meaning, though perhaps in some degree figurative, according to the general tendency of men to exaggerate and apply stronger language than the case will warrant, it is used to express the idea of taking property from a person or place without just right, but not expressing the nature or quality of the wrong done. Like many such terms, as pillaging, rifling, pilfering, embezzling, swindling, speculation, and many other like ambiguous terms which have not acquired, either in law or philology, a precise or definite meaning, they express the idea of wrongful acquisition, but not the nature of the wrong done." Page 9.

The same thing may be said of the word "steal," though it is not as indefinite as "plunder." It is generally used to express the crime of larceny — which is the purely technical word, about the meaning of which there can be no doubt,—and in a slander case it would need no *innuendo* or colloquium to give it force. Yet we often use it in a sense not synonymous with larceny, as when we speak of stealing a child, stealing a wife, stealing a thought, stealing land, stealing a literary composition, or the like. One of the definitions is "to take without right or leave." The primary idea of the word is *stealth*, or a secret, concealed or clandestine taking; but it is quite as often applied to open taking, and is used interchangeably with "rob," which is defined "to take away" without right—to *steal*; "to take anything away from, by unlawful force or secret theft—to *plunder*; to strip." Worcest. Dict., words "Steal," "Rob;" Webst. Dict., same words and "Purloin;" 2 Bouv. Dict., word "Stealing;" 2 Abb. Law Dict., word "Steal." I do not find the word "steal" used in defining larceny in any of the common law authorities cited by Mr. Bishop, or elsewhere, from Lord Coke down. 2 Bish. Cr. L., § 758, and notes; 1 Bish. Cr. L., § 566; 2 Whart. Cr. L., § 1750. And the truth is, I think, it is not a technical word, in the strict sense of that term, but a common word applied to almost any unlawful taking, without regard to exactness of use or accurate technical terminology. In *Dunnell v. Fiske*, 11 Metc., 551, Mr. Chief Justice Shaw says: "The natural and most obvious import of the word 'steal' is that of felonious taking of property, or larceny; but it may be qualified by the context." Page 554.

In *Alexander v. State*, 12 Tex., 540, where the words of the statute were "steal or entice away a slave," it was held the word "steal" imported a simple larceny, and "entice away" defined a separate offense, distinctly differing from the other. A similar statute was not so construed in South Carolina, but as creating a statutory offense differing from larceny; and this Texas case is, I believe, exceptional. *State v. Gossett*, 9 Rich. Law (S. C.), 428. In *Spencer v. State*, 20 Ala., 24, it appears that in the Penal Code of Alabama there were two sections, one of which, the twenty-fifth, enacted that if one should "fraudulently or feloniously *steal*" property in any other state or country, and bring it into that state, he might be convicted and punished "as if such larceny" had been committed in Alabama. Another, the eighteenth section, enacted that any one who should "inveigle, *steal*, carry or entice away" any slave, etc., should, on conviction, be punished, etc. The words "steal" and "larceny" were held to be technically used in the twenty-fifth section, and required that the ingredients of larceny should exist; while in the eighteenth section the word "steal," with others used, embraced not only larceny, but other offenses different from that offense in some essential particulars. Perhaps it would have been more accurate to say that the eighteenth section constituted a statutory offense embracing not only larceny, but other acts, essentially differing from those entering into that offense; because it is apparent from the case, and the others cited in the opinion, that is what the court meant, and not a plurality of offenses, including larceny. In *Williams v. State*, 15 Ala., 259, the word "steal" is said to import a larceny, when technically used, but in this eighteenth section to be used as a synonym of "carry away;" for the act declares that the offense shall be complete without an intention to convert to use of the taker or some other person, which was the essential ingredient in larceny. So, in *Murray v. State*, 18 Ala., 727, it was held that although the acts must, under the twenty-fifth section, constitute larceny in Alabama, it was the bringing of the slave into the state that constituted the statutory offense. And see *Ham v. State*, 15 Ala., 188. Furthermore, it appears from these cases that under these two sections a common law indictment for larceny was insufficient, because it did not describe the *statutory* offense; and this, although both "steal" and "larceny" appear in a technical sense in one of the sections; for the state could not punish the crime of *larceny* committed in another state, nor was there any such crime as larceny of a *slave* at common law. The offenses were *statutory*, and must be so charged; and it will be found they were, when properly indicted, charged under a pleading using the words of the statute in one count, as to which I shall have occasion to speak further hereafter. I cite the cases now to demonstrate that the word "steal" does not always nor necessarily import the crime of *larceny*. If congress had said that every person who shall *steal* goods belonging to a wreck, using no other words, I should probably hold it to denounce only acts constituting larceny at common law, in obedience to our familiar rule of construction that when congress defines a crime by only using its common law name, we interpret it by the common law; although, considering the character of the property and the nature of the jurisdiction, as arising out of the *maritime* and *commercial* control of the United States over the subject-matter, it might well be doubted if, strictly speaking, there could be a *common law* larceny under the circumstances mentioned in this statute, and whether the word "steal," when used in that connection, should not of itself mean more than it does at common law. Associated, as in this statute, with "plunder" and "destroy," I have no doubt it does mean a great deal

more, and just what I charged the jury in this case. The Revised Statutes, in sections 5356 and 5357, taken partly from this same act of 1825, and partly from others, were dealing with larceny on the high seas, and the language used shows that if congress intended to punish only that offense in this section it would have employed the technical language for the purpose.

The word "destroy" is also somewhat a maritime word, and is used, as will be seen by other sections of this chapter of the Revised Statutes, to denote any kind of deprivation of the owner by demolishing, making way with, or other subversion of his property. Taken altogether, these three words comprehend any kind of taking with evil intent, and we have implied by them the *animo furandi* and *lucri causa* of larceny, the love of greed accompanying embezzlement, breach of trust, and such self-appropriation as escapes the punishment for larceny for want of a trespass, and the wicked intent that belongs to such acts as we call malicious mischief, criminal trespass, and the like. Any of these intents are sufficient under the statute; and, although there must necessarily be a general evil or fraudulent intent, it is not to be confined to that specific intent which characterizes larceny. 1 Bish. Cr. L., §§ 205, 206, 207, 343, 344, 345; 1 Whart. Cr. L., § 297; 2 Whart. Cr. L., §§ 1794, 1800.

It is said by a learned annotator that the finder of a lost article of goods may have three motives: (1) To keep it and use it as his own; (2) to keep it for the owner when ascertained; (3) to keep it for a reward. 2 Ben. & Heard, Lead. Cr. Cas. (2d ed.), 431. To which may be added, in cases like this, that of depriving the owner of his property by destruction, if that can be an intent independent of that to use it as property belonging to the finder, or supposed by him to belong to himself, as in this case. I am unable to see any other motive, and the ingenuity of counsel has not satisfactorily suggested any; and I charged the jury in this case that if the second and third of these motives existed this statute was not violated, but if any other were found it was, and, it seems to me, clearly so. It was said in argument one might drag goods from the river to see if worth saving, and, on examination, supposing them worthless, immediately cast them back. I understand the authorities to hold that if kept but for a moment with the unlawful intent the crime is complete. 2 Whart. Cr. L., § 1789. So, if in the case put the intent were to appropriate the goods to his own use, the statute would be violated; but if it were to save them for the owner it would not. However, if excused in the case suggested it would not be for want of unlawful intent, but because the act of taking had not been completed.

§ 800. *Cases reviewed. Construction of a penal statute.*

I consider the case of *The United States v. Pitman*, 1 Spr., 196,—and see the *Missouri's Cargo*, id., 260, for a fuller statement of facts,—as a direct authority in support of the charge given to the jury. The learned counsel for the defendant, who have defended this case with a pertinacity and zeal that characterizes all they do, and a professional ability that could not be surpassed,—and I say this sincerely, and not to assuage defeat,—have gone into an elaborate argument and citation of authorities to show that the learned judge in that case uses the word "embezzlement" as the synonym of "larceny," which, it is said, was the crime committed, and also that Chancellor Kent and other judges have so used the word. I shall not stop to inquire whether Pitman could have been convicted of larceny at common law, but I doubt it. I think, however, that the court in that case did not so use the word, but rather in the sense used in the maritime law, as any fraudulent taking by the crew of parts of the cargo. 1

Bouv. Dic., word "Embezzlement;" 1 Abb. Dict., same word; The Boston, 1 Sumn., 329; Spurr v. Pearson, 1 Mason, 104; Edwards v. Sherman, Gilp., 461; The Rising Sun, 1 Ware, 379; Harley v. Gawley, 2 Saw., 7; Cromwell v. Island City, 1 Cliff., 221, where the word is used in the sense of "plunder." Also, that it is there used in the larger sense that we find it in our ordinary statutes against the wrongful appropriation of another's property. It is to be observed, too, that Pitman was a salvor, and the original taking was with that lawful intent, and yet he was convicted under this statute, which manifestly applies to all the cases of embezzlement and plunder by persons claiming salvage. At all events, the principle of construction adopted there applies as well to this case, and I am content to extend it, if need be, to the facts we have here, rather than adopt the narrow construction insisted on by counsel for the defendant. Even a penal statute should not be so strictly construed as to defeat the obvious intention of the legislature. American Fur Co. v. United States, 2 Pet., 358. The charge finds support, also, in the case of United States v. Coombs, 12 Pet., 72 (§§ 1628-32, *infra*); United States v. Palmer, 3 Wheat., 610 (§§ 535-541, *supra*), and United States v. Pirates, 5 Wheat., 184 (§§ 542-551, *supra*). See, also, The Kensington, 1 Pet. Adm., 239; United States v. Davis, 5 Mason, 356, at p. 361 (§§ 1021-23, *infra*).

§ 801. *It is not necessary in an indictment to distinguish between acts described as "stealing," "plundering" or "destroying."*

The next objection taken to the charge is that the court unwarrantably amalgamated the counts in the indictment, by which the defendant was surprised and misled. It is said the court made a new indictment and departed from the pleading of the government in order to avoid trying the defendant upon an indictment for larceny. This only amounts to saying that the court refused to adopt the defendant's view of the statute restricting it to a larceny of lost goods on land, for it is almost too plain for argument that under our practice the form of the pleading is immaterial if the substance of the averments is sufficient; and it requires some injury to the defendant to enable him to take any advantage of a defect in form. R. S., § 1025. The indictment is misleading no doubt in chopping this offense as it does, into pieces, by predicating one offense on "plunder," another on "steal," and yet another on "destroy," and subdividing these again into separate offenses in relation to goods taken from the wreck and those belonging to it. The process may as well have been continued by a like separation of the words "money, goods, merchandise, or other effects;" or, still further, of the words "in distress, wrecked, lost, stranded, or cast away upon the sea, or upon any reef, shoal, bank," etc., etc. The court admits that it did not detect this defect, if it be one, until it came to consider the charge to be given, and the request of the defendant to charge the jury to find a verdict on each separate count. The case in Sprague's Reports was passed by the court to counsel early in the proceedings, and attention called to its construction of the words "plunder" and "steal;" but the questions on the form of the indictment were not raised at the bar, nor suggested to the court, otherwise than by the requests for instructions handed up after the argument. This will account for any surprise so far as the court may be concerned; and if the fact were that any testimony had been excluded, or ruling made, to the prejudice of the defendant, because of the failure of the court to detect this peculiarity of the indictment, and because of the supposition that we were trying separate offenses under it, or any injury could have resulted, I should now grant a new trial. But it is plain to me that no harm

has been done him by this mode of pleading and trial. Even if they had been separate offenses — or separate indictments, for that matter — they could have been consolidated under our statutes and tried together. R. S., § 102'. Again, when so consolidated into one indictment, with separate counts, a general verdict is proper, and will be sustained if any of the counts be good and charge an offense. T. & S. Code (Tenn.), § 5217; 2 King's Dig. (2d ed.), §§ 2185, 2003, and cases cited; 1 Archb. Cr. Pl. (8th ed.), 292, and notes; *United States v. Pirates*, 5 Wheat., 184 (§§ 542-551, *supra*); *United States v. Patterson*, 6 McL., 466, 469 (§§ 2470-73, *infra*); *United States v. Peterson*, 1 Woodb. & M., 305; *United States v. Seagrist*, 4 Blatch., 420 (§§ 377-380, *supra*). This last case is a direct authority for disregarding the unnecessary separation of a statutory offense into several counts where it is made out by proof of acts of differing character, but all included in the statutory definition of the offense. It was a case where the defendants were indicted very much as in this case, under the second section of the act of March 3, 1835 (4 St., 776, now R. S., § 5359), for endeavoring to make a revolt or mutiny, etc., etc. The court says:

"It is practically unimportant whether the provisions of the second section are expounded as so many instances or methods in which the offense of an endeavor to make a revolt or mutiny may be manifested, or whether they are taken distributively, and understood to be so many separate and distinct offenses, each being sufficient of itself to sustain an indictment. The three counts of this indictment are so framed as to secure to the United States the advantage of either construction. It appears to me, therefore, that the court did not err in instructing the jury that, if the acts charged in the indictment were satisfactorily sustained by the evidence, and if the defendant committed those acts with intent to resist the master in the free and lawful exercise of his authority on board of the vessel, they would amount in law to an endeavor to make a revolt." At pages 423, 424.

Reverting to the Alabama cases, before cited, it will be found that it was held that a common law indictment for larceny could not sustain a conviction for the statutory offenses described in the sections of the Penal Code already cited. So, here, a common law indictment for larceny — if we had any such thing in our practice, as we have not, all our indictments being contrary to the form of the statute — would not do, showing plainly that, as in the Alabama cases, the indictment should charge the offense in the language of the statute; and it was done in those cases without the separation we have here into counts charging distinct offenses, which I have endeavored to show was immaterial. It is the same in Tennessee. *State v. Callicutt*, 1 Lea (Tenn.), 714. The form of indictment given under the English statute for plundering or stealing is a single count, charging that the defendant "did plunder, steal, take and carry away, against the form," etc., etc. It is stated, however, that you may add separate counts distinguishing between "in distress" and "wrecked," etc. Archb. Cr. Pl. (4th Am. ed.), 214; 2 Archb. Cr. Pl. (8th Am. ed.), 1332. But there is no objection to stating the same offense in different ways in as many different counts as you may think necessary. 1 Archb. Cr. Pl. (6th ed.), 93, and notes; *id.* (8th ed.), 292, and notes. And where the statute says the doing of this or that shall constitute the offense, the indictment may charge them all in one count, or in separate counts, at the election of the pleader. 1 Bish. Cr. Pro. (2d ed.), §§ 434-436. But whatever form is adopted the verdict should be, in a case like this, general on the whole indictment, rather than separate on each count,

and it is not error to so direct the jury as to relieve them of the confusion of finding a separate verdict for the different acts of the same offense, for all of which there was the same punishment. There may be cases of different grades, or punishment, or different offenses, where the court should direct separate findings on the separate counts, but surely this is not one of them. 1 Bish. Cr. Pro. (2d ed.), §§ 1005, 1009-1011. And, where the offense may be charged in one count, reciting all the statutory acts or elements, it seems to me more fitting to find a general verdict, and not to confuse with asking the jury to point out the particular act by following the separation of the pleader. The evidence will indicate on which act the verdict is predicated, if it be at all material to know it, in the subsequent proceedings. I fail, therefore, to see any injury to the defendant in the directions on that point of which so much complaint has been made in the argument. The jury were properly told to find a general verdict, and it is a mistake to treat the charge as altering the form of the pleadings or amalgamating the counts, though the language used might possibly be so construed. The object of the court was to rule that there were not, as had been argued, separate and distinct offenses, but one offense, which might be compassed by the doing of several acts, and that the doing of any one of them required a verdict of guilty. This being so, the defendant could not rightfully claim to be tried as if each act constituted a separate offense; and the real ground of complaint, on the motion for a new trial, is that the court did not so treat the case because the attorney for the government had so treated it in his pleading. I have endeavored to show that, conceding that there were charged separate offenses, and not several acts of the same offense, a general verdict was still proper and lawful, though it would have been, in that case, correct to find a separate verdict on each count. Hence, in any view, no error has been committed for which a new trial should be granted.

§ 802. *The rule as to the admissibility in evidence of confessions.*

We come, now, to the objection that the evidence of the confession was improperly admitted. I cannot see any reason why it should have been excluded. The witness Bennett was not in any proper view a person in authority; neither was Tarrant, the deputy marshal. In *Com. v. Tuckerman*, 10 Gray, 173, 190, the court states the rule to be that all confessions "which are obtained by threats of harm or promises of favor and worldly advantage, held out by a person in authority, or standing in any relation from which the law will presume that his communications would be likely to exercise an influence over the mind of the accused, are to be excluded from the hearing of judicial tribunals." Again: "Whether the court improperly admits them cannot be determined by reference to judicial authorities, which can only supply the principle of law which is to constitute a standard of decision; but in every case the admissibility in evidence of confessions must depend upon the peculiar state of facts and circumstances existing in that case." *Id.*, at p. 192; *Com. v. Morey*, 1 Gray, 461, 463; *United States v. Nott*, 1 McL., 499 (§§ 898-904, *infra*).

The circumstances in *Tuckerman's Case*, *supra*, are instructive, but I shall not take space to relate them here. The confessions were made to a stockholder and director of the corporation injured by the embezzlement, and yet were admitted, although the promises were stronger than we have here. The court says: "Thus, if an accused party has been made a prisoner, anything which may be said to him by the officer by whom he is held in custody will always be scrutinized with greatest care, and slight promises of favor coming from him will be considered a sufficient reason for rejecting all proof of subse-

quent confessions. But the defendant was not under arrest, and no charge had been brought or complaint made against him at the time of his interview with Reed." At page 193.

The court then compares the men in their relations and respective intelligence, and refers to the capacity of the accused to know what he was doing, and declares that what was said must always be considered in the light of the accompanying circumstances, which are never to be lost sight of in determining whether the promises in threats were limited, explained or qualified in their meaning by whatever else was said and done. See, also, *Com. v. Curtis*, 97 Mass., 474, 578; *Com. v. Whittemore*, 11 Gray, 202; *Com. v. Cuffie*, 108 Mass., 287; *Com. v. Smith*, 119 Mass., 311; *Com. v. Sego*, 125 Mass., 210. The cases in the federal courts substantially agree with these Massachusetts cases. *United States v. Nott*, *supra*; *United States v. Pocklington*, 2 Cranch, C. C., 293; *United States v. Kurtz*, 4 Cranch, C. C., 682; *United States v. Williams*, 1 Cliff., 5; *United States v. Graff*, 14 Blatch., 381; *Montana v. McClintock*, 1 Mont. T'y, 394; *Beery v. United States*, 2 Col. T'y, 186, 203, in which there is an able dissenting opinion attacking the rule of exclusion and recommending its abandonment. Indeed, it is generally lamented that there is any exclusion of the evidence of confessions under any circumstances, although it is conceded that the rule has become too firmly established to be ignored. The Tennessee cases are likewise in accord with the best cases on the subject. *Beggary v. State*, 8 Bax., 520; *Self v. State*, 6 Bax., 244; *Frazier v. State*, *id.*, 539; 2 King, Dig. (2d ed.), § 184. And I have found no more exact statement of the law of the subject than that made by that learned and accurate writer, now Mr. Justice Stephen. He says:

"No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat or promise proceeding from a person in authority and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly; and if (in opinion of the judge) such inducement, threat or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. But a confession is not involuntary only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding or by inducements held out by a person not in authority. The prosecutor, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions, are persons in authority." Steph. Dig., "Evidence" (May's ed., 1877), 72. See, also, 1 Greenl. Ev. (12th ed.), § 219 *et seq.*; 2 Ben. & Heard, Lead. Cr. Cas. (2d ed.), 484, 630; 2 Russ. Crimes (8th ed.), 824; 1 Whart. Cr. L. (17th ed.), § 683.

The real question is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from fear of the threat or hope of profit from the promise. Steph. Dig., "Evidence," p. 70, and note; *Reg. v. Reason*, 12 Cox, 228. And Chief Baron Kelly said: "The cases excluding confession, on the ground of unlawful inducement, have gone too far for the protection of crime." *Id.*, p. 73, and note; *Reg. v. Reeve*, 12 Cox, 179. The same thing was said by Baron Parke, and he further said that "he could not look at the decisions without some shame when he considered what objections had prevailed to prevent the reception of confessions in evidence, and that justice and common sense had been too frequently sacrificed at the shrine

of mercy." Reg. v. Baldry, 5 Cox, 623; S. C., 2 Ben. & Heard, Lead. Cr. Cas. (2d ed.), 484, 495.

Mr. Justice Earle said that the sacrifice was made, "not at the shrine of mercy, but at the shrine of *guilt*." Id. I am aware that the cases on this subject are conflicting to that extent, that if we look only for precedents any given case can be ruled one way or the other, so often are the established distinctions overlooked. But I think the principle to be extracted from them amounts to this: The court will submit the confession to the jury for what it may be worth, in all cases where the threat or promise has been made by one having no authority over the prosecution for the offense, and will exclude it in all cases where there has been a threat or promise of the nature above described, to one having such authority, or in his presence or by his sanction. There may be possible qualifications to this statement, as applicable to other circumstances, but it is sufficiently comprehensive to include the facts we have in hand. As I understand the law established by the cases that show the adjudication to have been made with careful consideration, the determination of the question of *authority* depends upon the relation of the person to a criminal prosecution for the act done by the accused. If some officious person, not at all so related to the prosecution for the crime, should, by threats or promises, extort a confession, it would be a question, not of the competency of the evidence for the judges to decide, but of its weight with the jury. The elements entering into the preliminary inquiry by the judge, where he is called on to determine the competency of the evidence, are these:

(1) Has the person to whom, or in whose presence, or by whose sanction, the alleged confession was made, any *authority*? (2) Were the threats or promises of that character that should exclude the confession as one made involuntarily?

Both these questions being answered in the affirmative, the evidence is excluded as a matter of *law*, the judge trying the facts as in other cases of mixed questions of law and fact; but either being answered in the negative, the evidence goes to the jury, and thereupon they try this as they do all the other facts of the case, giving such weight to the confession as they see fit. All evidence of confessions does not pass through this ordeal of trial by the judge, except to determine whether it belongs to the one class or the other; for if they have been made to persons not in authority, whether voluntarily or involuntarily, they go to the jury, to be by them discarded if *they* find that they have been extorted by threats or induced by promises of that kind that "the prisoner would be likely to tell an untruth from fear of the threat or hope of profit from the promise."

It would be going too far, perhaps, to say that the term "*confession*" implies, somewhat in the nature of the word, an acknowledgment of guilt to one in authority, not competent as evidence, if the judge sees that the person in authority has taken advantage of his position to extort or induce it; while such acknowledgment to one not in authority is merely an *admission* or *declaration* of the party, receivable in evidence precisely as in civil cases, to be valued by the jury according to circumstances. But the inexactness is more philological than technical, and this, because the two terms are ordinarily used to distinguish between *civil* and *criminal* cases, more as a matter of convenience than anything else. 1 Greenl. Ev., § 213. But when we come to classify *confessions*, when so broadly used, we find a need of some further division than that of *judicial* and *extrajudicial*. Id., § 216. Because, whether the given case falls within the one or the other of the classes as defined by Mr.

Greenleaf, we find that it is subject to the distinctions above adverted to, unless we treat all confessions made to one in authority as *judicial* — which, in a broad sense, they are — and do not limit that class, as he does, to those “made before a magistrate, or in court, in the due course of legal proceedings.” Otherwise, *extrajudicial* confessions, as defined by that learned author, must be again distinguished into those made to persons in authority over the prosecution, and those made to such as are not. *Authoritative* and *unauthoritative*, *official* and *extraofficial*, may be suggested as sufficiently comprehensive to designate the distinctions between the two, though I should prefer — following a not unnatural signification of the terms — to limit *confessions* to that acknowledgment of guilt made to any person in authority over the prosecution, and call all others *admissions*. Speaking of *extrajudicial* confessions, Mr. Greenleaf says: “All confessions of this kind are receivable in evidence, being proved like other facts, to be weighed by the jury.” 1 Greenl. Ev., § 216.

Again: “Before any confession can be received in evidence in a criminal case, it must be shown that it was *voluntary*.” Id., § 219.

Now, manifestly, these two statements of the texts are not only inaccurate, but conflicting, unless attention is given to the limitation to which I have just alluded; and with such attention they are both accurate and harmonious, and abundantly supported by the best considered cases. Some such classification will greatly aid in understanding the cases, and serves to somewhat clear up the confusion attending the subject throughout any investigation of it. The case of *Beggarly v. State*, *supra*, contains, in the opinion of a very able judge, intimations of an adherence to the rule suggested by Mr. Greenleaf as the wiser one, though, confessedly, not the one established by the later cases, that all confessions, whether made to persons in authority or not, must be entirely excluded *by the judge*, if it appear to him that the threats or promises used were sufficient to overcome the mind of the accused. 1 Greenl. Ev. (12th ed., by Redfield), § 223 and note.

In *Beggarly's Case*, *supra*, it is said: “In regard to the person by whom the inducements were offered, there has been conflict in the authorities — some holding that the inducements held out by private persons, not being prosecutor, officer, or having any authority over the prisoner, are not sufficient to exclude confessions thus obtained; but the sounder rule manifestly is that this is a mixed question of law and fact for the judge, and while it is proper to note the difference between confessions obtained by prosecutor, officer or person in authority, and those obtained by private persons, yet, if in fact the confessions were forced from the prisoner through hope or fear presented to his mind by a third person, they should be rejected.” Page 526.

This was said in regard to an occurrence that did not result in any confession, but a denial of guilt, the adjudication turning upon the admissibility of *subsequent* confessions received in evidence in the court below, and sustained because the prisoner had been warned and all the influence of that occurrence removed, as the court determined. But, as to the occurrence itself, if confession had resulted, as suggested by the court, it would have been as well rejected, because the inducements were sanctioned by one in authority, the magistrate, namely. It is true, the magistrate did not talk to the prisoner, on account of a delicacy he felt about his official position, but the accused was in custody before him, and while the examination was in progress, by his consent, and, as I infer, by his instigation, the prisoner was taken out by the witness for the very purpose of inducing a confession, the magistrate instructing the

witness "to tell him about turning state's evidence." This was really making the person talking to the prisoner an agent of the magistrate to do what he felt a delicacy in doing, and, under the circumstances of the case, it fell clearly within the rule of inducements held out by the sanction of one in authority, which are as fatal to the evidence as if held out by himself. 2 Ben. & Heard, Lead. Cr. Cas., 576, 516, and cases cited; Reg. v. Taylor, 8 C. & P., 733; S. C., 34 E. C. L., 608; Reg. v. Sleeman, 6 Cox, 245, and other cases cited; 3 Jac. Fish. Dig., 3712. It does not appear whether the case of Reg. v. Moore, 2 Den., 522; S. C., 12 Eng. Law & Eq., 583; S. C., 2 Ben. & Heard, Lead. Cas., 499, was called to the attention of the court, but it certainly resolves the conflict mentioned in the above extract and by Mr. Greenleaf in favor of the admissibility of all confessions made to a third person not in authority, to be weighed by the jury according to the circumstances of each case. It was so understood by the learned annotator of Greenleaf's Evidence, in the edition already cited, and by the text-writers since that case was reported, and by the learned judge in *Com. v. Smith*, 10 Gratt., 734,—one of the ablest expositions of the law on the subject I have found, and which has come under my observation since the foregoing portion of this opinion was written. See, also, *Wolf v. Com.*, 30 Gratt., 833, where the case was affirmed. I cannot, therefore, consider these expressions in *Beggarly v. State* as establishing the doctrine contended for as the rule of evidence in Tennessee, even if, as such, it were binding on this court, which it probably is not. *United States v. Reid*, 12 How., 361 (§§ 2694–99, *infra*).

When we come to determine who are persons in authority, in the sense of the rule above indicated, I do not know how better to express my judgment on the question than to adopt that of the learned judge in *Com. v. Smith*, *supra*. It was contended by the learned counsel in this case that the fact that a master or mistress could be such person in authority would show that any kind of domination would answer the rule, and that *official* authority was not essential as an element in determining the question. It might be a sufficient answer to this to say that the facts here do not show that Bennett had that domination over the mind of Stone to bring the case within the rule as thus indicated. The authorities already cited demonstrate that the person must have some authority over the prosecution of that particular offense, whether he be an officer of the law or not. The mere fact that he is an officer does not answer the purpose; he must be connected with the prosecution, and have authority through that connection over the prisoner. *Reg. v. Moore*, *supra*; *Com. v. Smith*, *supra*. I do not think it is necessary that the legal proceedings shall have actually commenced, but they must be impending or contemplated, and perhaps, under the strict rule, the accused must, in some way, be in the actual custody of the person in authority, or suppose himself so to be. The cases of master or mistress occupying that relation will be found to be where the offense concerned them in their persons or property, and it does not arise alone out of their attitude of master or mistress. *Reg. v. Moore*, *supra*; *Com. v. Smith*, *supra*. Not even does the relation of a parent to a child of tender years bring the case within the rule where the parent is unaffected by the crime. *The Queen v. Reeve*, L. R., 1 C. C., 362.

§ 803. *The rule in federal courts as to prosecutors.*

It was said that Bennett was a detective and also the agent of the owners of the goods, and stood for them in the relation of prosecutor. It is to be first observed that he was not a police officer, although he calls himself a *detective*,

but only a private agent employed, not to prosecute the crime, or to procure evidence for that purpose, but to gather up the goods or their value. He undoubtedly, during the progress of that employment, sought to influence the parties by suggestions of prosecution under the federal statutes, which he printed and circulated; but, as I understand the evidence, not till after the alleged confession of the defendant in this case. And at that time he had been advised by counsel, if I remember the testimony, and by the assistant United States district attorney, that no prosecution would lie in this court. But take all he said at the strongest, and it may well be doubted, if he had been in authority over the prosecution, whether the confession would be excluded under the latest cases. *The Queen v. Jarvis*, L. R., 1 C. C., 96; *The Queen v. Reeve*, id., 362. But I did not place my judgment on this ground, but on the more substantial one that he occupied no such relation to the prosecution as would exclude the evidence of the confession; conceding that it would have been excluded if he had been in authority. We have in our courts no such *quasi* officer as a prosecutor, as known to the common law and our state practice. At common law some person, generally the party injured, though it might be another person, must be named as prosecutor, except in special cases. And without this there could be no prosecution. 1 Archb. Cr. Pr. (8th ed.), 245, and notes; id. (6th ed.), 47, 52, 79, and notes; 1 Bish. Cr. Pr. (3d ed.), § 690. And the code of Tennessee has the same requirement. T. & S. Code (Tenn.), § 5096. It is through this *semi*-official relation to the prosecution that a private prosecutor becomes a person in authority in this matter of the evidence of confessions. But under our federal practice from the earliest times, and by force of the statute, the district attorney is the only prosecutor known to our law; and as a matter of fact, in this court, at least, no private prosecutor has ever been recognized. Act of 1879, ch. 20, § 35 (1 Stat. 92); R. S., § 771; *United States v. Mundel*, 6 Call (Va.), 245, 247; *United States v. McAvoy*, 4 Blatch., 418; *United States v. Blaisdell*, 3 Ben., 132, 143, where the court refused to recognize an agreement of the executive department not to prosecute the offender, and said that "when there is no district attorney in commission, the government cannot prosecute in this court." 1 Bish. Cr. Pr., § 278 *et seq.* It is impossible, therefore, for any one to occupy the place of a private prosecutor in this court, or to make any promises of immunity that will avail the accused in that capacity. It was otherwise at common law; for, generally, if the party injured refused to prosecute, there could be no prosecution. With us the district attorney alone can give such assurances. Neither Bennett or his principals could, therefore, have such authority over the prosecution as to bring them within the rule we are considering. Being owners of the goods, without this capacity to control the prosecution, through the necessity of becoming prosecutor, does not answer to make them persons in authority. 1 Whart. Cr. L. (7th ed.), § 692; id., § 686; *Ward v. People*, 3 Hill (N. Y.), 395. The case of *Frain v. State*, 40 Ga., 529, stating a contrary doctrine, is predicated upon a statute regulating the subject which abolishes all distinctions between persons in and not in authority. The statute is quoted in *Earp v. State*, 55 Ga., 136; S. C., 1 Am. Crim. Rep., 171. The *State v. Brockman*, 46 Mo., 566, is within the rule, because the owner of the goods was a prosecutor. In *The State v. Hogan*, 54 Mo., 192, the witnesses were the officers of the law concerned in the prosecution. It does not appear in *State v. Lawhorne*, 66 N. C., 638, how or by whom the confessions were obtained, and the case involved the admissibility of subsequent confession; while in *State v.*

Whitfield, 70 N. C., 356, the owner was the prosecutor. In *Flagg v. People*, 40 Mich., 706, the prisoner was in arrest and under the control of the officers having him in custody. These are the particular cases so much pressed by counsel, but I do not see that they militate against the views I have here expressed.

In regard to Tarrant, the deputy marshal, his mere presence, without more, would not invalidate the confession. He must be in authority over the prosecution and prisoner, and sanction the threat or promise held out by others. See the cases mentioned in the comments on *Beggarly's Case*, *supra*; 1 Whart. Cr. L. (7th ed.), § 692, at p. 609; *State v. Gossett*, 9 Rich. Law (S. C.), 428; *State v. Cook*, 15 Rich. Law (S. C.), 29; *Wiley v. State*, 3 Cold. (Tenn.), 362. He was present only in his character as the assistant of Bennett. I have no doubt they both relied upon his official position as an aid in procuring settlements for the goods taken from this wreck; but Tarrant was not using his official powers, if he had any, to extort or elicit this confession. He had no warrant of arrest, and was neither attempting nor threatening to make an arrest, and there was no cause for the defendant to reasonably suppose that he had any authority to hold out inducements or to sanction those held out by Bennett.

Finally, I may say that, while the courts are constantly lamenting that there is any rule that excludes the evidence of confessions or admissions of guilt in any case from the consideration of the jury, who have just as much capacity to weigh the facts of duress or inducement as they have any other facts in the case, and who finally in all cases pass upon the question, not of admissibility, but of duress or inducement, whenever the judge does admit the proof, I see no reason why the rule should be extended in the least beyond the established law of the cases. In this case I fully submitted to the jury the determination of the weight they would give to the evidence, and I have no doubt, if there was any threat or inducement to impair the testimony, the defendant received the full benefit of it. He could have been properly convicted upon his own testimony before the jury without the confessions; still, if they were improperly admitted, he would be entitled to a new trial. *United States v. De Quilfeldt*, 5 Fed. R., 276 (§§ 9-13, *supra*). Hence I have given the subject a careful examination, and am satisfied the evidence was properly admitted. The other requests refused need not be especially noticed. They are on the face of them not in accordance with the views I have taken of the statute and the law of the case as here expressed, and after thorough reconsideration I am of opinion a new trial should be refused. Motion overruled.

UNITED STATES v. MOULTON.

(Circuit Court for Massachusetts: 5 Mason, 537-555. 1880.)

STATEMENT OF FACTS.—Trial had under an indictment founded on the crimes act of 1790, ch. 36, alleging the theft, on the high seas, of a certain amount of foreign and domestic coin, and several bank-bills. There was no denial of the theft, but the question arose as to whether such articles were personal goods within the meaning of the act.

§ 804. *Foreign and domestic coins are "personal goods."*

Opinion by STORY, J.

The sixteenth section of the crimes act of 1790, ch. 36, provides "that if any person, etc., upon the high seas, shall take and carry away, with an intent

to steal or purloin, the *personal goods of another*, the person, etc., shall, on conviction, be fined not exceeding the fourfold value of the property so stolen," etc. The question is, whether foreign coin, and domestic coin, and bank-bills, or any of them, are "*personal goods*" within the intent of the statute. In the strictest sense of the common law, "personal goods" are movables belonging to, and the property of, some person, which have an intrinsic value. And even in this, the strictest sense, there cannot be any legal doubt that the foreign and domestic coins enumerated in the indictment are "*personal goods*," for they have an intrinsic value. In a more large and liberal sense, the term "goods" may embrace movables not having any intrinsic value, such as choses in action and moneyed securities, notes, bonds and other debts, and evidences of debts. Thus, a bequest by a party of all his goods and chattels, without any other restrictive or explanatory words, would carry choses in action, bonds, etc., as well as money and other valuable movables. And this upon the plain import of the words as expressive of the intention of the testator. Anonymous, 1 P. Will., 267. But in construing penal statutes, courts of law have often, in favor of the citizen, interpreted the word "goods" in its strictest sense; and, indeed, in capital felonies, have sometimes, in favor of life, adopted a far more limited meaning, savoring too often of unseemly nicety, if not of extravagant refinement.

The words of the present enactment approach very near to the definition of larceny at the common law. The usual definition of that offense is, the felonious and fraudulent taking and carrying away by any person of the mere *personal goods* of another (4 Black. Comm., 229; 3 Inst., 107; 2 East, C. L., 553; 2 Russell, Crimes, 1032); and according to Bracton (Lib. 3, ch. 32), "*furtum est secundum leges contractatio rei alienæ fraudulentæ, cum animo furandi, invito illo domino cujus res illa fuerit*," answering very nearly to the description given by a late learned judge, that it is the felonious taking of the property of another, without his consent and against his will, with intent to convert it to the use of the taker. Hammond's Case, 2 Leach, C. C., 1089; 2 Russell, Crimes, 1032, 1033; 2 East, Cr. L., 553; Curwood's Hawk., B. 1, ch. 19, and note, *ibid.* In the above definition, "personal goods" has always been construed to mean such movables only as have an intrinsic value; and therefore as not comprehending mere choses in action. The common law did not deem the latter the subject of larceny, because they were not of any intrinsic value, and did not import any property *in possession* of the person from whom they are taken. 4 Black. Comm., 234; 2 Russell, Crimes, 1112; 2 East, P. C., 597; Anonymous, Dyer, 5; Rex v. Morris, 2 Leach, C. C., 525; 3 Inst., 107, 109; Co. Litt., 118 b; Calye's Case, 8 Coke, 33 a. It was upon this ground that this court thought itself constrained to hold, in the case of The United States v. Davis, 5 Mason, 356 (§§ 1621-23, *infra*), that mere choses in action (such as a private promissory note for money) were not personal goods within the purview of the act of 1790. It was presumed that as the legislature made use of language importing, almost in the very words of the common law, a definition of larceny, such "personal goods" only as might be deemed property in possession at the common law were within the contemplation of the act. But to carry the exception farther, and exclude money and coin of foreign or domestic coinage, which are in the strictest sense "personal goods," having an intrinsic value, would, in our judgment, be to indulge a latitude of construction not properly belonging to judicial tribunals. The natural sense of the terms of the act ought to be adopted, unless the context affords clear proof of some more restrictive application of them. Very little light can be gathered from the decisions of the

English courts, upon the construction of their own statutes, to assist us in this part of the inquiry. In the first place, as has been already intimated, courts of law, in cases of capital felonies, have been very astute, perhaps unjustifiably so, to escape from the literal meaning of the words, and to create conjectural exceptions. Such a proceeding, if it may be properly allowed in cases affecting life, is wholly inapplicable to cases of mere misdemeanors, and to other cases not capital. There is much masculine sense in the distinction taken on this subject by the court, in the case of *The Commonwealth v. Fisher*, 17 Mass., 46. In the next place, there is not a single decision in the English books, to our knowledge, which, in point of authority, ought to govern in the construction of the present act; for in no English statute are the objects or the language substantially the same with ours. There are other accompanying words, or other clauses in the context, explanatory of the legislative intent, which might well authorize, if they did not absolutely require, the court to adopt the narrower construction, *in favorem vitæ*. It will be sufficient to cite a few of the more prominent cases in order to establish this position. In *Rex v. Leigh*, 1 Leach, C. C., 52, it was held by the court that stealing money was not a capital larceny within the statute of 24 Geo. 2, ch. 45. The words of that statute are, "all and every person, etc., who shall feloniously steal any *goods, wares or merchandises* of the value of forty shillings, in any *ship, barge*, etc., upon any navigable river, or in any port, etc., or upon any wharf or quay adjacent to such river or port." The court thought that the construction ought to be confined to such goods and merchandises as are usually lodged in ships or on wharfs and quays. Reliance was also placed upon the accompanying words, "*wares and merchandises*" (*noscitur a sociis*), and upon the clause as to *wharfs and quays*; and very properly, for it was difficult to presume that the legislature had a different intent as to goods in ships and on wharfs; and money is not usually lodged on wharfs. Foster, C. L., 79; 2 East, C. L., 647.

In the act of 1790 there are no such accompanying words; "personal goods" stand alone in the text, without any qualifying clause. In *Rex v. Guy*, 1 Leach, C. C., 241, which was an indictment for receiving two guineas which were stolen, it was held that, under the statutes of 3 W. & M., ch. 9, § 4, and 5 Ann, ch. 31, § 5, there cannot be an accessory after the fact for receiving money. The statute of W. & M., ch. 9, provides that, "if any person, etc., shall buy or receive any *goods or chattels* that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, he, etc., shall be taken and deemed an accessory, etc., to such felony, after the fact." The statute of 5 Ann, ch. 31, provides that, "if any person, etc., shall receive or buy any *goods or chattels* that shall be feloniously taken or stolen," etc., in the same general terms as that of W. & M. 2 East, P. C., 743, 744. The judges, in the construction of these statutes, seem uniformly to have held that the words "goods and chattels" mean such goods and chattels whereof larceny could be committed at the common law, upon the plain ground that the legislature did not intend to create any accessorial offense, except in cases where there was a principal offense already committed. It is certain that guineas are "*goods and chattels*," in the common law sense of the terms, and, as such, subjects of larceny; and it is somewhat difficult, therefore, to account for the decision in *Rex v. Guy* upon the principle above stated. Mr. East supposes the decision to have proceeded upon the ground that the statutes extended only to the receipt of such kind of goods and chattels, the property in which being generally, and in its own nature, capable of being ascertained by outward

marks and circumstances, made it more difficult for the thief to dispose of them without the aid of a receiver, by whom he was encouraged and protected, whereas money has no such distinguishing marks. 2 East, P. C., 748; 2 Russell, Crimes, 1307, 1308. This ground seems wholly unsatisfactory; for if larceny might be of money at the common law, which cannot be doubted (Hawk., B. 1, ch. 32, § 35; 2 Bl. Comm., 387), there seems no just reason why the accessory offense should not, if the words of the acts did not convey any restriction, be held co-extensive with the principal offense. The ground, however, such as it is, is inapplicable to the principal offense, and is limited to receivers. In *Rex v. Morris*, 2 Leach, 525, it was decided that the receiver of bank-notes, knowing them to be stolen, was not punishable as an accessory under the statute of 3 W. & M., ch. 9, and 5 Ann, ch. 31, notwithstanding the express declaration in the statute of 2 Geo. 2, ch. 25 (2 East, P. C., 598), that if any person shall steal any *bank-notes*, etc., "he shall be deemed guilty of felony, of the same nature and in the same degree, etc., as if the offender had stolen or taken any other goods of like value, with the money due," etc., upon the ground that the latter statute did not reach receivers of bank-notes as accessories under the former statutes, but applied only to the principal offender in the larceny. But this case has been since shaken by the decision in *Rex v. Dean*, 2 Leach, C. C., 798. See 2 East, P. C., 646, 749; 2 Russell, Crimes, 883, and note; *id.*, 1307, 1308.

These are the most material cases, and they fall far short of establishing the proposition that "personal goods," in the act of 1790, do not include coin or money. In our judgment, it would be an unjustifiable departure from the language of the legislature to hold that coin and money are not included within the prohibition. They are equally within the terms and the reason of the enactment.

§ 805. *Bank-bills are considered "personal goods" within the meaning of the crimes act.*

In respect to the *bank-bills* included in the indictment, there is much more difficulty. I agree to the doctrine of Lord Mansfield, in *Miller v. Race*, 1 Burr., 457, that bank-notes are usually treated in the common business of life as money and cash, and not as goods and chattels, or securities for money. But that case turned upon very different considerations from those which govern in the construction of penal statutes. There the only point was, whether bank-notes, being used as currency, the owner could, in case they were stolen, recover them against a subsequent *bona fide* holder. The court adjudged that he could not, upon sound principles of public policy. Now, there is strong reason to believe that bank-notes were not, before the statute of 2 Geo. 2, ch. 25, held to be "goods or chattels," within the meaning of the statutes of W. & M., and Ann, above referred to. This is not decisive; but it affords a presumption that in the opinion of parliament it was necessary to punish the larceny of bank-notes by a specific description *eo nomine*. Technically speaking, bank-bills are merely promissory notes for the payment of money; and they may be declared on as such. *Young v. Adams*, 6 Mass., 182; *Perry v. Coates*, 9 Mass., 537. They are not in all cases treated as *money*, though in most instances, for the purposes of civil justice, they are so. In *Commonwealth v. Carey*, 2 Pick., 47, the court declared that a bank-note might, in an indictment for theft, be described as a promissory note of the bank; and in this respect it was not distinguished from other private choses in action. In *Spangler v. Commonwealth*, 3 Binn., 533, the court seem to have treated bank-notes as no otherwise the subjects of larceny than as statutable enactments had made them

so. And Yeates, J., on that occasion said that bank and promissory notes are mere choses in action. But in *Commonwealth v. Boyer*, 1 Binn., 201, upon an indictment for larceny of bank-notes, the court thought that a description of them as the "goods and chattels" of the true owner was sufficient. The same doctrine is implied in *Commonwealth v. Richards*, 1 Mass., 337. In *People v. Holbrook*, 13 Johns., 90, the point was directly decided; and it was held that, in such a case, "goods and chattels" implied property or ownership. But in each of these cases there was a state statute, which made the larceny of bank-notes a substantive offense; and in two of them, the state statute was to the same effect as that of 2 Geo. 2, ch. 25; and it is not impossible that these considerations had an influence upon the decision.

The doctrine in New York has gone farther; and bank-notes have been held liable to be taken in execution upon a *feri facias* as money. *Handy v. Dobbin*, 12 Johns., 220. This decision would be entitled to very great weight, if it stood wholly uncontradicted. But in Massachusetts an opposite doctrine has been maintained. *Perry v. Coates*, 9 Mass., 537. Still, there is this material difference between bank-notes and other promissory notes, that the former in the common transactions of life are treated as money, and circulate as currency, and therefore have, in themselves, an intrinsic value in the common estimation of mankind. They are at least as much within the policy of the act of 1790, ch. 30, and as important to be guarded against larceny as any personal property whatsoever. Under such circumstances, the court has been anxious to ascertain whether bank-bills have been in any cases of a penal nature treated differently from any other choses in action; and especially whether in cases of statutable larcenies they have been distinguished from other negotiable notes. In *Rex v. Dean*, 2 Leach, C. C., 798, the indictment was for stealing a *bank-note* of the value of \$20, the property of *J. M.*, in his dwelling-house. The statute of 12 Ann, ch. 7, § 1, makes stealing "any *money, goods, chattels, wares or merchandises*, of the value of forty shillings," a capital offense. It was objected that bank-notes were not "money, goods, chattels, wares or merchandises," within the purview of the statute. But the judges were unanimously of opinion that they were; for that the statute was intended to protect every species of property. But the statute of 2 Geo. 2, ch. 25 (2 East, P. C., 597, 598), already referred to, doubtless had great influence in the decision, since it put the stealing of bank-notes upon the same footing as to nature, degree and punishment as the stealing of any other goods; though this ground does not expressly appear in the opinion of the judges. In *Rex v. Clarke*, 2 Leach, C. C., 1036 (4th ed.), the indictment was for larceny of certain *bankers' notes*, and for certain pieces of paper, of the value, etc., each stamped, and re-issuable, as bankers' notes, payable to the bearer. It appeared in evidence that the notes had been taken up by the bankers' agents, and were stolen from a parcel in their transit to the bankers for the purpose of being reissued. The objection was, that the notes, having been paid, were of no value, and consequently not the subject of larceny. The prisoner was convicted; and the judges held that he was rightly convicted. Mr. Justice Grose, in delivering their opinion, said, "The question submitted in this case to the consideration of the judges was whether the paper and stamps are, under the circumstances of the case, *the subjects of larceny at the common law*; or in other terms, whether they are *the property of* and *of any value to J. J. and A. L.* (the bankers), who were unquestionably the owners. These gentlemen have paid for the paper, the printing, and the stamps of these papers, which once existed both in char-

acter and value as promissory notes. Their character and value as promissory notes were certainly extinct at the time they were stolen. But even in this state they bore about them a capability of being legally restored to their former character and pristine value. It was a capability in which these owners had a special interest and property. The act of reissuing them would have immediately manifested their value as papers, etc. In what sense or meaning, therefore, can it be said that these stamped papers were not the valuable property of their owners? They were indeed only of value to those owners; but it is enough that they were of value to them. Their value to the rest of the world is immaterial. The judges are, therefore, of opinion that to the extent of the price of the paper, the printing and the stamps, they were valuable property belonging to the prosecutors." 2 East, P. C., 646, 749; 2 Russell, Crimes, 984, 1307, 1308; Rex v. Hammon, 2 Leach, C. C., 1083 (4th ed.). See, also, S. C., 2 Russ. Cr. L., 147, and note (2d English ed., 1828). It cannot escape observation how strongly every word of this opinion applies to the case of bank-notes which are outstanding; and it is to be considered that the question on the counts, to which alone the opinion applies, was as to the larceny at the common law. If bankers' notes payable to bearer were of the value of the stamps, and paper and printing, because reissuable, and therefore to be deemed valuable property, the subject of larceny, *a fortiori* bank-notes, for which the holder must be presumed to have given value, and which have in his hands a present value as currency, must be deemed such. There is, indeed, such a persuasive good sense in the opinion, that one feels very great difficulty in escaping from its conclusive effect in cases of the larceny of other mere choses in action. Rex v. Ransom, 2 Leach, C. C., 1090, is not so strong in its application. But Rex v. Vyse, 1 Ryan & M., C. C., 218, not only affirmed the doctrine in Rex v. Clarke, but proceeded a step farther. It was there held that bankers' notes, so paid and reissuable, were not only subjects of larceny at common law, but might be described in the indictment (as in that case they in fact were described) as "goods and chattels" of the owners.

These cases distinctly show that in modern times courts of justice in penal, and even in capital, cases are disposed to look at the real nature of the things stolen, and though they are in form choses in action, yet, if possessing a real value in possession, to hold them subjects of larceny. The choses in action which were held originally not to be the subjects of larceny at the common law were those which had no intrinsic value (bank-notes were not then in existence), and did not import any property in possession of the person. Can it be truly said that bank-notes, payable to bearer, and passing as currency, have no present value in possession? The present indictment has described them as of the value which they purport on their face to promise to pay. They pass as money; they are received as money. In courts of justice they are treated as money. On a declaration for money had and received, proof that the defendant received bank-notes for the use of the plaintiff would be sufficient to maintain the action. They have a present value in possession, not as a mere promise to pay money, but as money of an immediate, positive, exchangeable value. It seems to us, therefore, that it would be an over-refinement to hold that they are not "personal goods" within the sense of the act of 1790. They are far better entitled to the appellation of "goods and chattels" than the paid bankers' notes in Clarke and Vyse's cases above mentioned.

Besides, the bank-notes of the Bank of the United States, by the express pro-

visions of the charter (of which, as a public act, we are bound judicially to take notice), are receivable in payments to the United States; and they have, therefore, a present value, for such purposes, as cash. The same cannot be said of the other bank-notes stated in the indictment. But we are still entitled to consider them as of the present value of their respective denominations, as they are so alleged in the indictment.

If this were an indictment at common law, we might, as to the latter bank-notes, have some hesitation, though the cases of Clarke and Vyse would certainly go far to remove any technical scruples. One reason why, at the common law, bonds and other choses in action were not deemed subjects of larceny was that they could not be used as property in possession by the thief, but were suable only by the owner. But bank-notes, payable to bearer, are not now liable to such a consideration; for they are of present worth and value to the holder, and pass by delivery. We are now construing a public statute; and if we can perceive that the words of the statute, in common and legal understanding, are large enough to comprehend bank-notes, and that the policy of the statute applies to them with at least the same force that it does to "personal goods" in the most restrictive sense of the terms, we are bound to give that interpretation which carries the words to the extent of the mischief. We may say, as the judges did in Dean's Case, 2 Leach, C. C., 798, "that the statute was intended to protect every species of property" which may be deemed valuable property in possession. In the case of *Rex v. Robinson*, 2 Leach, C. C., 869, the judges held that *bank-notes* were a *valuable thing* under the statute of 9 Geo. 1, ch. 22, respecting threatening letters, which uses the words "money, venison, or *other valuable thing*." See, also, *Rex v. Aslet*, 2 Leach, C. C., 958 (4th ed.); 2 East, P. C., 1110; 2 Russ. Crimes, 1830, etc. But a private promissory note has been held not to be so. *Rex v. Major*, 2 Leach, C. C., 894; 2 East, P. C., 118. A distinction is here manifestly taken between choses in action which are mere evidences of a debt, and those which have a present value as currency. It can scarcely be doubted that under the statute of 30 Geo. 2, ch. 24, respecting false pretenses, *bank-notes* must have been deemed "money, goods, wares, or merchandises," although there is no case, now recollected, which turned on that point." See 2 East, P. C., 832.

Upon the whole, the court are of opinion that the bank-notes stated in the indictment, equally with the coin, are personal goods within the act of 1790, and therefore sentence must be passed upon the prisoner accordingly.

§ 806. **At common law.**—An indictment at common law for larceny can be sustained though the common law punishment has been changed, if it is not excluded by statute. *United States v. Hammond*,* 1 Cr. C. C., 15.

§ 807. **Title to property.**—A qualified property is sufficient to support an indictment for larceny, and evidence that the property was taken from the possession of the person named is proper to go to the jury. *United States v. Duffy*,* 1 Cr. C. C., 164.

§ 808. **Severance from the soil.**—It is not a felony to take and carry away rails from a fence, if the severance and carrying away are one continuous act. *United States v. Wagner*,* 1 Cr. C. C., 314; *United States v. Smith*,* 1 Cr. C. C., 475.

§ 809. **By one in possession of the property.**—A person cannot commit larceny of property of which he is lawfully in possession. *Ex parte Kenyon*, 5 Dill., 339.

§ 810. **Goods delivered for a special purpose.**—Where a workman, to whom goods are delivered for a special purpose, takes them away with intent to steal, he is guilty of larceny. *United States v. Strong*,* 2 Cr. C. C., 251.

§ 811. **Acting with servant of owner.**—Where one stole wood, in collusion with the servant of the owner, he was held guilty of larceny, notwithstanding the wood was delivered to him by the servant. *United States v. Walker*, 1 Cr. C. C., 402.

§ 812. **Property of married woman.**—Where one was indicted for stealing the goods of A. B., and it appeared in evidence that A. B. was a *feme covert*, and that the goods were the property of the husband, who was seeking employment elsewhere and not contributing to her support, and that she kept house, the court refused to instruct the jury that the defendant was not guilty upon the indictment. *United States v. Parsons*,* 4 Cr. C. C., 726.

§ 813. **Goods left in prisoner's coach.**—Where the owner of certain goods left them in the prisoner's hackney coach, by accident or mistake, and the prisoner found them there, and, knowing to whom they belonged, converted them to his own use with intent to steal them, he was held to be guilty of larceny. *United States v. Pearl*,* 5 Cr. C. C., 392.

§ 814. **Possession obtained fraudulently.**—Where the defendant went to B., who had sold cigars to C., and pretended that C. had sent for a box of them, whereupon he received the cigars, and appropriated them to his own use, the court held that he was not guilty of larceny. *United States v. Robertson*,* 5 Cr. C. C., 38.

§ 815. **Property of the United States.**—Larceny "of the personal goods of the United States" is larceny "of the personal goods of another," as those words are used in the sixteenth section of the act of April 30, 1790. *United States v. Maxon*,* 5 Blatch., 360.

§ 816. **The stealing of the goods of separate owners** at the same time, by the same person, and in the same place, constitutes separate offenses. And so where one was convicted on five separate indictments for stealing on the same day the goods of five persons, he was sentenced to five years' imprisonment; *i. e.*, one year upon each indictment. (THURSTON, J., dissented.) *United States v. Beerman*,* 5 Cr. C. C., 412.

§ 817. **Property of deceased person.**—An indictment for stealing the property of A. is supported by proof that the property belonged to the estate of a deceased person, which was in the possession and management of A. *United States v. Barlow*,* 1 Cr. C. C., 94.

§ 818. **Stealing a slave.**—An indictment at common law for stealing a "mulatto boy named William Foote, of the price of \$500, of the goods and chattels of one Fanny Thomas," was quashed because it did not aver the boy to be a slave. On motion that the prisoner be recognized to appear at the next term to answer a new indictment, the court held that an indictment would not lie at common law for stealing a slave. *United States v. Godley*, 2 Cr. C. C., 153.

§ 819. **By a servant or employee.**—If the porter and watchman of the Bank of the United States is sent into one part of the banking house to convey a number of notes into another part, and he takes one or more of them and converts them to his own use, he is guilty of larceny under section 16 of the crimes act of March 3, 1835. He is not guilty of embezzlement. *United States v. Clew*,* 4 Wash., 700.

§ 820. At common law, the person who, by the confidence of another, is intrusted with the possession of his property, cannot commit the crime of larceny by appropriating it to his own use. But it distinguishes between the legal possession which the existence of a trust implies, and that mere charge or supervision which is devolved on a servant or clerk. In the latter case the appropriation is larceny. *United States v. Hutchison*,* 4 Penn. L. J. Rep., 211.

§ 821. **Stealing bank-note.**—Under an indictment for stealing a bank-note, it is not necessary to prove that it is a genuine note of the bank. The note itself, being proved to be the note stolen, is *prima facie* evidence of what it purports to be on its face. Nor is it necessary to prove that it is the note of a chartered bank. *United States v. Byers*, 4 Cr. C. C., 171. See § 796.

§ 822. Where a statute makes it an offense to steal the notes of any incorporated bank, the statute of incorporation becomes a public statute. *United States v. Porte*,* 1 Cr. C. C., 369.

§ 823. Not an offense at common law to steal a bank-note. *United States v. Bowen*,* 2 Cr. C. C., 133; *United States v. Carnot*,* 2 Cr. C. C., 469.

§ 824. Under the act of March 2, 1831, enacting "that every person convicted of feloniously stealing, taking and carrying away any promissory note or other instrument of writing for the payment or delivery of money, or other valuable thing, to the amount of \$5. or upwards, shall be sentenced to suffer imprisonment and labor," parol evidence may be given of the contents and purport of the bank-notes stolen where they have been passed away by the owner. *United States v. Lodge*, 4 Cr. C. C., 673.

§ 825. Upon an indictment for stealing a bank-note, the court was of opinion that it was larceny, bank-notes being within the meaning of "personal goods," as used in the act of congress of April 30, 1790. *United States v. Murray*, 1 Cr. C. C., 141.

§ 826. Where an act of congress makes it an offense to steal "goods and chattels," a party cannot be convicted for stealing a bank-note; bonds, bills and notes are not goods and chattels at common law. *United States v. Morgan*,* 1 Cr. C. C., 278.

§ 827. On a conviction for stealing bank-notes, those which have passed to *bona fide* holders in the way of business will not be required to be delivered up to the owner. *United States v. Read*,* 2 Cr. C. C., 159.

§ 828. **Plundering wrecked vessel.**—Where an indictment alleges that the defendant did “plunder, steal, take and carry away” money from a stranded vessel, proof of either plundering or stealing is sufficient, as the statute punishing the offense is in the alternative. *United States v. Pitman*,* 1 Spr., 196. See §§ 791-795.

§ 829. The word “plunder,” as used in the act of congress punishing the plundering of any property from or belonging to any wrecked or stranded vessel, is not limited to forcible taking, but includes fraudulent taking or embezzling. *Ibid.*

§ 830. “**Personal goods.**”—Choses in action are not “personal goods,” within the meaning of section 16 of the crimes act of 1790, ch. 36, punishing the taking, with intent to steal or purloin, “the personal goods of another,” on the high seas, or in any of the places within the sole and exclusive jurisdiction of the United States. *United States v. Davis*, 5 Mason, 856 (§§ 1621-23). See § 796.

X. OFFENSES BY OFFICERS.

[See §§ 611, 612.]

SUMMARY—*Who an officer*, § 831.—*Embezzlement by officers under act of June 14, 1866*, § 832.—*Surgeon for examination of pensioners not an officer*, § 833.—*Liability of state officers*, § 834.

§ 831. A clerk in the office of the assistant treasurer of the United States, at Boston, appointed by such assistant treasurer, with the approbation of the secretary of the treasury, as authorized by the general appropriation act of July 23, 1863, is an *officer* or *person* “charged with the safe keeping of the public money,” within the meaning of the sixteenth section of the act of August 6, 1846, and is punishable under that section for loaning the public moneys intrusted to him for safe-keeping. (MILLER, GRIER and FIELD, JJ., dissent.) *United States v. Hartwell*, §§ 835-841. See § 846.

§ 832. The third section of the act of June 14, 1866, providing “that if any banker, broker or other person not an authorized depository of the public moneys,” shall do either of the acts therein specified, every such act shall be held to be an embezzlement, and concluding with the penal sanction, as follows: “And any president, cashier, teller, director, or other officer of any bank or banking association, who shall violate any of the provisions of this act, shall be deemed and adjudged guilty of an embezzlement of public money,” is confined to officers of banks and banking associations, and does not apply to a clerk in the office of the assistant treasurer, at Boston. *Ibid.*

§ 833. A surgeon appointed to make periodical examination of pensioners by the commissioner of pensions, under the third section of the act of March 3, 1873 (R. S., sec. 4777), is not an officer of the United States within the meaning of section 12 of the act of 1825, declaring that “every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine of not more than \$500, or by imprisonment not more than one year, according to aggravation of the offense.” *United States v. Germaine*, §§ 842, 843. See § 846.

§ 834. If a law of congress, passed as necessary and proper for carrying into effect any constitutional provision, is corruptly violated by any person, even though he be a judicial officer of a state, such person is amenable to prosecution in a United States court for such offenses. A justice of the peace of a state is therefore liable to punishment in a United States court for unlawfully and corruptly endeavoring to influence, obstruct and impede the due administration of justice in a court of the United States by issuing a warrant of arrest for, and sentencing to be whipped and imprisoned, a witness under recognizance in such court. *United States v. Kindred*, §§ 844, 845.

[NOTES.—See §§ 846-850.]

UNITED STATES v. HARTWELL.

(6 Wallace, 835-402. 1867.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS.—Hartwell, being a clerk in the office of the assistant treasurer of the United States at Boston, was indicted for embezzlement of public money, the indictment, in numerous counts, being founded on the statute of 1846, and on that of 1866. The court below being divided in opinion, certified two questions: first, whether defendant was liable under the sixteenth

section of the act of 1846 (the Sub-Treasury Act); and, second, whether any offense was charged under the act of 1866 of which the court has jurisdiction.

Opinion by MR. JUSTICE SWAYNE.

This case comes before us upon a certificate of division in opinion of the judges of the circuit court of the United States for the district of Massachusetts. As disclosed in the record the case is as follows:

The defendant was indicted for embezzlement. The indictment contains ten counts. The first three are founded upon the sixteenth section of the act of August 6, 1846, the remaining seven upon the third section of the act of June 14, 1866. The counts upon the act of 1846 allege that the defendant, being an officer of the United States, to wit, a clerk in the office of the assistant treasurer of the United States, at Boston, appointed by the assistant treasurer with the approbation of the secretary of the treasury, and as such charged with the safe-keeping of the public moneys of the United States, did loan a large amount of said moneys, with the safe-keeping whereof he was intrusted in his capacity aforesaid. The names of the borrowers and the amount and description of the moneys loaned are set forth.

The succeeding counts allege that the defendant, being a person, not an authorized depository of the public moneys of the United States, to wit, a clerk in the office of the assistant treasurer of the United States, at Boston, appointed by him with the approbation of the secretary of the treasury, having the care and subject to the duty to keep safely the public moneys of the United States, did knowingly and unlawfully appropriate and apply another portion of said public moneys, of which he had the care, and was subject to the duty, safely to keep as aforesaid, for a purpose not prescribed by law, to wit, did loan the same. The particulars with reference to the loans are given as in the preceding counts.

The testimony being closed, the opinions of the judges were opposed upon the points: 1. Whether the defendant was liable to indictment under the sixteenth section of the act of August 6, 1846; and 2. Whether there is any offense charged in the last seven counts under the third section of the act of June 14, 1866, of which the court had jurisdiction.

The section referred to in the act of 1846 describes in three places the persons intended to be brought within its scope. The language used in that connection is: "All officers and other persons charged by this act, or any other act, with the safe-keeping, transfer and disbursement of the public money, are hereby required," etc. "If any officer charged with the disbursement of the public moneys shall accept or receive," etc. "The provisions of this act shall be so construed as to apply to all persons charged with the safe-keeping, transfer or disbursement of the public money, whether such persons be indicted as receivers or depositories of the same."

§ 835. *A clerk appointed by virtue of an act of congress by an assistant treasurer, with the approval of the secretary of the treasury, is a public officer.*

Was the defendant an *officer* or *person* "charged with the safe-keeping of the public money" within the meaning of the act? We think he was both. He was a public officer. The general appropriation act of July 23, 1866 (14 Stat. at Large, 200), authorized the assistant treasurer, at Boston, with the approbation of the secretary of the treasury, to appoint a specified number of clerks, who were to receive, respectively, the salaries thereby prescribed. The indictment avers the appointment of the defendant in the manner provided in the act.

§ 836. — *what constitutes an office.*

An office is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties. The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

§ 837. — *distinction between a government office and a government contract.*

A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other. *United States v. Maurice*, 2 Marsh., 103; *Jackson v. Healy*, 20 Johns., 493; *Vaughn v. English*, 8 Cal., 39; *Sanford v. Boyd*, 2 Cr. C. C., 78; *Ex parte Smith*, id., 693. The defendant was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power. Const., art. II, § 2.

§ 838. *What the sixteenth section of the act of 1846 declares to be an embezzlement and a felony.*

The sixth section of the act of 1846, after naming certain public officers specifically, proceeds: "And all public officers, of whatever grade, be, and they are hereby, required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by this act, all public money collected by them, *or otherwise at any time placed in their possession and custody*, till the same is ordered by the proper department or officer of the government to be transferred or paid out." This clearly embraces the class of subordinate officers to which the defendant belonged.

We are also of the opinion that the act prescribes punishment for the offense with which the defendant is charged. The first part of the sixteenth section declares that if any officer to whom it applies shall convert to his own use, loan, deposit in bank, or exchange for other funds, except as permitted by the act, any of the public money intrusted to him, "*every such act* shall be deemed and adjudged to be an embezzlement," and is made a felony. It next enacts that if any officer charged with the disbursement of public moneys shall take a false voucher, "*every such act* shall be a conversion to his own use of the amount specified" in such voucher. This clause then follows: "And any officer or agent of the United States, *and all persons participating in such act*, being convicted thereof before any court of the United States of competent jurisdiction, shall be sentenced to imprisonment for a term of not less than six months nor more than ten years, and to a fine equal to the amount of the money embezzled." This clause is to be taken distributively. It applies, and was clearly intended to apply, to all the acts of embezzlement specified in the section — to those relating to moneys, in the first category, as well as to those relating to vouchers in the second. The context of the section and the language of the clause both sustain this view of the subject. If this be not the proper construction, then the consequence would follow that in this elaborate section, obviously intended to cover the whole ground of frauds by receivers, custodians and disbursers of the public moneys, of every grade of office, punish-

ment is provided for only one of the offenses which the act designates. There is no principle, which, properly applied, requires or would warrant such a conclusion.

§ 839. *The sixteenth section of the act of 1846 applies to subordinate as well as to principal officers.*

It is urged that the terms used in the sixteenth section to designate the persons made liable under it are restrained and limited to principal officers, by requirements and provisions which are applicable to them, and are inapplicable to all those holding subordinate places under them. To this there are several answers. We think the only effect of these provisions is to operate, according to their terms, where such higher officers are concerned. They are without effect as to the subordinates, to whom they are *inapplicable*. They do not take offenders of that class out of the penal and other provisions of the statute, which must be conceded otherwise to embrace them. The broad language of the provision in the preceding sixth section, which has been referred to, is coupled with no qualification whatever, expressed or implied. If the subordinates are not within the act, there is no provision in the laws of the United States for their punishment in such cases. So far as those laws are concerned they may commit any of the crimes specified with impunity. We think it clear that it was not the intention of congress to leave an omission so wide and important in the act, and our minds have been brought satisfactorily to the conclusion that they have not done so.

§ 840. *Penal laws to be construed strictly, but reasonably as well.*

We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent. *United States v. Wiltberger*, 5 Wheat., 96 (§§ 1633-36, *infra*); *United States v. Morris*, 14 Pet., 475; *United States v. Winn*, 3 Sumn., 211 (§§ 381-384, *supra*); 1 Bish. Cr. L., § 123; Bacon's Abr., tit. Statute, I.

We think we have not transcended these principles in coming to the conclusions we have announced.

§ 841. *The third section of the act of 1866, June 14 (to regulate, etc.), does not apply to the clerks in the offices of assistant treasurers.*

The determination of the second question certified depends upon the construction of the third section of the act to which it refers. That section provides "that if any banker, broker or other person, not an authorized depository of the public moneys," shall do either of the acts therein specified, every such act shall be held to be an embezzlement.

The penal sanction with which the section concludes is as follows: "And any president, cashier, teller, director or other officer of any bank or banking association, who shall violate any of the provisions of this act, shall be deemed and adjudged guilty of an embezzlement of public money, and punished as provided in section 2 of this act." This clause is limited in its terms to the officers named in it. There is nothing which extends it beyond them. It cannot, by construction, be made to include any others. It is confined to officers of banks and banking associations. The defendant is not brought within the act by the averments contained in the counts of the indictment, which are founded upon it. They describe him only as a clerk in the office of the assistant treasurer at Boston. As such, the act does not affect him, and the court has no jurisdiction of the offenses charged. These counts are, therefore, fatally defective.

The first point certified up will be answered in the affirmative and the second in the negative.

Answers accordingly.

JUSTICES MILLER, GRIER and FIELD dissented from the majority on the answer given to the first question.

UNITED STATES v. GERMAINE.

(9 Otto, 508-512. 1878.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Maine.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The defendant was appointed by the commissioner of pensions to act as surgeon, under the act of March 3, 1873, the third section of which is thus stated in the Revised Statutes as section 4777: "That the commissioner of pensions be, and he is hereby, empowered to appoint, at his discretion, civil surgeons to make the periodical examination of pensioners which are or may be required by law, and to examine applicants for pension, where he shall deem an examination by a surgeon appointed by him necessary; and the fee for such examinations, and the requisite certificates thereof in duplicate, including postage on such as are transmitted to pension agents, shall be \$2, *which shall be paid by the agent for paying pensions* in the district within which the pensioner or claimant resides, out of any money appropriated for the payment of pensions, under such regulations as the commissioner of pensions may prescribe."

He was indicted in the district of Maine for extortion in taking fees from pensioners to which he was not entitled. The law under which he was indicted is thus set forth in section 12 of the act of 1825 (4 Stat., 118): "Every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine of not more than \$500, or by imprisonment not more than one year, according to the aggravation of his offense."

The indictment being remitted into the circuit court, the judges of that court have certified a division of opinion upon the questions whether such appoint-

ment made defendant an officer of the United States within the meaning of the above act, and whether upon demurrer to the indictment judgment should be rendered for the United States or for defendant.

§ 842. *A surgeon appointed by the commissioner of pensions is not an officer of the United States.*

The counsel for defendant insists that article 2, section 2, of the constitution, prescribing how officers of the United States shall be appointed, is decisive of the case before us. It declares that "the president shall nominate, and by and with the advice and consent of the senate shall appoint, ambassadors, other public ministers and consuls, judges of the supreme court, and *all other officers* of the United States, whose appointments are not *herein* otherwise provided for and which shall be established by law. But the congress may, by law, vest the appointment of such inferior officers as they may think proper, in the president alone, in the courts of law, or in the heads of departments." The argument is that provision is here made for the appointment of *all* officers of the United States, and that defendant, not being appointed in either of the modes here mentioned, is not an *officer*, though he may be an agent or employee working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officers.

The constitution, for purposes of appointment, very clearly divides all its officers into two classes. The primary class requires a nomination by the president and confirmation by the senate. But foreseeing that, when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, congress might by law vest their appointment in the president alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt. This constitution is the supreme law of the land, and no act of congress is of any validity which does not rest on authority conferred by that instrument. It is, therefore, not to be supposed that congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish any one not appointed in one of those modes. If the punishment were designed for others than officers as defined by the constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government; and this has been done where it was so intended, as in the sixteenth section of the act of 1846, concerning embezzlement, by which any officer *or agent* of the United States, *and all persons participating in the act*, are made liable. 9 Stat., 59.

§ 843. *The commissioner of pensions is not the head of a department.*

As the defendant here was not appointed by the president or by a court of law, it remains to inquire if the commissioner of pensions, by whom he was appointed, is the head of a department, within the meaning of the constitution, as is argued by the counsel for plaintiffs. That instrument was intended to inaugurate a new system of government, and the departments to which it referred were not then in existence. The clause we have cited is to be found in the article relating to the executive, and the word as there used has reference to the subdivision of the power of the executive into departments, for the more convenient exercise of that power. One of the definitions of the word given by Worcester is, "a part or division of the executive government, as the

department of state, or of the treasury." Congress recognized this in the act creating these subdivisions of the executive branch by giving to each of them the name of a department. Here we have the secretary of state, who is by law the head of the department of state, the departments of war, interior, treasury, etc. And by one of the latest of these statutes reorganizing the attorney-general's office and placing it on the basis of the others, it is called the department of justice. The association of the words "heads of departments" with the president and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments. Such, also, has been the practice, for it is very well understood that the appointments of the thousands of clerks in the departments of the treasury, interior and the others, are made by the heads of those departments, and not by the heads of the bureaus in those departments.

So, in this same section of the constitution, it is said that the president may require the opinion, in writing, of the principal officer in each of the executive departments, relating to the duties of their respective offices. The word "department," in both these instances, clearly means the same thing, and the principal officer in the one case is the equivalent of the head of department in the other. While it has been the custom of the president to require these opinions from the secretaries of state, the treasury, of war, navy, etc., and his consultation with them as members of his cabinet has been habitual, we are not aware of any instance in which such written opinion has been officially required of the head of any of the bureaus, or of any commissioner or auditor in these departments.

United States v. Hartwell, 6 Wall., 385 (§§ 835-841, *supra*), is not, as supposed, in conflict with these views. It is clearly stated and relied on in the opinion that Hartwell's appointment was approved by the assistant secretary of the treasury as acting head of that department, and he was, therefore, an officer of the United States. If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In that case the court said, the term embraces the ideas of tenure, duration, emolument and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the commissioner of pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the commissioner of pensions of which we are not advised.

No regular appropriation is made to pay his compensation, which is \$2 for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the commissioner. He is but an agent of the commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to \$5 or \$500 per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel,

at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute.

We answer that the defendant is not an officer of the United States, and that judgment on the demurrer must be entered in his favor. Let it be so certified to the circuit court.

UNITED STATES v. KINDRED.

(Circuit Court for Virginia: 4 Hughes, 493-501; 5 Federal Reporter, 43-47. 1880.)

STATEMENT OF FACTS.—Davis, a colored man, testified against Pond, who was charged with selling liquor contrary to law, and having been recognized to appear before the grand jury Pond caused him to be arrested on a charge of obtaining goods on false pretenses in Southampton county, whither, upon the requisition of Kindred, a justice of the peace for that county, he was carried, but upon trial was acquitted. A second similar charge was made by Myrick at the instigation of Pond, and on this he was convicted by Kindred and sentenced to be whipped and to six months' imprisonment. The whipping was administered and Davis was thereafter forthwith sent to jail, but was afterwards released by the county judge. For these proceedings Kindred was indicted in the United States circuit court, and pleaded to the jurisdiction, demurred to the indictment, and moved to quash the indictment. There was a demurrer to the plea.

Opinion by HUGHES, J.

This indictment charges the defendant with unlawfully and corruptly endeavoring to influence, obstruct and impede the due administration of justice in the district court of the United States for the eastern district of Virginia in having, upon a warrant sued out by one William Myrick, dealt with J. P. Davis, a witness under recognizance in the United States court, in the manner set forth in the indictment—that is to say, the indictment, after setting out the facts connected with the warrant, including whipping and unlawful imprisonment, charges that Kindred did issue said warrant of arrest and did impose said sentence upon the said Davis to influence and obstruct him as a witness in said court of the United States, and with the further intent to influence, obstruct and impede the due administration of justice in the said court. There is a motion to quash the indictment for want of jurisdiction; a demurrer to the indictment based on the same ground of defense; and a special plea in bar setting out that Kindred in all that he did acted as a judicial officer; and claiming that if he acted only erroneously he is exempt from trial because his act was judicial, and can only be reviewed by a state court of appellate jurisdiction; and if he acted corruptly he is amenable only to the authorities and courts of Virginia, and is not amenable to trial and punishment by any court of the United States. To this plea there is a demurrer by the United States.

§ 844. *A judicial officer of a state is liable to indictment in a court of the United States, if, acting in his judicial capacity, he corruptly violates an act of congress passed to carry into effect a constitutional provision.*

It is not pretended, if there were no charge of wilful malfeasance or corruption here, but only of erroneous action by the justice of the peace in his judicial capacity, that the court of the United States would have jurisdiction to review the erroneous judgment committed in the discharge of a judicial func-

tion. Furthermore, although justices of the peace and all judicial officers are liable to indictment or arraignment in some manner for corrupt acts committed in the exercise of their judicial functions, yet it is not pretended that a court of the United States may try an indictment brought for any such corrupt judicial act against judicial officers of the state. The United States court has no such general power. But it is contended by the United States that if a law of congress, passed as necessary and proper for carrying into effect any constitutional provision, is corruptly violated by any person, even though he be a judicial officer of a state, such person is amenable to prosecution in a United States court for such offense.

§ 845. *Powers of the federal government.*

The federal government, its officers and courts have certain well-defined powers. The government may establish a postoffice system, do all acts necessary to conducting it efficiently, pass laws for punishing depredations upon the mails, and empower its courts to enforce those laws. So it may establish a customs system, an internal revenue system, a judiciary system, and do other things especially authorized by the national constitution; and it may pass all laws necessary and proper for carrying into execution the specific powers granted by that instrument. The peculiarity of our federal government, distinguishing it from all other confederacies previously existing, and from the confederacy of 1780 to 1789, which existed under the old articles of confederation, is that it is empowered to act upon individuals in the states in the exercise of the powers that have been adverted to, and is not limited in its powers to demands upon the constituent states in their corporate capacity. Its laws affect individuals, its authority controls individuals, its officers deal with individuals, its courts have cognizance of individuals. And, as the law is not a respecter of persons, if any individual wilfully and corruptly violates a law of congress, it will in general not avail him to plead that he is exempt from accountability by reason of his being an officer of a state, and did the act with which he is charged as an officer of the state.

It is very true, as has been decided in the cases cited at bar by defendant's counsel, that state officers are as such exempt from the operation of certain laws of the United States. A state officer's salary, for instance, cannot be taxed by the United States, because the power to tax would carry the power to destroy, and it is incompatible with the comity which should subsist between the federal government and those of the states, that any general law of congress taxing salaries should be extended to the salaries of state officers. See *The Collector v. Day*, 11 Wall., 125. So, a state officer, appointed under state laws, responsible to state courts, and charged with duties and service to the state, is not in general liable to process from United States courts requiring him to perform positive duties imposed by laws of congress. See *Commonwealth of Kentucky v. Dennison*, 24 How., 107 (§§ 3615-25, *infra*).

But I am sure that none of these and like cases which have been decided, and were cited by defendant's counsel, go to the extent of deciding that a state officer who wilfully and corruptly violates a law of congress passed for any of the constitutional purposes which have been indicated is, *qua* state officer, clothed with impunity for his crime and exempted from punishment. The laws of the United States operate upon individuals without any reference in general to their relations to the state. The accident of their being state officers does not in general affect their liability as citizens to the ordinary process and jurisdiction of the courts of the United States; and, as before said,

if they commit crimes against the United States, they are punishable for such crimes.

Now, in the present case, a law is charged to have been violated which is necessary and proper to securing the efficient administration of their functions by the courts of the United States. There could be no proper administration of justice if the strong and influential were at liberty to arrest, imprison and otherwise intimidate the weak and timid and detain them from attendance as witnesses before the United States courts. Congress has constitutional power to pass laws proper for preventing the commission of this offense, and the plea and demurrer of the defendant virtually admits that he would be amenable to these laws but for the fact that he, in the acts complained of, was acting in the judicial capacity of a justice of the peace of the state of Virginia. So that the only question for consideration is, whether a justice of the peace of a state may, in the exercise of his office, wilfully and corruptly violate a law of the United States. If this indictment merely charged the defendant with an erroneous judgment it could not be sustained; for errors committed even by so humble a judicial officer as a justice of the peace cannot be reviewed, corrected or punished by indictment in any court, but must go up to an appellate court for correction on appeal or writ of error.

But this indictment charges a wilful and corrupt motive and action on the part of this justice; charges an offense which is especially made punishable by a constitutional law of congress passed in 1831. That justices of the peace and all judicial officers are punishable at common law for corrupt conduct in their judicial office when so expressly charged by indictment is too well settled to need argument. The case of *Jacobs v. Commonwealth*, 2 Leigh, 709, is an instance in which the courts have recognized this liability in the state of Virginia.

So, the only question is, whether justices are liable under an act of congress to indictment for a statutory offense, charged to have been committed wilfully and corruptly. I think, after what has been said, that this proposition is too plain for argument, and I will overrule the defendant's demurrer, deny his motion to quash, and sustain the prosecution's demurrer to the plea.

§ 846. In general.—A clerk appointed by direction of the secretary of the treasury to a position at the fractional currency counter of a treasury department is an officer of the United States within the meaning of the constitution and the statutes of the United States with reference to the liability of officers charged with the safe-keeping of public money. *United States v. Bloomgart*, * 2 Ben., 356. See §§ 831, 833.

§ 847. A proposal by an officer alleged to be in default, to deposit a sum to secure any balance that may be found against him, is not an admission that anything is due from him. *United States v. Forsythe*, * 6 McL., 584.

§ 848. A clerk in a postoffice, acting as cashier, is a public officer within the meaning of the penal clause of the sub-treasury act of August 6, 1846, and liable to prosecution under it for embezzling the funds intrusted to him. That act declares "that if any one of the said officers, or of those connected with the postoffice department, shall convert to his own use, in any way whatever, or shall use by way of investment, in any kind of property or merchandise, or shall loan with or without interest, or shall deposit in any bank, or shall exchange for other funds except as allowed by this act, any portion of the public moneys intrusted to him for safe-keeping, disbursement, transfer, or for any other purpose, every such act shall be deemed and adjudged to be an embezzlement of so much of the said moneys as shall be thus taken, converted, invested, used, loaned, deposited or exchanged, which is hereby declared to be a felony." *Embezzlement*, * 5 Op. Att'y Gen'l, 685.

§ 849. It is not necessary that an officer charged with a certain duty omit to perform it with positive criminal intent, before he can be punished for an act resulting from such omission. Negligence or indifference leading to such an act in such a case supplies the absence of

criminal intent, and renders the offender liable the same as if the intent existed. *United States v. Thomson*,* 12 Fed. R., 245.

§ 850. An officer may be said to act fraudulently when he acts in bad faith, in disregard of his official obligation and legal duty. The law exacts from him fidelity, care and diligence in the discharge of his duties, and if, in disregard of his official duties and obligations, he acts carelessly and indifferently, so that evil and mischief result, which can be traced to the negligent and indifferent conduct of the officer, he may be held responsible, and cannot escape upon the plea that he had no actual fraudulent intent in doing what he did, or in failing to do the thing which the law required. Such negligence is criminal in law. *United States v. Baldridge*,* 11 Fed. R., 552.

XI. POLYGAMY.

SUMMARY — *Religious belief will not justify a crime.* § 851. — *Statutes constitutional,* § 852. — *Charge as to consequences of polygamy,* § 853.

§ 851. Religious belief is no justification for the commission of any overt act pronounced criminal by the laws of the United States. Religious belief is no justification in a prosecution for polygamy. *Reynolds v. United States*, §§ 854-865.

§ 852. The statutes of the United States punishing polygamy are not in violation of the first amendment to the constitution, which guaranties the free exercise of religion. While the law cannot interfere with opinion and belief, it can with acts and practices. *Ibid.*

§ 853. In a prosecution for polygamy it is proper for the court in charging the jury to call the attention of the jury to the consequences of polygamy to the women and children affected by it. *Ibid.*

[NOTES. — See §§ 866-870.]

REYNOLDS v. UNITED STATES.

(8 Otto, 145-169. 1878.)

ERROR to the Supreme Court of the Territory of Utah.

STATEMENT OF FACTS. — Reynolds was indicted for bigamy under section 5352 of the Revised Statutes. There was a plea in abatement that the indictment was found by a grand jury composed of only fifteen members; the plea was overruled. Objections were made to a number of persons called as jurors, and exception was taken to the admission of the testimony of a witness, given on a former trial, who had been prevented from attending the trial by the accused. There was a verdict of guilty and judgment accordingly. Further facts appear in the opinion of the court.

Opinion by WATTE, C. J.

The assignments of error, when grouped, present the following questions:

1. Was the indictment bad because found by a grand jury of less than sixteen persons? 2. Were the challenges of certain petit jurors by the accused improperly overruled? 3. Were the challenges of certain other jurors by the government improperly sustained? 4. Was the testimony of Amelia Jane Schofield, given at a former trial for the same offense, but under another indictment, improperly admitted in evidence? 5. Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty? 6. Did the court err in that part of the charge which directed the attention of the jury to the consequences of polygamy? These questions will be considered in their order.

§ 854. *The number of grand jurors in a territorial court is governed by territorial laws.*

1. As to the grand jury. The indictment was found in the district court of the third judicial district of the territory. The act of congress "in relation to courts and judicial officers in the territory of Utah," approved June 23,

1874 (18 Stat., 253), while regulating the qualifications of jurors in the territory, and prescribing the mode of preparing the lists from which grand and petit jurors are to be drawn, as well as the manner of drawing, makes no provision in respect to the number of persons of which a grand jury shall consist. Section 808, Revised Statutes, requires that a grand jury impaneled before any district or circuit court of the United States shall consist of not less than sixteen nor more than twenty-three persons, while a statute of the territory limits the number in the district courts of the territory to fifteen. Comp. Laws Utah, 1876, 357. The grand jury which found this indictment consisted of only fifteen persons, and the question to be determined is, whether the section of the Revised Statutes referred to or the statute of the territory governs the case.

By section 1910 of the Revised Statutes the district courts of the territory have the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States; but this does not make them circuit and district courts of the United States. We have often so decided. *American Ins. Co. v. Canter*, 1 Pet., 511; *Benner v. Porter*, 9 How., 235; *Clinton v. Englebrecht*, 13 Wall., 434. They are courts of the territories, invested for some purposes with the powers of the courts of the United States. Writs of error and appeals lie from them to the supreme court of the territory, and from that court as a territorial court to this in some cases. Section 808 was not designed to regulate the impaneling of grand juries in all courts where offenders against the laws of the United States could be tried, but only in the circuit and district courts. This leaves the territorial courts free to act in obedience to the requirements of the territorial laws in force for the time being. *Clinton v. Englebrecht*, *supra*; *Hornbuckle v. Toombs*, 18 Wall., 648. As congress may at any time assume control of the matter, there is but little danger to be anticipated from improvident territorial legislation in this particular. We are therefore of the opinion that the court below no more erred in sustaining this indictment than it did at a former term, at the instance of this same plaintiff in error, in adjudging another bad which was found against him for the same offense by a grand jury composed of twenty-three persons. 1 Utah, 226.

§ 855. *As to challenge of jurors by defendant.*

2. As to the challenges by the accused. By the constitution of the United States (Amend. VI), the accused was entitled to a trial by an impartial jury. A juror to be impartial must, to use the language of Lord Coke, "be indifferent as he stands unsworn." Co. Litt., 155 b. Lord Coke also says that a principal cause of challenge is "so called because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triers" (id., 156 b); or, as stated in Bacon's Abridgment, "it is grounded on such a manifest presumption of partiality that, if found to be true, it unquestionably sets aside the . . . juror." Bac. Abr., tit. Juries, E., 1. "If the truth of the matter alleged is admitted, the law pronounces the judgment; but if denied, it must be made out by proof to the satisfaction of the court or the triers." Id., E., 12. To make out the existence of the fact, the juror who is challenged may be examined on his *voir dire*, and asked any questions that do not tend to his infamy or disgrace.

All of the challenges by the accused were for principal cause. It is good ground for such a challenge that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the

opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and be more than a mere impression. Some say it must be positive (Gabbet, Cr. L., 391); others, that it must be decided and substantial (Armistead's Case, 11 Leigh (Va.), 659; Wormley's Case, 10 Gratt. (Va.), 658; Neely v. The People, 13 Ill., 685); others, fixed (State v. Benton, 2 Dev. & B. L. (N. C.), 196); and still others, deliberate and settled (Staup v. Commonwealth, 74 Penn. St., 458; Curley v. Commonwealth, 84 id., 151). All concede, however, that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside. Mr. Chief Justice Marshall, in Burr's Trial, 1 Burr's Tr., 416, states the rule to be that "light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause, the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial, because the verdict is against the evidence. It must be made clearly to appear that, upon the evidence, the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.

§ 856. *A person who "believes" he has formed an opinion which he has never expressed is a competent juror.*

The challenge in this case most relied upon in the argument here is that of Charles Read. He was sworn on his *voir dire*, and his evidence, taken as a whole, shows that he "believed" he had formed an opinion which he had never expressed, but which he did not think would influence his verdict on hearing the testimony. We cannot think this is such a manifestation of partiality as to leave nothing to the "conscience or discretion" of the triers. The reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls far short of raising a manifest presumption of partiality. In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of hav-

ing formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact except in a clear case. The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so. Such a case, in our opinion, was not made out upon the challenge of Read. The fact that he had not expressed his opinion is important only as tending to show that he had not formed one which disqualified him. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed. Under these circumstances it is unnecessary to consider the case of Ransohoff, for it was confessedly not as strong as that of Read.

§ 857. *Upon the trial of a defendant for polygamy, persons who are themselves living in polygamy are not competent jurors. If a challenge to such jurors was not good for cause it was for favor.*

3. As to the challenges by the government. The questions raised upon these assignments of error are not whether the district attorney should have been permitted to interrogate the jurors while under examination upon their *voir dire* as to the fact of their living in polygamy. No objection was made below to the questions, but only to the ruling of the court upon the challenges after the testimony taken in answer to the questions was in. From the testimony it is apparent that all the jurors to whom the challenges related were or had been living in polygamy. It needs no argument to show that such a jury could not have gone into the box entirely free from bias and prejudice, and that if the challenge was not good for principal cause, it was for favor. A judgment will not be reversed simply because a challenge good for favor was sustained in form for cause. As the jurors were incompetent and properly excluded, it matters not here upon what form of challenge they were set aside. In one case the challenge was for favor. In the courts of the United States all challenges are tried by the court without the aid of triers (R. S., sec. 819), and we are not advised that the practice in the territorial courts of Utah is different.

§ 858. *Where a witness is absent by the procurement of defendant, his testimony at a former trial may be given in evidence.*

4. As to the admission of evidence to prove what was sworn to by Amelia Jane Schofield on a former trial of the accused for the same offense, but under a different indictment. The constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The constitution does not guaranty an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

In Lord Morley's Case, 6 State Tr., 770, as long ago as the year 1666, it was

resolved in the house of lords "that in case oath should be made that any witness who had been examined by the coroner and was then absent was detained by the means or procurement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer that, if their lordships were satisfied by the evidence they had heard that the witness was detained by means or procurement of the prisoner, then the examination might be read; but whether he was detained by means or procurement of the prisoner was matter of fact, of which we were not the judges, but their lordships." This resolution was followed in *Harrison's Case*, 12 id., 851, and seems to have been recognized as the law in England ever since. In *Regina v. Scaife*, 17 Ad. & Ell. (N. S.), 242, all the judges agreed that, if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness taken before a magistrate and in the presence of the prisoner might be read. Other cases to the same effect are to be found, and in this country the ruling has been in the same way. *Drayton v. Wells*, 1 Nott & M. (S. C.), 409; *Williams v. State*, 19 Ga., 403. So that now, in the leading text-books, it is laid down that, if a witness is kept away by the adverse party, his testimony taken on a former trial between the same parties, upon the same issues, may be given in evidence. 1 Greenl. Ev., sec. 163; 1 Taylor, Ev., sec. 446. Mr. Wharton (1 Whart. Ev., sec. 178) seemingly limits the rule somewhat, and confines it to cases where the witness has been corruptly kept away by the party against whom he is to be called, but in reality his statement is the same as that of the others; for in all it is implied that the witness must have been wrongfully kept away. The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one.

§ 859. *Quære: Whether the ruling of the trial court in admitting evidence of the former testimony of a witness, absent by defendant's procurement, is reviewable by a court of error.*

Such being the rule, the question becomes practically one of fact, to be settled as a preliminary to the admission of secondary evidence. In this respect it is like the preliminary question of the proof of loss of a written instrument, before secondary evidence of the contents of the instrument can be admitted. In *Lord Morley's Case*, *supra*, it would seem to have been considered a question for the trial court alone, and not subject to review on error or appeal; but without deeming it necessary in this case to go so far as that, we have no hesitation in saying that the finding of the court below is, at least, to have the effect of a verdict of a jury upon a question of fact, and should not be disturbed unless the error is manifest. The testimony shows that the absent witness was the alleged second wife of the accused; that she had testified on a former trial for the same offense under another indictment; that she had no home, except with the accused; that at some time before the trial a subpoena had been issued for her, but by mistake she was named as Mary Jane Schobold; that an officer who knew the witness personally went to the house of the accused to serve the subpoena, and on his arrival inquired for her, either by the name of Mary Jane Schofield or Mrs. Reynolds; that he was told by the accused she was not at home; that he then said, "Will you tell me where she

is?" that the reply was "No; that will be for you to find out;" that the officer then remarked she was making him considerable trouble, and that she would get into trouble herself; and the accused replied, "Oh, no; she won't, till the subpoena is served upon her," and then, after some further conversation, that "She does not appear in this case."

It being discovered after the trial commenced that a wrong name had been inserted in the subpoena, a new subpoena was issued with the right name, at 9 o'clock in the evening. With this the officer went again to the house, and there found a person known as the first wife of the accused. He was told by her that the witness was not there, and had not been for three weeks. He went again the next morning, and not finding her, or being able to ascertain where she was by inquiring in the neighborhood, made return of that fact to the court. At 10 o'clock that morning the case was again called; and the foregoing facts being made to appear, the court ruled that evidence of what the witness had sworn to at the former trial was admissible. In this we see no error. The accused was himself personally present in court when the showing was made, and had full opportunity to account for the absence of the witness, if he would, or to deny under oath that he had kept her away. Clearly, enough had been proven to cast the burden upon him of showing that he had not been instrumental in concealing or keeping the witness away. Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own. Upon the testimony as it stood, it is clear to our minds that the judgment should not be reversed because secondary evidence was admitted.

This brings us to the consideration of what the former testimony was, and the evidence by which it was proven to the jury. It was testimony given on a former trial of the same person for the same offense, but under another indictment. It was substantially testimony given at another time in the same cause. The accused was present at the time the testimony was given and had full opportunity of cross-examination. This brings the case clearly within the well-established rules. The cases are fully cited in 1 Whart. Ev., sec. 177. The objection to the reading by Mr. Patterson of what was sworn to on the former trial does not seem to have been because the paper from which he read was not a true record of the evidence as given, but because the foundation for admitting the secondary evidence had not been laid. This objection, as has already been seen, was not well taken.

§ 860. *A party committing an overt act in violation of the criminal law of the land cannot plead in justification his belief that the law is wrong, and its violation a religious duty.*

5. As to the defense of religious belief or duty. On the trial, the plaintiff in error, the accused, proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church "that it was the duty of male members of said church, circumstances permitting, to practice polygamy; . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof

by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practice polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come." He also proved "that he had received permission from the recognized authorities in said church to enter into polygamous marriage; . . . that Daniel H. Wells, one having authority in said church to perform the marriage ceremony, married the said defendant on or about the time the crime is alleged to have been committed, to some woman by the name of Schofield, and that such marriage ceremony was performed under and pursuant to the doctrines of said church."

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he "was married as charged — if he was married — in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be 'not guilty.'" This request was refused, and the court did charge "that there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right,—under an inspiration, if you please, that it was right,—deliberately married a second time, having a first wife living, the want of consciousness of evil intent — the want of understanding on his part that he was committing a crime — did not excuse him; but the law inexorably in such case implies the criminal intent."

§ 861. *Right of free exercise of religion.*

Upon this charge and refusal to charge the question is raised whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of congress to prescribe criminal laws for the territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong. Congress cannot pass a law for the government of the territories which shall prohibit the free exercise of religion. The first amendment to the constitution expressly forbids such legislation. Religious freedom is guarantied everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is whether the law now under consideration comes within this prohibition. The word "religion" is not defined in the constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guarantied.

Before the adoption of the constitution attempts were made in some of the colonies and states to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed against their will for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the states, but seemed at last to culminate in Virginia. In 1784, the house of delegates of that state having under consideration "a bill establishing provision for teachers of the Christian religion," postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested "to signify their opinion

respecting the adoption of such a bill at the next session of assembly." This brought out a determined opposition. Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. Semple's Virginia Baptists, Appendix. At the next session the proposed bill was not only defeated, but another "for establishing religious freedom," drafted by Mr. Jefferson, was passed. 1 Jeff. Works, 45; 2 Howison, Hist. of Va., 298. In the preamble of this act (12 Hening's Stat., 84) religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the state.

In a little more than a year after the passage of this statute the convention met which prepared the constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion (2 Jeff. Works, 355), but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. 1 Jeff. Works, 79. Five of the states, while adopting the constitution, proposed amendments. Three—New Hampshire, New York and Virginia—included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association (8 id., 113), took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

§ 862. *As to bigamy and polygamy.*

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com., 79), and from the earliest history of England polygamy has been treated as an offense against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offenses against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

§ 863. — *it is competent for congress to enact laws punishing the practice as a criminal offense.*

By the statute of 1 James I. (ch. 11), the offense, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the constitution of the United States the declaration in a bill of rights that "all men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of that state substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy or polygamy be punishable by the laws of this commonwealth." 12 Hening's St., 691. From that day to this we think it may safely be said there never has been a time in any state of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. 2 Kent, Com., 81, note (e). An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

In our opinion, the statute immediately under consideration is within the legislative power of congress. It is constitutional and valid as prescribing a rule of action for all those residing in the territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

§ 864. *Criminal intent.*

A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married the second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defense of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only. In *Regina v. Wagstaff*, 10 Cox, C. C., 531, the parents of a sick child, who omitted to call in medical attendance because of their religious belief that what they did for its cure would be effective, were held not to be guilty of manslaughter, while it was said the contrary would have been the result if the child had actually been starved to death by the parents, under the notion that it was their religious duty to abstain from giving it food. But when the offense consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made. No case, we believe, can be found that has gone so far.

§ 865. *It is competent for the court in charging the jury to call their attention to the consequences of the offense to innocent third persons.*

6. As to that part of the charge which directed the attention of the jury to the consequences of polygamy. The passage complained of is as follows: "I think it not improper, in the discharge of your duties in this case, that you

should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children,—innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the territory of Utah, just so do these victims multiply and spread themselves over the land.”

While every appeal by the court to the passions or the prejudices of a jury should be promptly rebuked, and while it is the imperative duty of a reviewing court to take care that wrong is not done in this way, we see no just cause for complaint in this case. Congress, in 1862 (12 Stat., 501), saw fit to make bigamy a crime in the territories. This was done because of the evil consequences that were supposed to flow from plural marriages. All the court did was to call the attention of the jury to the peculiar character of the crime for which the accused was on trial, and to remind them of the duty they had to perform. There was no appeal to the passions, no instigation of prejudice. Upon the showing made by the accused himself, he was guilty of a violation of the law under which he had been indicted; and the effort of the court seems to have been not to withdraw the minds of the jury from the issue to be tried, but to bring them to it; not to make them partial, but to keep them impartial.

Upon a careful consideration of the whole case, we are satisfied that no error was committed by the court below.

Judgment affirmed. (a)

§ 866. Bigamy and polygamy.—On conviction for bigamy, at Alexandria, in the District of Columbia, in 1817, the defendant was held entitled to the benefit of clergy, and was sentenced to be burnt in the hand. *United States v. Lambert*,* 2 Cr. C. C., 137.

§ 867. Upon the trial on indictment for polygamy, an instruction to the jury that “they should consider what are to be the consequences to the innocent victims of this delusion,” was held not to be an error. *United States v. Reynolds*,* 1 Utah T’y, 319.

§ 868. That plural or polygamous marriage is a part of the religion of the defendant is no defense to an indictment for polygamy under the statute of the United States of 1862. *United States v. Reynolds*,* 1 Utah T’y, 226.

§ 869. The statute of 1 Jac. 1, ch. 11, prohibiting bigamy, was in force in Maryland on February 27, 1801, and by the act of congress of that date became a part of the law of the county of Washington. The act of Maryland of 1706, declaring that this English statute, “and every article, clause, matter and thing in said act contained, shall be and are in full force, to all intents and purposes, within this province,” made the act in force in Maryland in the same manner and to the same extent as it was in force in England and Wales. The words “are in full force” imply a recognition of the already existing validity of the act in Maryland, and such was the fact. *United States v. Jennegen*,* 4 Cr. C. C., 118.

§ 870. Upon an indictment, in the District of Columbia, for bigamy, it is incumbent on the United States to prove that one of the marriages, which took place in Pennsylvania, was a valid marriage according to the laws of Pennsylvania. *Quere*, whether a marriage *de jure* can be presumed from a marriage *de facto* in Pennsylvania. *Ibid*.

(a) MR. JUSTICE FIELD concurred, except as to the admission of evidence given on a former trial upon a different indictment.

The accused was sentenced by the lower court to imprisonment at hard labor. On a rehearing this was held to be error, and the judgment was reversed and the cause remanded, with instructions to the lower court to cause the sentence “to be set aside and a new one entered on the verdict in all respects like that before imposed, except so far as it requires the imprisonment to be at hard labor.”

XII. THE POSTOFFICE.

[See XXVI, 6, *infra*; also §§ 1104-1106.]1. *In General.*

SUMMARY—*Obstructing the mail, §§ 871, 872.—Stealing from the mail; letter thrown into hall by carrier, § 873; opening letter as agent, § 874; proof of value of bank-notes, §§ 875, 884; letter need not be taken out of building, § 876; accused must be an officer or employee, § 877; law applies to letters in transitu, § 878; taking without criminal intent, § 879; taking a letter from a place where it is kept, § 880; after letter has passed from control of postoffice, § 881; letter not intended to be transported by post, § 882; mail carrier not sworn, § 883.*

§ 871. The act of congress of March 3, 1825, punishing any person who "shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same," applies only to those who know that their acts will have that effect, and perform them with the intention that such shall be their operation. It does not apply to a temporary detention of the mail caused by the arrest of the carrier upon an indictment in a state court for murder. *United States v. Kirby*, §§ 885-883. See § 949.

§ 872. Horses used in carrying the mail cannot be seized and detained by one who has furnished food for them, if by such act the mail would be obstructed. *United States v. Barney*, §§ 889-891. See § 949.

§ 873. Section 3892 of the Revised Statutes, punishing the taking of "any letter . . . which has been in any postoffice, or branch postoffice, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence or pry into the business or secrets of another," or the secreting, embezzling or destroying the same, protects a letter thrown into the hall by the carrier, under the direction of the person to whom the letter was directed, to leave her letters there. One taking such a letter before it reaches the owner, and opening and reading the same, and resealing it and delivering it to the owner, is punishable. *United States v. McCready*, §§ 892, 893. See §§ 916, 936.

§ 874. The act of March 3, 1825, punishing any person who "shall take any letter or packet . . . out of a postoffice, or shall open any letter or packet which shall have been in a postoffice, or in custody of a mail carrier, before it shall be delivered to the person to whom it is directed, with a design to obstruct the correspondence, to pry into another's business or secrets; or shall secrete, embezzle or destroy any such mail, letter or packet," does not punish the agent to receive the letter from the office fully authorized by the party to whom it was directed, who embezzles such letter before delivering it to his principal. But if the defendant, at the time he took the letter from the postoffice, did it with the criminal intent of opening it for the purpose of prying into another's business or secrets, the act is larceny, although he had the permission of the person to whom the letter was directed to bring his letters from the office. *United States v. Sander*, §§ 894-897. See § 922.

§ 875. To justify a conviction under the twenty-second section of the postoffice act, punishing any person who "shall open, embezzle or destroy any such mail, letter or packet, the same containing any article of value," it must be proved that the bank-notes alleged to have been taken from the letter were of some value. Any one whose business or profession leads him to an acquaintance with such notes may prove them to be genuine. *United States v. Nett*, §§ 893-904.

§ 876. Under the twenty-second section of the postoffice act, punishing any person who "shall steal the mail, or shall steal or take from or out of any mail, or from or out of any postoffice, any letter or packet," the letter need not be taken out of the postoffice building in order to constitute the offense. If the defendant opens the letter and takes out money, and reseals the letter and returns it to its place without leaving the room, he is guilty of the offense under the statute. *Ibid.*

§ 877. Section 21 of the act to regulate the postoffice, declaring that "if any person employed in any of the departments of the postoffice establishment shall unlawfully detain or open any letter, packet or mail of letters with which he shall be intrusted, or which shall have come into his possession, and which are intended to be conveyed by post, on conviction, shall be punished," etc., applies only to persons employed in the postoffice department, as carrier, postmaster or assistant postmaster, into whose possession letters intended to be conveyed by post ordinarily come. It must be alleged and proved that the defendant was thus employed. He must have been, at the time of the act, a regular employee. A person who had been

assistant, and who had left the office, and occasionally came in to give instructions to a new assistant, in the absence of the postmaster, and who received no compensation, is not within the statute. *Ibid.*

§ 878. Section 21 of the postoffice act of 1825, providing a penalty against "any person employed in any of the departments of the postoffice establishment" who "shall unlawfully detain or open any letter, packet or mail of letters with which he shall be intrusted, or which shall have come into his possession, and which are intended to be conveyed by post," applies to letters *in transitu*, and which have not reached their place of destination. It does not apply to letters withheld from the postmaster by his assistant after they have reached the office of their destination. *United States v. Pearce*, §§ 905-907.

§ 879. Under section 22 of the postoffice act of 1825, providing a penalty against any person who shall steal the mail, or shall steal, take from, or out of, any postoffice, any letter or packet, . . . whether with or without the consent of the person having custody thereof, and shall open, embezzle or destroy any such mail, letter or packet, the same containing an article of value, a mere taking from the mail without any criminal intent is not punishable. The taking must not only be unlawful but felonious; it must be a clandestine taking—such as would amount to a larceny of personal property. *Ibid.*

§ 880. Furtively and feloniously removing a letter from and out of the place where it is kept in a postoffice is stealing it from and out of the postoffice within the act of congress punishing the offense, whether the removal be beyond the building containing the postoffice or not, or the abduction be no more than the transfer of the letter to the pocket of the person taking it. *United States v. Marselis*, §§ 908, 909.

§ 881. After the voluntary termination of the custody of a letter by the postoffice department or its agents, the property in and right of possession to the letter belong wholly to its real proprietor, and his rights are under the guardianship of the local law and not of that of the United States. So where a person embezzles money contained in a letter directed to another person of the same name and delivered by letter carrier to another for him, the federal courts have no jurisdiction of such embezzlement. *United States v. Parsons*, §§ 910, 911.

§ 882. On an indictment under the act of March 3, 1825, for stealing a bank-note from a letter placed in the mail of the United States and intended to be conveyed by post, it is no defense that the letter was placed in the mail by one postmaster, under an agreement with a postmaster at an intermediate point on its route, that it was not to be sent to its apparent destination, but returned to the writer. The purpose of the writer, not to have the letter go to its apparent destination, does not affect its character or prevent it from being a letter intended to be transported by post, as required by the statute and charged in the indictment. *United States v. Foye*, §§ 912-915.

§ 883. The third section of the act of March 3, 1825, expressly subjects persons employed in the conveyance of the mails to all pains, penalties and forfeitures for violating the injunctions of the act, though not sworn. It is held that a mail carrier is punishable under the twenty-first section of the same act for stealing a bank-note from a letter deposited in the mails, although he has not been sworn. *Ibid.*

§ 884. Where a mail carrier was indicted under an act of congress for stealing, from a letter deposited in the mail, "a certain bank-note, of the denomination of \$5, purporting to be issued by the Casco Bank of Portland, in the state of Maine," an instruction that if the jury believed the evidence offered by the government, tending to prove that the person who inclosed the note in the letter took it as of the value of \$5, that the defendant passed it in discharge of a debt of \$5, and the testimony of a broker accustomed to receive the bills of the bank that it was like the bills he was accustomed to receive, it was competent for them to find that this was a bank-note of the value of \$5, was held not to be erroneous. *Ibid.*

[NOTE.— See §§ 916-955.]

UNITED STATES *v.* KIRBY.

(7 Wallace, 482-487. 1868.)

CERTIFICATE OF DIVISION from the U. S. Circuit Court, District of Kentucky.

STATEMENT OF FACTS.—Defendants were indicted, under the act of March 3, 1825, for obstructing and retarding the passage of the mail, etc. They pleaded that Farris, the mail carrier, had been indicted for murder in a state court of Kentucky, and that a bench warrant was issued by said court and placed in the hands of Kirby, sheriff of the county, and that Farris was arrested on said warrant, without any intent on the part of the defendants to retard the mail.

The judges were divided in opinion as to whether the defendants were liable on the facts stated.

§ 885. *Acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows, are not punishable.*

Opinion by MR. JUSTICE FIELD.

There can be but one answer, in our judgment, to the questions certified to us. The statute of congress, by its terms, applies only to persons who "knowingly and wilfully" obstruct or retard the passage of the mail, or of its carrier; that is, to those who know that the acts performed will have that effect, and perform them with the intention that such shall be their operation. When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object. The statute has no reference to acts lawful in themselves from the execution of which a temporary delay to the mails unavoidably follows.

§ 886. *All persons in the public service are exempt from arrest upon civil process, but the rule is different when the process is issued upon a charge of felony.*

All persons in the public service are exempt, as a matter of public policy, from arrest upon civil process while thus engaged. Process of that kind can, therefore, furnish no justification for the arrest of a carrier of the mail. This is all that is decided by the case of *The United States v. Harvey*, 8 Law Rep., 77, to which we are referred by the counsel of the government. The rule is different when the process is issued upon a charge of felony. No officer or employee of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the forms prescribed by the constitution and laws. The public inconvenience which may occasionally follow from the temporary delay in the transmission of the mail caused by the arrest of its carriers upon such charges is far less than that which would arise from extending to them the immunity for which the counsel of the government contends. Indeed, it may be doubted whether it is competent for congress to exempt the employees of the United States from arrest on criminal process from the state courts, when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*. But whether legislation of that character be constitutional or not, no intention to extend such exemption should be attributed to congress unless clearly manifested by its language.

§ 887. *Rule for the construction of statutes.*

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

§ 888. *A mail carrier may be arrested on a charge of murder.*

The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted "that whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II., which enacts that a prisoner who breaks prison shall be guilty

of felony, does not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burnt." And we think that a like common sense will sanction the ruling we make, that the act of congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder. The questions certified to us must be answered in the negative; and it is so ordered.

MR. JUSTICE MILLER did not sit in this case.

UNITED STATES v. BARNEY.

(District Court for Maryland: 3 Hughes, 545-549; 3 Hall, L. J., 128. 1809.)

Opinion by WINCHESTER, J.

STATEMENT OF FACTS.—The indictment in this case, which charges the defendant with having wilfully obstructed the passage of the public mail at Susquehanna river, is founded on the act of congress of March, 1799. The defendant sets up as a defense and justification of this obstruction of the mail, that he had fed the horses employed in carrying the mail for a considerable time, and that a sum of money was due to him for food furnished at and before the time of their arrest and detention.

On this state of facts two questions have been agitated. 1st. Whether the right of an innkeeper to detain a horse for his food extends to horses owned by individuals and employed in the transportation of the public mail? And, 2d. Whether such right extends to horses belonging to the United States, employed in that service?

The first question involves the consideration of principles of some extent, and to decide correctly on the second it may be necessary to state them generally.

§ 889. *Lien defined.*

Lien is generally defined to be a tie, hold, or security upon goods or other things which a man has in his custody till he is paid what is due to him. From this definition it is apparent that there can be no lien where the property is annihilated, or the possession parted with voluntarily and without fraud. 2 Vern., 117; 1 Ath., 234. The claim of a lien otherwise well founded cannot be supported if there is, 1st. A particular agreement made and relied on. Sayer's Rep., 224; 2 R. A., 92. Or, 2d. Where the particular transaction shows that there was no intention that there should be a lien, but some *other security is looked to and relied upon*. 4 Burr., 2223.

If, therefore, in this case, the agreement between the defendant and the public agent actually was that he should be paid for feeding the public horses on as low terms as any other person on the road would supply them, he could not justify detaining the horses; for the particular agreement thus made, and under which the food was furnished, is the foundation of the remedy of the defendant, and it can be pursued in no other manner than upon that agreement. Or, if there was no particular agreement, this case is such, that, between the defendant and a private owner of horses and carriages employed in transporting the mail, I incline to think it could not legally be presumed a lien was ever intended or contemplated. A carrier of the mail is bound not to delay its delivery, and under severe penalties, and it can scarcely be supposed that no

would expose himself to the penalty for such delay by leaving his horses subject to the arrest of every innkeeper on the road for their food, or that in such case the innkeeper could look to any other security than the personal credit of the owner of the horses for reimbursement. But the law on such a case could be only declared on facts admitted by the parties or found by the jury, and is not now before the court.

3d. The great question in this case rests on a discrimination between the property of the government and individuals. To the government is granted by the constitution the general power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; to raise and support armies; to provide and maintain a navy; to establish postoffices and post-roads; and to make all laws which shall be necessary and proper for carrying these and all other constitutional powers into effect.

§ 890. *The United States government cannot be sued, nor can a lien be permitted against it.*

The public money can never be drawn out of the treasury unless by consent of the legislature; but whenever a debt is contracted in the establishment of a postoffice or road, or in the support of an army, or in the provision for raising or supporting a navy, or any other measure of general welfare, the public faith and credit is pledged for its payment. On the public faith and credit advances are made to the government, relying on the constitutional mode of reimbursement. If it were otherwise, what dreadful consequences would not result! A ship-carpenter might libel public ships, a quartermaster retain the supplies of the army, or an innkeeper stop the progress of an army for food to horses of a baggage wagon. Every man must surely deprecate a state of society where no immunity to the government shall be afforded by the constitution against such evils. Happily we are not so exposed. Congress only has the power, and it is bound by the most sacred of moral obligation and duty, to provide for the payment of the public debts. No other remedy exists for a creditor of the government than an application to congress for payment. A lien cannot be permitted to exist against the government; for liens are only known or admitted in cases where the relation of debtor and creditor exists so as to maintain a suit at law for the debt or duty which gives rise to a lien, in case the pledge be destroyed or the possession thereof lost.

As in the case of a carrier of the mail, he cannot sue for the hire nor retain the mail, because he cannot sue. Yet the carrier of private property may sue or retain, because the government is not answerable. Justice is the same, whether due from one to a million or a million to one man; but the mode of obtaining that justice must vary. An individual may sue and be sued. The United States cannot be sued. Suability is incompatible with the idea of sovereign power. The adversary proceedings of a court of judicature can never be admitted against an independent government or the public stock or property. The ties of faith, public character and constitutional duty are the sure pledges of public integrity, and to them the public creditors must, and, I trust, with confidence may, look for justice. They must not measure it out for themselves. I have stated these principles to show that, by law, the defendant could not justify stopping the mail on principles of common law, as they apply to individuals and to the government.

§ 891. *The law prohibits any obstructions to the passage of the mail.*

There are, however, considerations arising from the act of congress which

are conclusive to my mind. The statute is a general prohibitory act. The common law, if opposed, must give way to it, and the court is bound to decide according to the correct construction of that law. That the act is constitutional is not, nor indeed can be, questioned. It has introduced no exception. Whether the acts which it prohibits to be done were lawful or unlawful before the operation of that law, or, independent of it, might or might not be justified, is not material. This law does not allow any justification of a *wilful and voluntary act* of obstruction to the passage of the mail. If, therefore, courts or juries were to introduce exceptions not found in the law itself, by admitting justifications for the breach of the act, which justifications the act does not allow to be made, it would be an assumption of legislative power. Many exceptions might be introduced, and perhaps with propriety. For instance, a *stolen horse found in the mail-stage*. The owner cannot seize him. The driver being in debt, or even committing an offense, can only be arrested in such way as does not obstruct the passage of the mail. These examples are as strong as any which are likely to occur, but even these are not excepted by the statute, and probably considerations of the extreme importance to the government and individuals of the regular transmission of public dispatches and private communications may have excluded these exceptions. But whatever may have been the policy which led to the adoption of the law, which the court will not inquire into, it totally prohibits any obstruction to the passage of the mail.

It is the duty of the court to expound and execute the law, and, therefore, I am of opinion and decide that the defendant is not justifiable.

UNITED STATES v. MCCREADY.

(Circuit Court for Tennessee: 11 Federal Reporter, 235-237. 1882.)

STATEMENT OF FACTS.—Defendant was indicted for violating Revised Statutes, section 3892, by taking and opening a letter addressed to Lettie Amis, “to pry into the business and secrets of said Lettie Amis.” There was a special verdict reciting the facts that the letter was taken, opened and read by defendant, and then sealed up again and delivered by her to Lettie Amis. The verdict further stated that the letter carrier had thrown the letter into a hall where Lettie Amis had directed him to leave her letters.

Opinion by HAMMOND, D. J.

The question for the consideration of the court in this case is whether, under the facts found by the jury in their special verdict, the defendant is guilty, as charged in this indictment, or has violated the provisions of the statute under which it is drawn. The indictment charges the offense literally in the words of the statute, and the special verdict finds all the material allegations of both counts to be true. But it is insisted for the defendant that these facts do not constitute a violation of the statute, because, as the letter was taken by the defendant after its delivery by the letter carrier at a place designated by Lettie Amis for the delivery of her mail, it had in law been “*delivered*” within the intent and meaning of the act; and that, if a proper construction of its language embraces an offense committed after the letter has passed from the actual control of the postoffice officials and agents, and before manual delivery to the person to whom it was directed, the enactment is to that extent beyond the legislative power of congress.

The clause of the statute material to be considered is the taking of “any letter . . . which *has been* in any postoffice or branch postoffice, or in the

custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed," with the unlawful design. From the language used there can be no doubt that congress intended to protect letters sent by mail from embezzlement, and from interference, with the improper designs here enumerated, until they reached their destination by a proper delivery. The offense created is concerning a letter which "*has been*" in the mail, as well as the unlawful taking of a letter "out of the postoffice," or "from a letter or mail carrier," evidencing an intention on the part of congress to protect postal correspondence from depredation as well after it has left the actual custody of the agents and officers of the postoffice department as during the transit, or while in the postoffice or in the hands of the letter carrier for delivery. The offenses denounced by the last clause of the statute are the secretion, embezzlement or destruction of letters before they have reached the persons to whom directed; and, under the language used, none of these offenses could be committed until after the letters had left the custody of the postal authorities and agents; and, according to the defendant's argument, they would not, therefore, be punishable. Persons employed in the postal service of the government are punished for these offenses by the preceding section, and this section seems intended to apply to other than postal employees.

§ 892. *Authorities reviewed.*

This act has been several times considered by the circuit courts, and a few of the cases will be examined. In the case of *United States v. Parsons*, 2 Blatch., 104 (§§ 910, 911, *infra*), decided in 1849, a special verdict was found, under the literal facts of which the defendant was guilty of opening (then an offense under the act before revision) a letter with the design here charged. Without discussing the authority of congress to pass the act, the court held it did not embrace the case made by the facts found, which were as follows: A letter carrier having a letter for delivery directed to Charles H. Parsons, gave it to A., in the defendant's house, in the absence of the defendant, who afterwards, at a different place, gave it to the defendant, who opened and embezzled the contents. The defendant's name was the same as that on the direction of the letter. The court says: "We think that the object of this section does not look beyond a possession of letters obtained wrongfully from the postoffice or from a letter carrier. Its design is to guard the postoffice and its legitimate agents in the execution of their duties in the safe-keeping and delivery of letters. After the voluntary termination of the custody of a letter by the postoffice or its agents, the property in and right of possession to it belong wholly to its real proprietor, and his rights are under the guardianship of the local law and not of that of the United States. All action and authority of the postoffice department in respect to the letter terminated on its delivery to that third person, and in our opinion it was not intended that the act of congress should apply any longer than while the letter should be within the power and control of that department."

It seems to be conceded, however, by the learned judge that if the letter in this case had been wrongfully obtained from the letter carrier, the case would have been within the statute; yet the argument used in support of the doctrine, that a letter is not protected after the termination of its custody by the postoffice agents, would as well apply to a wrongful as to a rightful possession of it. In the case of *United States v. Sander*, 6 McL., 598 (§§ 894-897, *infra*), the indictment contained two counts,—one charging the defendant with opening a letter with the prohibited designs; the other with secreting and embez-

zling it. The defense was that defendant was the authorized agent of Phoebe Sturdivant, to whom the letter was directed, and that a delivery to him was in law such a delivery to her that the functions of the government over the letter thereupon terminated. The court so held, saying: "A letter having been committed to the postoffice department for carriage and delivery, if once parted with by the postmaster to a person authorized to receive it, from that moment ceases alike to be under the control of the department, and the power and authority of the general government. . . . When the functions of the department are exhausted by the proper delivery of mail matter (once placed in its charge), such mail matter is then beyond the reach and authority of any legislation of congress."

Yet, while the learned judge in charging the jury in that case instructed them to return a verdict of not guilty if they found the defendant was the authorized agent, as alleged, and received the letter from the postoffice without any criminal purpose entertained at the time, he also charged that if, when he obtained it from the postoffice, he had the criminal intent of opening with the design specified in the statute, the offense was complete, having had its inception in his taking the letter from the office with the wrongful intent. It is difficult to see how, under the above-quoted construction of the act, the question of "design" or "intent" could enter into the consideration of the question if the defendant was the authorized agent to receive the letter, or how the opening or embezzlement of the letter after it is taken by rightful authority from the postoffice, but with an intent to violate the seal for the forbidden or wrongful purpose, would be within the statute or within the scope of the legislative power of congress, while one so taken with a proper intention would not be longer within that protection. In either case the criminal act is not done until after the letter has left the custody of the officials by a rightful delivery, and the protection of the statute is extended to it after delivery to the agent of the addressee.

The case of United States *v. Mulvaney*, 4 Park. C. C., 164, decided in 1855, involved a construction of the statute under consideration. There the mail carrier left with the defendant (John Mulvaney), at his place of business (82 Catharine street), a letter directed to "John Stewart, care of John Mulvaney, 82 Catharine street, New York City." Defendant at first objected to receive the letter, but did, and said he would see it was duly delivered to the person to whom it was directed. The letter was never delivered to Stewart, and on inquiry being made of the defendant he at first denied having received it, but afterwards confessed to having received, opened, read and burned it. For the defense it was contended — *First*, that as the defendant had resorted to no fraud to obtain possession of the letter, on its receipt by him it had passed beyond the control of the government, and its jurisdiction to punish for the offense charged no longer existed; and, *second*, that there was no proof of the *corpus delicti* charged in the indictment, except the uncorroborated confession of the defendant, which was not sufficient to sustain a conviction; and the court sustained both defenses. No opinion, however, was written in the case, the report merely showing the conclusion arrived at.

In the case of United States *v. Pond*, 2 Curt., 265 (§§ 2454–59, *infra*), the indictment charged the defendant with opening (then an offense under the original act) a letter which had been in a postoffice before it had been delivered to the person to whom it was directed, with the design obnoxious to the statute. A motion was made to quash the indictment on various grounds, and was over-

ruled by Judge Curtis, who uses the following language as to the grounds of the motion pertinent to this inquiry: "The first objection is that the indictment does not allege that the defendant unlawfully opened the letter in question. But following the words of the act, it does allege such facts as, if true, amount to an unlawful opening; for it avers the letter was opened before it reached the person to whom it was addressed, with intent to obstruct the correspondence and pry into the business or secrets of another. This intent renders the opening of such a letter unlawful, and it would add nothing material to call it so. . . . It is further objected that it is not alleged that, at the time of the opening, the letter was in the custody of any postmaster, letter carrier, or other person having lawful charge of the letter. The words of the act do not require that the letter, when opened, should be in the lawful custody of any one, but only that it had been in the postoffice, or in the custody of a mail carrier, and was opened before delivery to the person to whom directed. And I do not perceive sufficient reason why the language should not be literally construed. If a letter should be obtained by fraud or theft from a postoffice by one person, and be opened by a second with design to pry into the business or secrets of another, or obstruct his correspondence, I think it would be an offense within this act. And so in any other case which has occurred to me, of a lawful or unlawful custody at the time of the opening with such intent."

In the case of *United States v. Driscoll*, 1 Low., 303 (A. D. 1869), one of the indictments considered in the opinion was for opening a letter which had been in a postoffice before it had been delivered to the person to whom it was directed, with the design alleged in the indictment in the case at bar. The defendant was an errand boy, whose duty required him to take from the postoffice all letters arriving by mail to the address of his employers, and he was convicted of embezzling and opening his employers' letters so received by him, and the sole question discussed in the opinion is whether the agent or servant of a person to whom a letter is addressed is within the meaning of the law. The indictments were there drawn under twenty-second section of the act of March 3, 1825, from the last sentence or clause of which section 3892 of the Revised Statutes is carved. The court says: "Some of the language is broad enough to include within its literal meaning every letter that has ever been in a postoffice, and every person that can deal with such a letter before it reaches the manual possession of its owner;" and after discussing the question as arising under another section of the statute, in which the court holds that the taking must be unlawful, and that the taking by an agent was lawful, the court further says as to the provision now under consideration: "But I think the delivery means in this, as in the other clause, delivery to the person, or to his authorized agent. When such a delivery has been made, the government is discharged of further responsibility, and its functions cease to operate upon the letter. If the clerk or servant of the owner betrays his trust, that is a matter to be looked into by the authority of the state, whose laws regulate such agencies. . . . I have considered this question once before. A letter had been left at a shop where the letters of a person to whom the particular letter was addressed were, with his knowledge and consent, usually left. A stranger, the defendant, intermeddled with such a letter after such delivery, and was indicted under the latter clause above cited; and the case being, by consent, submitted to me in a somewhat informal way, I ruled upon it, and the result was a *no. pros.*"

The case of *United States v. Nutt*, 23 Int. Rev. Rec., 386, reported since the revision of the federal statutes, was considered by the district court for the

northern district of Ohio in 1877. The indictment was substantially the same as the one we are considering, except that the taking of the letter was from a postoffice. A letter signed "Nutt Brothers" had been written by John M. Nutt to Baughman, at Quincy, and was mailed at Sidney. The next day John M. gave the defendant, William A. Nutt, a written order, signed "Nutt Brothers," to the postmaster at Quincy, and the defendant on the order received the letter from the postmaster and opened it. The defenses were numerous and some of them very ingenious. In charging the jury the court said: "But it is claimed by the defendant that if the letter was obtained from the postoffice with the assent and consent of the postmaster it was not a taking under the provisions of the statute making it an offense. I direct you on that subject that the taking of a letter out of a postoffice in which it was regularly received, by a person other than the person to whom it was addressed, and without his consent or direction, but with the consent of the postmaster, who voluntarily delivered it to him to be delivered to the proper person, with the design, at the time, to obstruct the correspondence or pry into the business or secrets of the person to whom it is addressed, is a violation of the statute. . . . It is not necessary to show that the letter was unlawfully or clandestinely taken from the office by the defendant to make the taking, with the design specified, a violation of the statute. . . . It is claimed that the defendant had a right under that order to get possession of the letter. I direct you on that subject that where a letter is placed in the hands of the officer charged with the duty of mailing, and has been mailed and passed the mailing office into the custody of the postoffice department for delivery, the writer loses control of it, and the alleged writer has no right to take it out of such custody and prevent or delay such delivery." See, also, *United States v. Eddy*, 1 Biss., 227, and *United States v. Tanner*, 6 McL., 128.

Another case, that of *United States v. Thoma*, 25 Int. Rev. Rec., 171, was decided in 1879 by the district court of New Jersey. The facts found by the special verdict were briefly that about December 7, 1877, a registered letter was sent from Switzerland to "Jacob Schoch, care of Charles Thoma, Long Branch, N. J.," containing a bill of exchange in favor of Schoch, who died at Long Branch in October preceding, of which place he had for several years been a resident. Thoma, the defendant, received the letter from the postoffice and receipted for it, and under advice brought it again to the postmaster, who opened the letter and returned it to the defendant. Schoch, before his death, was expecting this letter, and had told defendant "he would have the first claim on it," the former being indebted to the defendant at the time. Schoch's widow, who lived apart from him in New York city, and had obtained letters of administration on his estate there, had demanded the letter and bill of exchange of the defendant, who refused to deliver it until his debt was paid or secured. The court, in considering these facts, says: "The act of the defendant, as thus explained, brings him, I am inclined to believe, within the letter of the law but not within its spirit. Penal statutes should be construed strictly, and the retention of a letter by a person who came lawfully into its possession is not the misdemeanor that congress had in view. . . . But the delivery of the letter to the defendant terminated the action and authority of the postoffice department over the subject-matter. It was directed to the defendant's care. He was designated as the person to receive it from the postoffice. So far as the department was concerned its responsibility ended with the delivery to him. . . . It was suggested on the argument that Judge Cadwallader gave a dif-

ferent view of the section, holding in a recent case that a defendant was liable to its penalties who opened a letter addressed to his care, to a female servant of his family—the letter having been delivered to him by the officials of the postoffice. The case is not reported, and there may have been circumstances connected with it that justified such a construction, and which do not appear here.”

See, also, *United States v. Mulvaney*, *supra*, where the letter was taken by the defendant in whose care it was directed. Under this section of the Revised Statutes it may be that delivery of a letter to a person in whose care it is addressed is such a delivery as that the person receiving it is not guilty of the unlawful *taking* denounced by this law. Indeed, the regulations of the postmaster-general (made by legal authority) in such cases require the delivery to the person addressed, rather than to the person in whose care addressed, only when so requested by the former. *Postal Laws and Regulations*, § 280 (ed. 1879). I have examined with considerable care the cases on this subject arising under the English postal laws. The question there almost always turns on the definition of a “post-letter,” and nearly all the cases discuss it with reference to the time or circumstances under which a letter becomes a post-letter, or whether it has ever been such, rather than when its character as such ceases, because the English statute points out with so much particularity what shall constitute a delivery, or rather when a letter shall cease to be a post-letter; its character as such continuing “to the time of its being delivered to the person to whom it is addressed, or to his house or office, or to his servant or agent, or other person considered to be authorized to receive the letter according to the usual manner of delivering that person’s letters.” 1 Vict., c. 36, § 47. A few of the English and some other cases examined are collected in a note to this opinion. (a)

§ 893. *A letter left in a hall by a letter carrier, with the sanction of the owner, but in his absence, is under the protection of Revised Statutes, section 3892, and taking and opening it by another person is a violation of that statute.*

The argument made for the defendant in this case would incorporate into our statute all the provisions and limitations of the English statute; and the court here is asked to rule on the question presented as though it now contained them. But I cannot accede to this doctrine. Congress has denounced in unambiguous terms the intermeddling with correspondence transmitted by mail “before it has been delivered to the person to whom it was directed;” and while the delivery to an authorized agent of the addressee may possibly be a good delivery within the meaning of the statute, I am not prepared to hold that the placing of a letter in a private letter-box, or leaving it in an office or hall, by the letter carrier, in the absence of the person to whom it is addressed, even with his sanction, exposes it to the depredations of strangers beyond the parview of this section or the power of congress to create and punish the offense. Public policy requires a different construction of this statute; and the

(a) NOTE.—Consult *United States v. Nott*, 1 McL., 499 (§§ 898-904, *infra*); *United States v. Pearce*, 2 McL., 14 (§§ 905-907, *infra*); *United States v. Martin*, id., 23; *United States v. Lancaster*, id., 431 (§§ 2474-79, *infra*); *United States v. Fisher*, 5 McL., 3; *United States v. Whitaker*, 6 McL., 342; *United States v. Emerson*, 5 McL., 406; *United States v. Patterson*, 6 McL., 463 (§§ 2470-73, *infra*); *United States v. Belew*, 2 Marsh., 220; *United States v. Foye*, 1 Curt., 34 (§§ 912-915, *infra*); *Dewee's Case*, Chase's Dec., 533; *United States v. Wilson*, 1 Bald., 102; *United States v. Wood*, 3 Wash., 440; *United States v. Hart*, 1 Pet. C. C., 300; *United States v. Baugh*, 1 Fed. R., 784 (§§ 2460-63, *infra*); *United States v. Hardyman*, 13 Pet., 176; *Rex v. Harley*, 1 Car. & Kir., 89; *Rex v. Gardner*, 1 Car. & Kir. (17 E. C. L.), 628; *Reg. v. Newey*, id., 623, note a; *Reg. v. Jones*, 2 Car. & Kir., 136; *Reg. v. Looney*, id., 466; *Reg. v. Bickerstaff*, id., 761; *Reg. v. Wynn*, id., 853; *Rex v. Pearson*, 4 C. & P., 472; *Reg. v. Menze*, 1 Car. & Marsh., 234. And as to construction of statutes, *Spofford v. Kirk*, 97 U. S., 484, 490; *United States v. Justices of Lauderdale County*, 10 Fed. R., 430. Compare, also, R. S., §§ 3300, 3391, 5467, 5469, 5470, 5471.

laws creating and governing our entire postal system, now grown to such huge dimensions, have, by their various provisions and the regulations made in pursuance thereof, undertaken, since the establishment of the government, to protect correspondence from all manner of depredation and unlawful interference from the time of mailing till it reaches the hands of those entitled to break the seal. For example, section 3923 provides that a receipt shall be taken upon the delivery of any registered mail matter and returned to the sender; section 3936 prescribes how undelivered letters shall be returned to the writers; and sections 3938 and 3939 provide for a like return of request letters and valuable dead letters. Mail matter directed to and left at hotels "must be returned to the postoffice as soon as it is evident that it will not be claimed." "Officers of clubs and boards of trade or exchange should not hold unclaimed letters longer than ten days, except at the request of the person addressed." Post. Laws & Reg., p. 30. See, also, *id.*, §§ 275-294, as to the delivery of letters addressed to a firm, letters coming from the pension office, those directed to officials, minors, deceased persons, assignees, defunct corporations, fictitious persons, and those sent to a place at which there is no postoffice. See, also, "Delivery of Letters," 13 Op. of Atty. Gen., 395, 406, 481. In this last opinion letters arrived at a postoffice, directed to a young lady over eighteen, but under twenty-one, years of age, which were claimed both by herself and her guardian, and the attorney-general held she was entitled to them, citing the section now under consideration. See, also, official opinions of assistant attorneys general of post-office department (Post. Laws & Reg., 323, 331, 333, 337, 344), and opinion No. 67, referred to on page 347 in manuscript which I have obtained from the department, it being the departmental construction of section 3892. The opinion uses this language: "It was evidently the intention by the section (and it should be so construed) to make the taking or receiving by any person of a letter of the description set out in the section, 'with a design to obstruct the correspondence or pry into the business or secrets of another,' an offense complete in itself."

The word "deliver" has perhaps as many different shades of meaning ascertained by judicial interpretation as any other term known to the law. I have examined a large number of cases in which it has been defined, including those involving the delivery of deeds, the delivery of goods under a contract, the delivery by and to common carriers and vessels, and the delivery of notices, telegrams, and the like. A few of the cases will be briefly noticed. *Ostrander v. Brown*, 15 Johns., 39, and *Price v. Powell*, 3 N. Y., 322, decide that, "as between carrier and consignee, delivery implies mutual acts of the two. Landing the property on the wharf at the end of the voyage is not a good delivery without, at the least, giving notice to the consignee." In the case of *O'Bannon v. Southern Express Co.*, 51 Ala., 481, it was held that merely placing goods in such a position that the receiving clerk in a carrier's office might see them, but without calling his attention to them, is not a delivery. In *Cox v. Todd*, 7 Dowl. & R., 131; S. C., 16 C. L., 277, on a contract that barley should be delivered during April, the court uses this language: "If the word '*delivered*' means no more than *brought*, then the plaintiff has performed the contract; but I think that is not the meaning." The case of *Hill v. Humphreys*, 2 Bos. & Pull., 343, was an action for the recovery of attorneys' fees. By the English statute, before such an action could be maintained, a bill of the fees thirty days before suit was required to be "delivered to the party to be charged therewith, or left for him at his dwelling-house or last place of abode." The bill was left

at defendant's counting-house, and Lord Eldon directed a non-suit. In *Vincent v. Slaymaker*, 12 East, 372, an action of the same character, the delivery was to an attorney of the defendant, and it was held a good delivery to the defendant by a divided court, Lord Ellenborough dissenting. Later, in 1849, and after this statute had been amended by allowing a delivery at the place of business or by post, the case of *McGregor v. Keiley*, 3 Exch., 794, an action for such a bill of fees, was decided. The plea alleged that no bill had been *delivered to defendant* or sent by post to or left for him at his place of business or dwelling-house; replication that *plaintiff did deliver to defendant*. The proof was that witness went to defendant's house and delivered the bill to a servant at the door. It was objected that this was *no proof of delivery to the defendant*. Pollock, C. B., overruled the objection, and the case was reserved for the consideration of the court whether there was *proof of personal delivery*, and the only question considered was whether there was *any evidence* from which a jury might infer that defendant received the bill, and it was resolved that there was. 1 Taylor, Ev., § 182; 2 Whart. Ev., § 1326, and cases cited.

In most of the cases decided on this statute adversely to the views we entertain, the courts base their decisions on the ground that after the letter carrier, or other postal agent, has parted with actual possession of a letter "all action and authority of the postoffice department terminates as to it;" but *non constat* that it then, and before it actually reaches the person for whom it was intended, becomes a subject of public plunder, beyond the power of the government to punish for its embezzlement or destruction. Some of the cases, by their reasoning, intimate that the act is unconstitutional as being beyond the legitimate scope of legislative enactment delegated to congress. But the late case of *United States v. Hall*, 98 U. S., 343, decided in 1878, overrules all such objections. This was an indictment under section 4783, Revised Statutes, against a guardian for embezzling the pension money of his ward, in violation of his trust. The case came before the supreme court of the United States on a certificate of division in opinion between the judges of the circuit court, and involved substantially two questions: *First*, whether the offense is committed when the embezzlement charged did not take place until the pension money was paid over by the government to the defendant, as guardian of his ward; and, *second*, whether the act of congress defining the offense charged is a valid law, passed in pursuance of the constitution. Both these questions were decided in the affirmative by a unanimous court, Justice Clifford delivering the opinion, which is an exhaustive review of the legislation of congress, and of the cases, both state and federal. The reasoning in that case, and its analogy to the one under consideration, are decisive of the questions here, and accord fully with my own judgment on the principles here involved. And, indeed, if a guardian, who is an officer of the state, under bond for the faithful discharge of his duties as such, is punishable for embezzling the pension money of his ward, after he had lawfully received it, and after its final and complete payment by the United States, *a fortiori*, one is punishable who wrongfully, without any authority of law or pretense of authority, in fact, embezzles or unwarrantably interferes with mail correspondence which has parted from the actual possession of the postal authorities, but before its receipt by the person for whom it was intended, and to whom it was directed, and to whom the government undertook to convey and deliver it; provided, of course, the offense is created by statute in either case, as is the fact. Every objection made here, as well as many others, was urged in *United States v. Hall*. It was there in-

sisted that the statute was municipal in its character, operating directly on the conduct of individuals; that if congress may pass such a law it may assume all the police regulations of the state; that, as the state law authorized the guardian to receive the money, he cannot, under an act of congress, be punished for embezzlement after lawfully receiving it; and that, when the payment is made to the guardian, the money ceased to be under the constitutional control of the United States. But the supreme court was "unhesitatingly of a different opinion," for reasons stated with remarkable force and clearness.

The wisdom of the policy which originated this and kindred statutes for the protection of the mails, and has kept them alive and operative, substantially in their present form, for sixty years, cannot but be apparent when we consider for a moment the object for which they were designed, and the multiplicity of varied interests, commercial, social, governmental, financial, and in short of every description, which are intrusted to the mail department of the public service. And it is of the utmost importance that the immense correspondence of the country should be most carefully and scrupulously guarded by wholesome laws made for its protection at all times and under all circumstances, from the time of mailing until it reaches those who are entitled to its secrets. The public have a right to repose just this kind and degree of confidence in the postal system of the government; and in my judgment congress, if it has not already done so, can constitutionally enact laws for the protection of the mails to such an extent.

The system of mail delivery in cities, by letter carriers, is of comparatively modern date, and is constantly increasing with the growth and development of the country. It necessarily affords greater and more abundant opportunity for the commission of offenses like those charged in this case than the older method of delivery at the postoffice. Letters are left in private boxes, on tables, counters and under doors, and if the system is to be efficient they must be protected in that situation. Indeed, the postmasters-general have for years, by their printed regulations, urged the public to "provide, in cities where letter carriers are employed, letter boxes at places of business or private residences, thereby saving much delay in the delivery of mail matter." For the above reasons, it seems to me that section 3892 should receive a liberal construction by the courts. The evil to be remedied and guarded against is so easy of accomplishment it could not, under an opposite or different construction, be prevented by the existing statute. It is ample in its letter and spirit, and was, no doubt, intended to protect the seals of all correspondence through the mails until actual manual delivery to the party addressed, or his authorized agent. The courts should, in my judgment, effectuate that intention by so construing it, and not devolve the duty of affording the required protection on the states upon any theory that there is a want of constitutional power in congress to do it. It seems an unnecessary separation of the subject-matter to so divide the duty of protection.

I am, therefore, of the opinion that the special verdict in this case renders the defendant guilty of the offense charged in the indictment.

UNITED STATES *v.* SANDER.

(Circuit Court for Ohio: 6 McLean, 598-603. 1855.)

Charge by WILLSON, J.

STATEMENT OF FACTS.—This is an issue, upon a plea of not guilty, to an indictment founded upon the last clause of the twenty-second section of the

act entitled "An act to reduce into one the several acts establishing and regulating the postoffice department," of the 3d March, 1825. By this clause of the statute it is provided "that if any person shall take any letter or packet not containing any article of value or evidence thereof out of a postoffice, or shall open any letter or packet which shall have been in a postoffice or in custody of a mail carrier before it shall be delivered to the person to whom it is directed, with design to obstruct the correspondence, to pry into another's business or secrets, or shall secrete, embezzle or destroy any such mail, letter or packet, such offender, upon conviction," etc.

The indictment contains two counts. The first charges that the defendant, on the 5th day of May, 1855, at Vermilion, etc., did open a letter which had been put into the mail at Coldwater, in the state of Michigan, to be conveyed by post and directed to Phoebe Sturdevant, Vermilion, Ohio, with a design to obstruct the correspondence and to pry into another's secrets. The second count charges that the "defendant, at Vermilion, in the district aforesaid, on the 5th day of May, 1855, did secrete and embezzle a certain letter which had before been in the postoffice at Vermilion, in said district, before it had been delivered to the person to whom it was addressed and directed, and which letter was then and there directed to Phoebe Sturdevant, at said Vermilion, and which said letter had, before that time, been put into the mail of the United States at Coldwater, in the state of Michigan, and was intended to be conveyed by post to Vermilion aforesaid, and which said letter had before that been conveyed by mail, and was deposited in said postoffice at Vermilion, and had not, before the same was so secreted and embezzled by said defendant, been delivered to said Phoebe Sturdevant."

§ 894. *A count is not bad which charges two distinct acts connected with the same transaction, both being indictable.*

At the commencement of the trial of the cause the defendant's counsel made a motion to quash the second count of the indictment for duplicity. The court overruled the motion, with an intimation to counsel, however, that if the court, on reflection, should deem the ruling wrong, they would direct the jury to exclude the testimony, as impertinent to the second count of the indictment. We are satisfied that the second count is not defective for duplicity. When a statute makes two or more distinct acts, connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offense, it has been repeatedly held that they may be coupled in one count. Thus, setting up a gaming table, and inducing others to bet upon it, may constitute distinct offenses; for either, unconnected with the other, an indictment will lie. Yet, when both are perpetrated by the same person at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted.

§ 895. *As to use of technical terms in an indictment.*

In describing an offense under this statute no technical words are necessary. In the case of *The United States v. Mills*, 7 Pet., 142 (§§ 2452-53, *infra*), the court say: "The general rule is that in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute. There is not that technical nicety required as to *form* which seems to have been adopted and sanctioned by long practice in cases of felony." In the case of *Mills* the indictment was substantially, in form, like the second count of this; both charge the secreting and embezzling in one count, and both are founded on the same section of the postoffice law. The same ruling has been

adopted by this court in the case of *The United States v. Lancaster*, 2 McL., 431 (§§ 2474-79, *infra*).

But a more serious and grave question is raised by defendant's counsel in requesting the court to charge the jury "that if they should find the letter in question had been delivered by the postmaster at Vermilion to the defendant, who was at the time a fully authorized agent of Phœbe Sturdevant, to receive it, that any embezzlement by him thereafter, and before delivery to her, does not constitute an offense under the statute." It is claimed by counsel that a delivery to an authorized agent is a delivery to the principal, and that when this is done the functions of the postoffice department, and the powers of the federal government, are at an end in the premises.

We believe this position of counsel to be well taken. It is a familiar principle of law that an act done by an authorized agent, within the scope of his authority, is an act of the principal: "*Qui facit per alium facit per se.*" Hence it is that the delivery of goods by a third person to an agent, and his acceptance of them for his principal, is, in contemplation of law, a delivery to and acceptance by the principal. So payment made by a third person to the agent in the course of his employment is payment to the principal, and whether actually paid to the principal or not, by the agent, it is conclusive on him.

A letter, packet, or other thing valuable, having been committed to the postoffice department for carriage and delivery, if once parted with by the postmaster to a person authorized to receive it, from that moment ceases alike to be under the control of the department and the power and authority of the general government. The sanction, by the federal courts, of the contrary doctrine, would be dangerous in its tendency and subversive of reserved state authority. No power is given to congress to legislate upon the subject, except what is incident to and necessary to carry out the grant contained in the eighth section of the first article of the constitution. The grant is simply "*that congress shall have power to establish postoffices and post-roads;*" and while we would not adopt the limited and narrow construction given to this grant by President Monroe, in his special message to congress of 4th May, 1822, yet we would not extend implied powers further than what is necessary to carry out, with safety to the public, the legitimate operations of the postoffice establishment. When the functions of the department are exhausted by the proper delivery of mail matter (once placed in its charge) such mail matter is then beyond the reach and authority of any legislation of congress.

§ 896. *If an authorized agent of the person to whom a letter is addressed receives the letter with criminal intent of opening it to pry into another's business, he is guilty of larceny of the letter.*

It is for the jury to determine from the testimony whether the defendant was the authorized agent of Phœbe Sturdevant to take this letter from the postoffice at Vermilion. If he so received it, without any criminal purpose at the time, you will have done with the case by returning a verdict of not guilty. But on the contrary, if you are satisfied from the testimony, beyond a reasonable doubt, that the defendant, at the time he obtained the letter from the postoffice, did it with the criminal intent of opening it for the purpose of prying into another's business or secrets, then, although he may have had the previous consent of Phœbe Sturdevant to bring her letters from the postoffice, you will be required, nevertheless, to examine the evidence as to the offense charged in the first count of the indictment; for in that case the offense had its inception at the time of his taking the letter from the office, as that act was in itself a larceny

§ 897. *As to proof of criminal intent.*

We do not intend to recapitulate the testimony or comment upon it. We will say, however, that there is in this country a growing unwillingness to rest convictions on confessions alone. Yet it is hardly to be supposed that a man who is innocent will make statements to different persons, and perform acts at different times, which, taken together, go directly to prove an alleged commission of a crime. When it is a question of intention of the accused, for an alleged violation of law, the jury in no case can have furnished them, by the prosecution, positive proof; when the intent is material, however, it must be shown by the government; and this is to be done by proving overt acts of the defendant from which the intention can be implied, as every man is supposed to intend the necessary consequences of his own acts.

Take the case, gentlemen, and under the rules of law, as given to you by the court, return a verdict according to the evidence. (The jury failed to agree.)

UNITED STATES *v.* NOTT.

(Circuit Court for Ohio: 1 McLean, 499-509. 1839.)

Charge by the Court.

STATEMENT OF FACTS.—The defendant having been indicted at the present term for stealing bank-notes out of a letter received in the postoffice at Akron, pleaded not guilty and went to trial. The indictment contained twelve counts, which will be more particularly noticed hereafter.

Francis Dod, a witness, states John Dod wrote a letter at his request to Elizabeth Dod, directed to Akron, in which were inclosed two ten-dollar bills; one on the State Bank of Indiana, and the other on the Cleveland Bank. He identifies the notes presented at the trial. The letter not being received by Elizabeth Dod, the witness went to Akron to inquire after it, about the 8th May last. On inquiry at the office, the letter was handed to him, which he opened and found that the money had been taken out. The letter had been first charged with twelve and a half cents postage, but had subsequently been charged thirty-seven and a half cents. Witness complained to Mr. Johnson, the postmaster, of the loss of the money; and while they were conversing on the subject, the defendant happened to pass by. The defendant before this had been a regular assistant postmaster at Akron, but a short time before had left the office. He still, however, at the request of the postmaster, gave occasional instruction to the assistant in the office, who had little or no knowledge of the business. The postmaster spoke to the defendant and inquired whether he had any knowledge of the letter, the witness at the same time handing him the letter. The defendant said that the boy in the office informed him the letter had been opened by Elizabeth Davis, supposing it was intended for her, but finding it was not, she returned it, and the letter was resealed; that the letter contained two bank-notes, which induced the defendant to alter the charge of postage to thirty-seven and a half cents.

The postmaster states that the next day, being in company with the defendant and several others, he charged the defendant with stealing the money. Some one present observed, how can this matter be settled, and the defendant observed, how can it be, seeing he, the postmaster, was so determined. The postmaster observed that he had nothing against the defendant but this, and that he had no vengeance to gratify; but that the transaction should be prosecuted and exposed. The defendant then asked the postmaster to walk with

him. They went up to the third story of the house where the defendant lodged, and the defendant stepped into another room and soon returned with one of the notes, which the letter contained, in his hand. The other he had passed away to a person in town. He confessed that he took the money, etc. And the defendant's counsel moved the court to exclude this testimony from the jury, and also the whole evidence that has been heard, being connected with it, on the ground that the confession was made under such circumstances as to render it inadmissible. And 19 Com. L. Rep., 519, 533, 444; 2 Russ., 648, 645; 2 Stark., 27, and 6 Halst., 183, were read to sustain the position taken.

§ 898. *Rule concerning confessions of persons charged with crime.*

Confessions, as has often been said, should be received with great caution, for experience has shown that they often mislead, and sometimes convict an innocent person. Under a charge of a highly criminal offense, the mind must always be agitated, and may be influenced by hopes or apprehensions, which it is difficult, if not impossible, sometimes to comprehend. To make a confession, therefore, evidence, it must be made, so far as can be ascertained, in the absence of any excitement which creates a hope to obtain favor, or to avoid a threatened punishment. But the court in such cases must judge of the motives which induce the confession, from the confession itself, and the circumstances under which it was made.

§ 899. — *modern English doctrine.*

The modern doctrine on this subject in England seems to have been carried great lengths in favor of the prisoner. And in one of the cases read, the confession was excluded because a bystander, unknown to the prisoner, and who had no right to interfere, observed in his hearing that he had better confess. This was going farther to exclude confessions than the reason of the rule would seem to require. And in some of the cases all subsequent confessions are supposed to have been made under the influence which at first operated; and on this ground they have also been excluded from the jury. It is difficult to lay down any precise form of words which, if addressed to the prisoner, shall exclude his confessions. Every case must be governed by its own circumstances. In the present case, so far as the facts are developed, there seems to have been no promise held out to induce a confession, nor any threat to extort one. On the contrary, the postmaster, by his remarks, guarded the defendant against any such motive. For, while he informed him that he had no vengeance to gratify, he declared that the case should be prosecuted, and the whole matter exposed. There is, therefore, no ground, under any of the cases cited, to exclude the confession. But if a promise had been made as an inducement to the confession, the facts connected with the confession could not be withdrawn from the jury. And in this case the facts connected with the confession of the defendant, unless explained, go strongly to fix the offense upon him. In company with the witness he went to his lodgings, and there he handed to the witness one of the notes, which is proved to have been inclosed in the letter. Now, unless he shall show how he came by this note, the presumption that he feloniously abstracted it from the letter is strong. But the whole confession is clearly admissible to the jury.

In a subsequent part of the case, a witness, being called by the defendant, proved that before the confession of the defendant, stated by the postmaster, an assurance was given him that the whole matter might, perhaps, be compromised if he would confess, and that the prosecutor would, probably, be

satisfied on the reimbursement of his expenses. And the court then stated to the counsel that the facts which the first witness does not contradict change the aspect of the evidence, and render the confession inadmissible. And they remarked that in their charge to the jury they should exclude as evidence the confession.

§ 900. *Under the twenty-first section of the act of 1825, no one can be convicted who is not employed in the postoffice department.*

The evidence being closed, the defendant's counsel prayed the court to instruct the jury that they could not find the defendant guilty, under the first, second and twelfth counts in the indictment, unless they are satisfied from the evidence that, at the time the offense is alleged to have been committed, the letter in question was "intended to be conveyed by post." In the three counts specified, the letter is described as a "letter intended to be conveyed by post." By the twenty-first section of the act to regulate the postoffice, etc., it is provided "that if any person employed in any of the departments of the postoffice establishment shall unlawfully detain or open any letter, packet or mail of letters, with which he shall be intrusted, or which shall have come to his possession, and which are intended to be conveyed by post, on conviction shall be punished," etc. And if such letter contain a bank-note or any article of value, the punishment is greatly increased. This provision is only applicable to a person employed in the postoffice department, as a carrier, a postmaster or assistant postmaster, into whose possession letters intended to be conveyed by post ordinarily come. It does not, therefore, apply to any one disconnected with the postoffice, who may steal a letter from a postoffice or the mail.

Under the regulations of the department it is made the duty of a carrier to receive letters between postoffices, and he is required to deposit them to be mailed in the first postoffice on his route. Should he purloin a letter thus received, instead of depositing it in a postoffice, he would be guilty of violating the law. The letter was intended to be conveyed by post, and it came into his possession in the line of his official duty. So a letter, intended to be conveyed by post, comes into the possession of a postmaster or assistant postmaster, when deposited in the postoffice, to be forwarded by post. And the section undoubtedly reaches the case, where a letter is purloined by a person employed in the department, either from the office to which it was directed, or on its passage to such office. But the counts must charge the defendant as employed in the postoffice department, and it must be shown that he was thus employed, before he can be found guilty under this section of the statute.

§ 901. *On a charge for stealing bank-notes from the mail, it is necessary to show that they had some value.*

The court are also requested to charge the jury that they cannot convict the defendant under the seventh, eighth, ninth and tenth counts, unless they are satisfied from the evidence that the notes in question are genuine, and are of some value. The twenty-second section of the postoffice act, under which this indictment seems principally to have been framed, provides that "if any person shall steal the mail, or shall steal or take from or out of any mail, or from or out of any postoffice, any letter or packet; or if any person shall take the mail, or any letter or packet therefrom, or from any postoffice, whether with or without the consent of the person having custody thereof, and shall open, embezzle or destroy any such mail, letter or packet, the same containing any article of value, etc., shall be punished, on conviction, as therein provided."

In a late case in England it has been decided (*King v. Ellen*, Russ. & Ryl., 188) that the genuineness of an instrument inclosed in a letter, under a provision somewhat similar to the above, need not be proved. The statute contemplates that the article inclosed shall be of some value; and on this ground the punishment inflicted is much more severe than where a letter is abstracted which contains no article of value. This article would seem, therefore, to constitute an important part of the offense, and some evidence of its value must therefore be given.

§ 902. *Proof of genuineness of bank-notes.*

It is clearly not necessary to prove the handwriting of the presidents and cashiers, whose signatures appear on the face of the notes, by one who has seen them write. Any one whose business or profession leads him to an acquaintance with such notes may prove them to be genuine. And the jury, in the exercise of their judgment, may find them to be genuine from an inspection of them, and the acts of the defendant. The defendant passed one of the notes, as appears from the evidence, at its full nominal value, and if this and the other evidence in the case shall satisfy the jury that the notes, or either of them, were genuine and of some value, they can act accordingly. A counterfeit note being of no value, or a note on a bank which never existed, or is wholly insolvent, would not constitute the offense under the statute. In these cases the notes inclosed in the letter stolen are seldom recovered, and the only evidence of their genuineness is that they appeared to be so to the person who inclosed them; and that being on solvent banks, they were of value. This evidence has often been held sufficient to go to the jury, and on which convictions have been had.

§ 903. *It is not necessary that the letter stolen should have been taken out of the postoffice building.*

The court are further requested to charge the jury that they cannot find the defendant guilty under the fifth, sixth, seventh, eighth and ninth counts, unless they are satisfied from the evidence that the letter therein mentioned was taken from and out of the office by the defendant. And an authority is cited from 19 Com. Law Rep., 533, sustaining the instruction asked. In this report the British statute is not recited so that it can be compared with the act under consideration. The words of the act are, if any person "shall steal from, or out of, any postoffice." And the instruction supposes that the offense is not perpetrated under this section, unless the letter shall be taken out of the post-office building. That if the letter be feloniously taken and rifled of its contents, by an individual who returns it before he leaves the postoffice room, the offense is not committed. This would indeed be a singular construction of the statute. The word postoffice, as used in this section, does not mean the building in which the postoffice is kept, but the case or pigeon holes where the letters are deposited. And when a letter is feloniously taken from the place where it is ordinarily and properly deposited, the offense is consummated. And it is of no importance to inquire whether the offender remained in the room or went out of it. In the present case, if the prisoner opened the letter, took out the money, resealed the letter, and returned it to the place of deposit, before he left the room, he is guilty of the offense under the statute.

§ 904. *Difference in the offense when committed by a person employed in the postoffice department and by one who is not.*

And the defendant's counsel further ask the court to instruct the jury that they cannot find the prisoner guilty under the first, second, third, fourth and

twelfth counts, which charge the prisoner as an assistant postmaster, unless they shall be satisfied from the evidence that he was, at the time the offense is alleged to have been committed, actually employed under a valid contract as an assistant. Where a person not employed in the postoffice department shall be convicted of stealing a letter from the mail or a postoffice, which contains bank-notes, etc., he is punishable by imprisonment not less than two nor more than ten years. But if such person be employed in the department, he is punishable by imprisonment not less than ten years, nor more than twenty-one years. This difference of punishment in the two cases shows how much, in the opinion of the legislature, the offense is aggravated when committed by a person employed in the department. The fact, then, of his employment must not only be stated in the indictment, but it must be distinctly proved.

The employment within the law is not that of a casual assistant, who may occasionally be in the postoffice and assist in distributing or making up the mail. But he must be a regular assistant employed by the postmaster, and whose duty it is to perform the various functions which appertain to the office. The prisoner, it appears, had been a regular assistant in the postoffice at Akron, but some time before this occurrence he had left the office, and engaged in other business. He was under no obligation to act as assistant postmaster, nor did he receive a compensation. The extent of his engagement was, in the absence of the postmaster, to give some instructions to the boy in the office respecting his duties, of which, being inexperienced, he was ignorant. This, we think, is not an employment within the law. We do not say that a regular written contract would be necessary, but we are of the opinion that the person, to come within the law, must be a regular assistant.

The jury will disregard the confessions of the prisoner, because made under circumstances which ought to exclude them from consideration. But they will give full weight to the facts connected with the confessions. The notes taken out of the letter were in possession of the prisoner, and he has wholly failed to show in what way he received them. Much has been said, gentlemen of the jury, of the high importance of this case, and of the ruinous consequences of a conviction. The case is important, but the court and jury must be governed by the facts and the law, and are not answerable for the consequences. If these shall cover the defendant with infamy, and blight his future prospects, it is the result of his own acts. His reproaches should be against himself, and not against the law or the administrators of the law.

(The jury returned a verdict of guilty, and on a subsequent day the defendant was sentenced to confinement in the state penitentiary for two years, at hard labor.)

UNITED STATES *v.* PEARCE.

(Circuit Court for Michigan: 2 McLean, 14-19. 1839.)

Opinion by the COURT.

STATEMENT OF FACTS.—This was an indictment under the postoffice law. It contained two counts as follows: "That the defendant was employed in the postoffice department of the United States, as an assistant to Lemuel Brown, the postmaster of the United States at the said township of Shiawassee, and did then and there unlawfully and forcibly detain from the said Lemuel Brown, postmaster as aforesaid, two packages of letters with which he, the said Josiah Pearce, was then and there intrusted, as such assistant to the said Lemuel Brown, postmaster, as aforesaid, against the peace," etc. "And the jurors

aforesaid, upon their oaths aforesaid, do further present that the said Josiah Pearce, to wit, on the 25th day of January, 1839, at the said township of Shiawassee, in the district aforesaid, unlawfully, fraudulently and deceitfully, did take from the mail of the United States three packages of letters, against the peace," etc.

It was proved that Lemuel Brown was postmaster, and being about to leave the neighborhood for some months he appointed Pearce, the defendant, assistant, the person who had acted as assistant in the office being unwell. After an absence of about three months Brown returned, and finding that the defendant had removed the office to his own house, and that there was complaint respecting the removal, he called on the defendant at his house, in company with his former assistant, whose appointment had not been revoked, and informed the defendant that he would relieve him from any further care of the office, and would take the papers, etc. Certain letters directed to the postmaster, received in his absence, and others received by the last mail, and the dead letters, were handed to him; but the defendant refused to deliver the other letters, or pay over the money he had received for postage, and, seizing a gun, threatened to shoot the postmaster if he did not leave the house. The postmaster retired, and left the letters he had received with his former assistant, with instructions to act as his assistant. He did so, and handed out the letters in his possession as they were called for. The postmaster boarded at the house, with the assistant, at which the office was kept.

In the course of two or three days after this, the defendant made oath before a justice of the peace that certain property had been stolen or fraudulently taken from him, specifying certain letters, etc., which were legally in his possession; on which a search warrant was issued, and the letters in the possession of the regular assistant taken from him, and he was arrested and taken before a justice of the peace. On examination the assistant was released, but the letters were delivered over by the justice to the defendant, who continued for some days to open the mail and hand out letters, claiming a right so to act by virtue of his appointment. The postmaster then applied to the authority of the United States, instituted a prosecution against the defendant, and, through the instrumentality of the marshal, obtained possession of the postoffice, letters and papers.

§ 905. *The provision of the postoffice law, that a postmaster shall reside at the place where the office is kept, is directory to the postmaster-general, and an office is not vacated until he acts.*

The defendant offered evidence to prove that the postmaster had agreed to resign the office in his favor; that he had sold him the case in which the letters were deposited; that he had removed from Shiawassee, and consequently had, under the law and instructions of the department, vacated the office. And in support of this last position the postoffice act was read, which provides that no person shall hold the office of postmaster who does not reside at the place where the office is kept. But the court held that this provision was directory to the postmaster-general, and, indeed, was imperative on him; but that, until he acted, the postmaster and his sureties were responsible to the department, and to individuals who should be injured by any neglect of duty in the office; that, if the postmaster had intended to remove, about which fact there was contradictory evidence, the weight of the evidence being decidedly against the allegation that he had removed, it could constitute no justification to the defendant.

The evidence being closed, the district attorney claimed a conviction of the defendant under that part of the twenty-second section of the postoffice act of 1825 which provides that, "if any person shall steal the mail, or shall steal, or take from, or out of, any mail, or from, or out of, any postoffice, any letter or packet therefrom, or from any postoffice, whether with or without the consent of the person having custody thereof, and shall open, embezzle or destroy any such mail, letter or packet, the same containing any article of value, etc., shall, on conviction thereof, be imprisoned not less than two nor exceeding ten years." And it is insisted that a conviction should be had, also, under the twenty-first section, for the detention of letters, on the first count in the indictment.

The twenty-first section provides that, "if any person employed in any of the departments of the postoffice establishment shall unlawfully detain or open any letter, packet or mail of letters with which he shall be intrusted, or which shall have come into his possession, and which are intended to be conveyed by post," he shall, on conviction thereof, be punished, etc. The evidence does not show that the defendant detained any letters which came into his possession, "and which were intended to be forwarded by mail;" and it is the detention of such letters that is punishable under this clause of the statute. It applies to letters *in transitu*, and which have not reached their place of destination; letters deposited in a postoffice to be forwarded, or handed to a mail carrier on his route, between postoffices, come within the provision if fraudulently detained.

As there is no evidence against the defendant, showing the detention of such letters, he cannot be convicted on the first count in the indictment. More difficulty arises in giving a construction to the twenty-second section as applying to the facts proved. The language of the act is, if any person shall steal, or take from any mail or postoffice, a letter, etc., shall be punished, etc. Now to give a literal construction to this language, the taking from the mail, or a postoffice, a letter, is punishable the same as for stealing it. This could not have been the intention of the legislature. A mere taking may be an innocent act, as if done through mistake, or without any criminal intent; and we find in the latter part of the same section, that, if any person shall take any letter or packet not containing any article of value, out of a postoffice, a very different punishment is inflicted. It could not have been the intention of the legislature to provide different penalties for the same act; and, consequently, the taking in the part of the section first cited must either be limited to letters containing some article of value, or to a felonious taking.

§ 906. *Under the postoffice law the simple taking of a letter without felonious intent is not criminal.*

The taking of a letter which contains an article of value is limited in this section to a taking with or without the consent of the person having the custody thereof, and where such letter is embezzled or destroyed. This provision, does not embrace the class of offenses provided for in the previous part of the section, which is stealing or taking. The design of the taking is shown by the embezzlement or destruction of the letter. But is a simple taking, without a felonious intent, punishable the same as for stealing? We think, when the statute is taken together, and its object and scope are considered, that such a construction cannot be sustained. To come within this provision of the statute, the taking must not only be unlawful but felonious; it must be a clandestine taking — such as would amount to larceny of personal property. This con-

struction is not only justified by a different punishment being provided in the same section, for taking a letter from a postoffice, but by the first taking being placed in the same class and punished as for the stealing or the embezzlement of a letter.

§ 907. *Proof of criminal intent.*

The conduct of the defendant was highly reprehensible in refusing to surrender the office, on the demand of the postmaster; and still more so on his obtaining possession of the letters delivered to the postmaster, under the forms of law. This proceeding was an aggravation of his offense, and can only be palliated, in any degree, by the ignorance of those who were engaged in it. It was a prostitution of the forms of law to attain an illegal object. But unless the defendant in taking the steps he did take had a criminal intent, he is not guilty under the above section. If he was honestly engaged in the prosecution of what he supposed to be a right, and his whole conduct evinced nothing more than a disposition to hold the office and fairly to discharge its duties, he was not guilty of a felonious taking within the meaning of the statute. It is the intent, in all instances, which constitutes the crime, and which is ascertained by the acts of the offender. In many instances the act itself being a crime of great enormity, the whole burden of proving an innocent intent is devolved on the party accused. In this case enough appears in the evidence to show that the defendant did not intend to steal the mail, or any letters or packets from the postoffice. Of this, however, the jury can judge. (Verdict, not guilty.)

UNITED STATES v. MARSELIS.

(Circuit Court for New York: 2 Blatchford, 108-112. 1849.)

STATEMENT OF FACTS.—This was a special verdict, to the effect that the defendant was a clerk in the postoffice of New York, and embezzled two letters containing money; that the letters were not in his custody, but that he obtained them by leaving his regular business and going to the table on which they were lying.

Opinion by BETTS, J.

The points raised on the special verdict in this case are, whether, within the meaning of the twenty-second section of the act of 1825, the defendant stole the mail or the letters from or out of the postoffice.

§ 908. *Meaning of the words "mail" and "postoffice" as used in acts of congress.*

The terms *mail* and *postoffice* seem, each of them, to bear in the acts of congress, and in general acceptation, both a generic and a specific sense. Instances are presented in sections 2, 4, 11 and 22 of the act of 1825 of the employment of the term *mail* as embracing the whole body of mailable matter transmitted from office to office, and also the particular packets addressed from and received at different postoffices. The instructions of the postmaster-general under the act are to the same effect. So, also, the term *postoffice* is applied by section 1 to the department, which is not at all concerned in receiving and delivering letters. In its ordinary use, the term embraces the *business* of keeping, forwarding and distributing mailable matter, equally with the *place* where such business is conducted. And, manifestly, such place to constitute a postoffice need not be a building set apart for that use, or any apartment or room in a building; but, according to the extent of business done, may be a desk or a trunk or box carried about a house, or from one building to another. The place

of the deposit of the mailable matter would, in this sense, constitute the *post-office*, and anything taken out of that place of reception or keeping would be taken from or out of the postoffice, without regard to the distance of removal, or to circumjacent inclosures or rooms.

§ 909. *What is a sufficient asportation of a letter to constitute the offense of stealing from the mail or the postoffice under section 22 of the act of March 3, 1825.*

We do not feel called upon to define the exact signification of the word *mail*, or to determine whether the packets taken by the defendant are properly described under that denomination; for, in our opinion, judgment must, on the other point, be rendered against him upon the special verdict. He took the letters in the postoffice building, from and out of that part of it appropriated to their deposit, with intent to convert their contents to his own use. This was an asportation sufficient to constitute larceny at common law, and consummated the offense of *stealing*, denounced by the act of congress. Furtively and feloniously removing a letter from and out of the place where it is kept in a postoffice is *stealing* it from and out of the postoffice, whether the removal be beyond the building containing the postoffice, or the abduction be no more than the transfer of the letter to the pocket of the person taking it.

We concur in the conclusion of the district court of this district in a case heretofore pending in that court against this same defendant, that he is liable to conviction under the twenty-second section of the act, although he was employed in the postoffice, and might, perhaps, be subject to indictment under the twenty-first section of the act. Judgment of conviction must be rendered against the defendant upon the special verdict.

UNITED STATES v. PARSONS.

(Circuit Court for New York: 2 Blatchford, 104-108. 1849.)

STATEMENT OF FACTS.—A letter was delivered to Parsons by a person with whom the mail carrier had left it. It was addressed to "Charles H. Parsons," and contained another letter and \$33 in money. It was not intended for defendant, but for another person of the same name. Defendant opened it and is charged with appropriating its contents. The indictment was found under section 22 of the act of March 3, 1825.

Opinion by BERRIS, J. •

The facts found by the special verdict are within the *letter* of the statute. The letters had been in a postoffice, and were opened, and their contents embezzled by the defendant, before they had been delivered to the persons to whom they were directed. The special verdict, however, raises the question whether the intent and proper construction of the twenty-second section of the postoffice act of March 3, 1825, embraces the case.

§ 910. *Construction of statutes of March 3, 1825, and of July 2, 1836.*

The forty-first section of the act of July 2, 1836 (5 U. S. Stat. at Large, 89), gives to persons intrusted with the delivery of letters the character of mail carriers, within the meaning of the twenty-second section of the act of 1825. Therefore, the letters in question in the present case, while in charge of such letter carrier, are to be regarded as in the postoffice, or in the custody of a mail carrier. What, then, is the true import and force of the phrase, "shall have been in a postoffice or in custody of a mail carrier," and of the phrase, "before it shall have been delivered to the person to whom it is directed?" Are they

of unlimited extent, covering every condition of a letter until it reaches its rightful destination? To give the language this construction would be to continue letters which had been once in the mail still under the power and control of the federal government, in every change and transfer from person to person and place to place, and without limitation of time. Legislation of such scope and extent would clearly not be in furtherance of the functions and duties of the postoffice department, but in protection of the private property of individuals, after it had become detached from that department, and was wholly out of the charge of its agents. Such legislation would thus necessarily take the quality and form of a municipal regulation, governing the relations and responsibilities of individuals to each other, in respect to letters and their contents which had been in the postoffice, although not obtained from the postoffice or any of its agents, or in the possession of a party through any act of fraud or deceit against the postoffice laws. And congress would thus in effect be invested with the power to compel every person into whose possession a letter which had been in the postoffice should come, to take upon himself the responsibility of carrying and delivering it to the person to whom it should be directed.

§ 911. *When the custody of a letter by the postoffice department has been voluntarily terminated by its agents, the rights of the owner of the letter are no longer under the protection of the laws of the United States; he must look to the local law.*

We think that the object of this twenty-second section does not look beyond a possession of letters obtained wrongfully from the postoffice or from a letter carrier. Its design is to guard the postoffice and its legitimate agents in the execution of their duties, in the safe-keeping and delivery of letters. After the voluntary termination of the custody of a letter by the postoffice or its agents, the property in and right of possession to it belong wholly to its real proprietor, and his rights are under the guardianship of the local law, and not of that of the United States. The delivery of the letter in the present case by the letter carrier was to a person at the house, as was supposed by both, of the person to whom it was directed. The defendant was not then at the house, and in no way participated in the delivery. The person who received the letter supposed that it belonged to the defendant, and afterwards carried it and delivered it to him at a different place, as being rightfully his. All action and authority of the postoffice department, in respect to the letter, terminated with its delivery to that third person; and, in our opinion, it was not intended that the act of congress in question should apply any longer than while the letter should be within the power and control of that department. From that time the law of the state takes authority over it, as the property of one of its citizens.

A question was raised on the argument as to the power of congress to legislate on the subject indefinitely, and to pass laws governing the conduct of persons in respect to letters which have been mailed, after such letters have become entirely disconnected from the postoffice department. But the construction we have given to the act, limiting its operation to letters yet remaining under the authority of the department, renders it unnecessary to consider this question.

Judgment for defendant.

UNITED STATES *v.* FOYE.

(Circuit Court for Massachusetts: 1 Curtis, 364-369. 1853.)

Opinion by CURTIS, J.

STATEMENT OF FACTS.—The prisoner, being a mail carrier, was indicted for stealing a bank-note from a letter deposited in the mail of the United States, and intended to be conveyed by post. Having been found guilty by the jury, he has moved for a new trial, and in arrest of judgment.

§ 912. *Defendant liable though not sworn.*

The first cause assigned for a new trial is that the defendant, not having been sworn, was not liable to be convicted as a mail carrier under the twenty-first section of the act of March 3, 1825 (4 Stat. at Large, 102). This cause is not sufficient. The third section of the act expressly subjects persons employed in the conveyance of the mails to all pains, penalties and forfeitures for violating the injunctions of this act, though not sworn. The twenty-first section, by inflicting a penalty on the act charged in the indictment, must be considered as enjoining mail carriers not to commit that act; and, consequently, if they do it they are subject to the penalty provided in the twenty-first section.

§ 913. *A prisoner convicted of stealing and passing a bank-note cannot be heard to say that it was a counterfeit.*

The second ground of the motion is, that the jury were erroneously instructed concerning certain evidence. The indictment charges that the letter contained "a certain bank-note of the denomination of \$5, purporting to be issued by the Casco Bank of Portland, in the state of Maine; the said bank-note being an article and evidence of value, viz., of the value of \$5." Evidence was offered by the government tending to prove that the person who inclosed the note in the letter received the bill as of the value of \$5; that the defendant, after taking it from the letter, paid it to a creditor in discharge of a debt of \$5; and a broker, who was much accustomed to receive bills purporting to be issued by the Casco Bank, having examined this bill, testified that it was like the bills he was accustomed to receive and pay. The jury were instructed that, if they believed this evidence, it was competent for them to find this note was a bank-note of the value of \$5. In this instruction we think there was no error. The act of the defendant in passing this note in payment of a debt of \$5 was equivalent to an affirmation by him that it was what it purported to be. It is a familiar rule that the indorser of negotiable paper is estopped to deny the genuineness of all signatures which precede his own. And though this rule is not applicable to paper passing by delivery only, and the defendant was not estopped, as against the United States, from showing this was not a bank-note, yet we have no doubt his uttering it as genuine was evidence to go to the jury to prove it to be a bank-note and of the value of \$5; and, if so, it would warrant, in point of law, in the absence of all other evidence, a finding to that effect.

§ 914. *Accused liable for stealing a decoy letter.*

The next cause assigned is, that the particular letter proved did not support the allegation in the indictment, which charges that one J. Pike Stickney deposited in the postoffice at Georgetown a letter addressed to John Blake, Ipswich, "which was intended to be conveyed by post, and was then and there mailed, to be conveyed in the mail of the United States to the town of Ipswich aforesaid." The evidence showed that Stickney was the postmaster at Georgetown; that, in consequence of the loss of money from the mail on that route, he agreed with the postmaster at Newburyport to deposit in the mail a letter

containing money, addressed to John Blake, Ipswich; if the letter should arrive safely at Newburyport it was not to be sent on to Ipswich, but was to be returned to Stickney. In pursuance of this arrangement this letter and money were sent, arrived safely at Newburyport, and were returned to Stickney, who the next day, remailed the same letter, and the bag containing it was committed to the prisoner, who was the mail carrier between Georgetown and Newburyport. The letter was mailed precisely like other letters, that is to say, a bill was made out containing the usual entries; this bill and the letter were inclosed in a wrapper, and the packet addressed to Ipswich, and deposited in the mail-bag with other packets.

The first objection is, that this was not a letter intended to be conveyed by post, within the meaning of the act and of the indictment. And the prisoner's counsel relies chiefly on the decision of the judges on a question reserved in the case of *The Queen v. Rathbone*, 1 C. & M., 220. But we consider that case distinguishable from this. By 1 Vic., ch. 36, § 47, it is enacted that "post-letter shall mean any letter or packet transmitted by the post under the authority of the postmaster-general." The prisoner was indicted for stealing a post-letter. It appeared that an inspector placed the letter which was stolen among some other letters, which the prisoner, who was employed in the post-office, was to sort, and inclosed in it a sovereign to try the prisoner's honesty, which was suspected. This letter the prisoner stole, and it was held not to be a post-letter, within the meaning of the act; for though, in fact, the letter was in the postoffice, it had not come there in the course of business, and so was not transmitted by post under the authority of the postmaster-general.

In the case at bar the only material difference between the letter stolen and any others in the same bag was, that it was not intended to be sent to its address, but it was intended to be conveyed by post from Georgetown to Newburyport, and was regularly mailed for that purpose. We do not think the purpose of the writer, not to have the letter go to its apparent destination, affects its character, or prevents it from being a letter intended to be transmitted by post, or takes it out of the protection of the statute.

§ 915. *The description of the termini of the mail route cannot be treated as surplusage, but must be proved as laid.*

But a far more difficult question arises under the other part of the objection. The indictment alleges, not only that this letter was intended to be conveyed by post, but describes where it was to be conveyed; it fixes the *termini* as Georgetown and Ipswich. The allegation is, in substance, that the letter was intended to be conveyed by post from Georgetown to Ipswich. The question is, whether the words from Georgetown to Ipswich can be treated as surplusage. It was necessary to allege that the letter was intended to be conveyed by post. The words from Georgetown to Ipswich are descriptive of this intent. They describe more particularly that intent which it was necessary to allege. In *United States v. Howard*, 3 Sumn., 15 (§§ 2065-70, *infra*), Mr. Justice Story lays down the following rule, which we consider to be correct: "No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage." Apply that rule to this case. It is legally essential to the charge to allege some intent to have the letter conveyed somewhere by post. Suppose the indictment had alleged an intent to have it conveyed between two places where no postoffice existed, and over a route where no post-road was established by law. Inas-

much as the court must take notice of the laws establishing postoffices and post-roads, the indictment would then have been bad, because this necessary allegation would, on its face, have been false. Words, therefore, which describe the *termini* and the route, and thus show what in particular was intended to identify the intent, and show it to be such an intent as was capable, in point of law, of existing. And we are obliged to conclude that they cannot be treated as surplusage, and must be proved substantially as laid. We are of opinion, therefore, that there was a variance between the indictment and the proof, and that for this cause a new trial should be granted.

§ 916. **Opening letters.**—When a letter is once placed in the postoffice, it is in the custody of the law, and no one except the writer or the person to whom it is directed, or some person authorized by him, has the right while it is there to open it for the mere purpose of ascertaining its contents. The letters of prisoners are within this rule, and the officer in whose custody they are has no right to open such letters without their consent. *United States v. Eddy*, * 1 Biss., 227. See §§ 873-883.

§ 917. Permission given to a sheriff by a prisoner in his custody to inspect all letters written by him does not give the sheriff authority to open a letter of such prisoner after it is once deposited in the postoffice, though it was deposited by another without the sheriff's knowledge. *Ibid.*

§ 918. Neither postmasters nor postoffice agents, nor officers of any kind or grade, have any authority to open letters while in the postoffice, under the pretext that there might be something improper, or even criminal, written therein. *Ibid.*

§ 919. A state officer having a prisoner in his custody may exercise a certain discretionary power over his written correspondence with others so long as that correspondence is out of the jurisdiction or control of the postoffice department; but when it is placed within the legal custody of the officers or agents of the department, and while it continues there, the laws of the United States operate on it, and not the laws of the state. *Ibid.*

§ 920. Where the defendant was indicted for taking from the postoffice and reading a letter directed to another, the jury were instructed that the writer of the letter had a right to control the use of it, and if the letter was written with a view that the defendant should read it, as well as the person to whom it was directed, the defendant was not guilty; and although the letter was directed to another, yet if the writer, before writing it, requested the defendant or authorized him to take the letter out of the office and read it, the defendant was not guilty of any violation of the postoffice law in so doing. *United States v. Tanner*, * 6 McL., 128.

§ 921. Section 21 of the postoffice law of 1825, which makes it criminal for any person employed in any of the departments of the postoffice establishment to open any letters "with which he shall be intrusted, or which shall have come into his possession, and which are intended to be conveyed by post," does not apply to letters to be delivered at the same place where they are lodged in the postoffice. *United States v. Oliver*, * 4 Law Rep 197.

§ 922. **Postmaster opening letter as agent.**—A postmaster was indicted under section 5467, R. S., for embezzling a letter containing a ten-dollar note. It appeared that some time after the alleged act he gave to the person to whom the letter was addressed two five-dollar notes. The defendant alleged that he was authorized to open the letter and to act as the agent of the person to whom it was addressed. The court held that such an agency is incompatible with the duties of a postmaster, and that very strict proof ought to be required by the jury of such an agency, expressly granted and conceded by the real owner of the letters. Also, that, to constitute an offense under the indictment, some evidence is necessary of the genuineness and value of the note charged to have been stolen out of the letter. *United States v. Bramham*, * 3 Hughes, 557. See § 874.

§ 923. **Robbing the mail.**—Robbing the carrier of the mail of the United States, or other person intrusted therewith, of such mail, by stopping him on the highway, demanding the surrender of such mail, and at the same time showing weapons calculated to take his life, such as pistols or dirks, and obtaining possession of the mail by the means aforesaid, against the will of the carrier, is such a robbing of the mail, and such a putting the life of the carrier or person intrusted therewith in jeopardy, by the use of dangerous weapons, as will bring the offense within the terms of the nineteenth section of the act of congress of April 30, 1810, declaring that "if in effecting such robbery of the mail the first time, the offender shall wound the person having the custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender or offenders shall suffer death." *United States v. Hare*, * 2 Wheeler, 288.

§ 924. Putting the mail carrier in fear, and his life in peril or danger, is putting his life in jeopardy, within the meaning and intent of the act of congress of April 30, 1810, declaring that if, in robbing the mail, "the offender shall wound the person having the custody thereof, or put his life in jeopardy by the use of dangerous weapons," such offender shall suffer death. *United States v. Wood,* 2 Wheeler, 325.*

§ 925. On an indictment for robbing the mail it was not necessary that the carrier from whom it was taken should have taken the oath prescribed by the postoffice law. *United States v. Wilson,* Bald., 78.*

§ 926. On an indictment for robbing "the mail" it is not essential that the whole mail be robbed, but it is sufficient that any bag, valise or portmanteau containing mail be taken and cut into and its contents rifled. *Ibid.*

§ 927. On an indictment for robbing the mail and putting the carrier's life "in jeopardy" it is sufficient to prove that the robbers showed the carrier deadly weapons, thereby putting him in fear of his life, and that they effected the robbery by these means. A person is in jeopardy when placed in circumstances which would justify his taking the life of his assailant. Jeopardy means danger, peril, reasonable fear, and well-grounded apprehension. *Ibid.*

§ 928. Theft by carrier.—Under the twenty-second section of the postoffice act of 1825, declaring it to be an offense "if any person shall steal the mail, or shall steal or take from or out of any mail, or from or out of any postoffice, any letter or packet," etc., one charged, as carrier, with stealing the mail, may be convicted, and cannot plead in justification that he is a carrier. *United States v. Burroughs,* 3 McL., 405.*

§ 929. A carrier of the mail is "a person employed in any of the departments of the general postoffice," within the meaning of section 18 of the act of April 30, 1810, "regulating the postoffice establishment," and inflicting certain penalties for stealing letters from the mail. *United States v. Belew,* 2 Marsh., 280.*

§ 930. A letter carrier was charged with embezzling a letter which was intended to be conveyed by mail, and which contained an article of value, which had been intrusted to the accused, and had come into his possession as such letter carrier. *Held*, that the indictment charged an offense under section 5467 of the Revised Statutes. *United States v. Pelletreau,* 14 Blatch., 126.*

§ 931. Embezzlement.—An errand boy, whose duty it was to take from the postoffice all letters arriving by mail to the address of his employers, was indicted under section 22 of the act of March 3, 1825, for embezzling letters so received, and for opening such letters. *Held*, that he was not liable under said section. *United States v. Driscoll,* 1 Low., 303.*

§ 932. There are two offenses defined in section 279 of the Revised Postal Laws of 1872, each punishable by imprisonment, to wit, embezzling a letter and stealing its contents. *United States v. Taylor,* 1 Hughes, 517.*

§ 933. An embezzlement of money order funds by a postmaster is shown where the postmaster has actually applied the funds to his own use, or where he has failed to pay over such funds when required, either by the law or regulations, or when demand is made by an officer authorized for that purpose. It is not a defense that the funds were temporarily extracted and that the postmaster intended to replace them, or that, after proceedings against him, he had paid the money embezzled over to the department. *United States v. Gilbert,* 17 Int. Rev. Rec., 54.*

§ 934. Upon an indictment of a postmaster for embezzling letters containing articles of value, where none of the other postmasters along the intended route of the letters, and through whose hands the letters must have passed in order to reach their destination, were called as witnesses, and the defendant was proved to be of good character, the evidence of a witness of bad repute among his neighbors, who testified that he saw the defendant open the letters and take their contents, under circumstances very improbable, was held to be of very little weight. *United States v. Emerson, 6 McL., 406.*

§ 935. Section 279 of the act approved June 8, 1872,—which act was a revision,—has been transcribed *verbatim* in the Revised Statutes, section 5467, until the latter and concluding part of the section is reached; there the words "every such person shall, on conviction thereof, for every such offense," have been omitted, and as the section now reads no penalty is prescribed for any offense under that section, save for stealing the valuable contents of a letter by an employee in the postal service. The section cannot be made to cover the offense of embezzling a letter with valuable contents. *United States v. Long,* 10 Fed. R., 879.*

§ 936. Stealing from the mail.—The mail of the United States embraces everything which may by law be transported or conveyed by post, and every unlawful taking from the mail of anything which constitutes a part of it is a crime. *United States v. Dennis,* 1 Bond, 104.* See §§ 873-883.

§ 937. A person employed in the postoffice department who steals any article of value

from the mails is liable under section 12 of the act of 1864, no matter whether the article is specifically enumerated as mailable or not. *United States v. Randall*,* *Deady*, 524.

§ 938. It is not an offense punishable by the United States for a postoffice official to steal the contents of a letter, unless the letter came into the hands of the postoffice department for transportation and delivery. *United States v. Winter*,* 13 *Blatch*, 333.

§ 939. On an indictment for stealing a letter it is no objection that the letter is a decoy sent on purpose to entrap the defendant. *United States v. Cottingham*,* 2 *Blatch*, 470.

§ 940. Under section 5467 of the Revised Statutes, which declares it to be an offense for any person employed in any department of the postal service to steal or take any article of value enumerated in the statute from any letter intended to be conveyed by mail, which comes into his possession "either in the regular course of his official duties or in any other manner whatever," a local mail agent at a railway station, also in the employment of the railroad as telegraph operator, who has taken the usual oath of office for the faithful performance of his duties, but receiving no compensation from the government, and whose duty it is to receive the mail-bags from the trains, and deliver them to the trains, is punishable for stealing an article of value from a letter delivered to him to be delivered to the mail agent on the train to be mailed. *United States v. Hamilton*,* 9 *Fed. R.*, 442.

§ 941. Under section 21 of the act of March 3, 1825, declaring that "if any person employed in any department of the postoffice establishment shall secrete, embezzle or destroy any letter, mail or bag of letters with which he shall be intrusted, or which shall have come into his possession, and are intended to be conveyed by post, containing any bank-note," etc., an indictment which alleges that the letter containing the bank-note was put into the postoffice to be conveyed by post, and came into the custody and possession of the defendant as driver of the mail stage, is sufficient. It need not be alleged or proved that the letter was mailed. *United States v. Martin*,* 2 *McL.*, 256.

§ 942. Where a portion of certain bank-notes belonged to S. and B., and the residue to C. and K.; and the latter persons deposited their notes with the former persons to be forwarded to the bank to procure exchanges; and all the notes were inclosed in a letter by S. and K., which was signed by them; and all the notes were stolen from the mail, the property in the notes was correctly laid in the indictment as that of S. and K. *United States v. Burroughs*,* 3 *McL.*, 405.

§ 943. Upon the trial of an indictment for stealing a letter from the mail, which letter contained a draft, where there is no evidence implicating the defendant with the violation of the mail shown to have taken place, except evidence of the possession by the defendant of the draft, it will be for the jury to determine, first, whether the evidence sufficiently proves the fact of the possession of the draft by the defendant; and secondly, whether, if in his possession, he abstracted it from the mail. If he came feloniously into possession of the draft by any other means than by stealing it from the mail, the circuit court has no jurisdiction. *United States v. Crow*,* 1 *Bond*, 51.

§ 944. Evidence of the previous good character of a person indicted for stealing a letter from the mail, and proof that, on hearing of the charges against him, he came from a distance to his home and courted a full investigation of the charges, is entitled to weight, unless the evidence of guilt is clear beyond a reasonable doubt. *Ibid.*

§ 945. A postmaster was indicted for stealing a letter from the mail containing money. The good character of the defendant was proved, and all the persons through whose hands the letter would pass in reaching its destination were not examined as witnesses. The court charged the jury that the defendant's character should have weight in their deliberations, and that unless they were satisfied beyond a reasonable doubt of the defendant's guilt they ought to acquit. *United States v. Whitaker*,* 6 *McL.*, 342.

§ 946. Where the defendant was charged with receiving an article which had been stolen from the mail in the state and district of Illinois, knowing the same to have been so stolen, and it was proved that the letter containing the article was mailed at Fairfield and directed to a person at Shawneetown, the circuit court for the district of Illinois charged the jury that, if they were able to say from this proof that this mail route was in the state of Illinois, it was sufficient proof of the place of the commission of the crime to sustain the charge. *United States v. Keene*,* 5 *McL.*, 509.

§ 947. In order to convict a person on a charge of buying or receiving a land warrant, knowing that it had been stolen from the mail, contrary to the forty-fifth section of the postoffice act of 1825, punishing any person who shall "buy, receive or conceal, or aid in buying or in concealing, any article mentioned in the twenty-first section of this act, knowing the same to have been stolen or embezzled from the mail of the United States, or out of any postoffice," it must be proved that the land warrant was stolen from the mail by the person by whom it was alleged to have been stolen, and that the defendant received it knowing it to have been so stolen. *Ibid.*

§ 948. Treasury notes issued by authority of the act of congress passed October 12, 1837, are promissory notes within the meaning of the act of congress, approved March 3, 1825, punishing the buying, receiving or concealing of certain articles, knowing them to have been stolen from the mail. *United States v. Hardyman*, * 18 Pet., 176.

§ 949. *Obstructing the mail.*—Where the agent of the legal owner of lands, who had been placed in actual possession thereof under the order of a competent judicial tribunal, executed by the proper officer, placed obstructions on the track of a railroad running through the land, and refused to remove the obstructions or allow the train to proceed when told that it carried the United States mail, he was held by the commissioner on the preliminary hearing on his recognizance to answer. *United States v. De Mott*, * 3 Fed. R., 478. See §§ 871, 872.

§ 950. Driving a carriage through a crowded and populous street at such a rate or in such a manner as to endanger the safety of the inhabitants, is an indictable offense at common law. And if a mail carrier so drives his carriage, a constable may stop him, without a warrant, in order to prevent a breach of the peace, without rendering himself liable for obstructing the passage of the mail. *United States v. Hart*, * Pet. C. C., 390.

§ 951. Under the act of congress of 1825, punishing "any person who shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier," a constable is liable for arresting a carrier while engaged in carrying the mail, upon a warrant, in an action of trespass, issued by a justice of the peace. The mere service of the warrant is not punishable, but any detention of the carrier is within the act. *United States v. Harvey*, * 8 Law Rep., 77.

§ 952. Municipal corporations have the right to make ordinances regulating the speed of railroad cars and trains within the corporate limits, as well of those carrying the mail of the United States as of those which do not. The fact of conveying the mail does not exempt the officers of the railroad company from fine for breach of such regulations. And this, notwithstanding the act of congress punishing any person who "shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage conveying the same." *Obstruction of Mail*, * 5 Op. Att'y Gen'l, 554.

§ 953. An indictment for obstructing and retarding a horse and vehicle while carrying the mail is not sustained by proof of preventing a horse from being taken out of the stable to be used for the purpose of carrying the mail. *United States v. McCracken*, * 3 Hughes, 544.

§ 954. *False return by postmaster.*—The act of June 30, 1879, declares "that a postmaster making a false return shall be deemed guilty of a misdemeanor," etc. *Held*, that a person aiding a postmaster to make a false return is liable to the punishment provided by the statute. *United States v. Snyder*, * 3 McC., 377; S. C., 8 Fed. R., 805.

§ 955. *Franking printed matter sealed in envelopes for another* is not an offense under the law punishing the franking of letters for another. *Dewee's Case*, * Chase's Dec., 531.

2. Non-mailable Matter.

SUMMARY—*Letters and circulars concerning lotteries; evidence, §§ 956, 957; laws apply to sealed letters, and are valid, § 958.—Scheme for circulating counterfeit money, § 959; gist of the offense under section 5480; evidence, § 960.—Giving information as to things calculated to produce abortion or prevent conception, §§ 961-965, 970, 972; immaterial that the articles would not produce the effect intended, §§ 964, 965.—Immaterial that articles could not be obtained at place designated, § 966.—Meaning of word indecent, § 967.—Law does not apply to private sealed letters, §§ 968, 969.—Sending articles in answer to a decoy letter, §§ 970, 973.—Powers of congress, §§ 971, 972.—Causing articles to be mailed by another, § 974.*

§ 956. Under section 3894, Revised Statutes, punishing any person who shall deposit or send by mail any "letter or circular concerning lotteries," etc., it is not necessary for the government to prove that the lottery was one established by law, having a legal existence, and that the parties issuing the tickets, etc., were a corporation, as they purported to be, and had or carried on a real lottery. *United States v. Noelke*, §§ 975-987.

§ 957. In a prosecution for sending circulars relating to a lottery through the mail, based on section 3894, Revised Statutes, the occupation of the defendant, as dealer in lottery tickets, and other extrinsic circumstances, are proper to be considered by the jury, on the question whether the circular related to a lottery. On this question they may also consider the fact that an act creating the lottery was on the statute book of a state. *Ibid*.

§ 958. The laws of the United States prohibiting the depositing in the mail of letters or circulars concerning lotteries apply to sealed letters, and are constitutional and valid. *In re Jackson*, §§ 988-990. See § 1018.

§ 959. Evidence proving that the defendant devised a scheme for putting counterfeit money into circulation by sending through the mail to a certain person a letter calculated to induce that person to purchase counterfeit money at a low price, for the purpose of putting it off as good, is sufficient to sustain an indictment under section 5480 of the Revised Statutes, although there is no evidence to show an intention to defraud any particular person. *United States v. Jones*, §§ 991-993.

§ 960. The gist of the offense created by section 5480 of the Revised Statutes consists in the abuse of the mail. The *corpus delicti* is the mailing of the letter in execution of the unlawful scheme. There being direct proof of the mailing of the letter by some one, and the letter itself showing its unlawful character, it is competent to prove that the defendant was the sender by his own admission. *Ibid*.

§ 961. Under section 8893 of the Revised Statutes, a publisher of a newspaper may be punished for knowingly mailing a newspaper containing an advertisement from which no one could fail to understand that it was intended to give information where, how, and by whom articles and things designed for the procuring of abortion and prevention of conception could be obtained and made. It is sufficient if the advertisement gives the forbidden information indirectly. *United States v. Kelly*, §§ 994, 995. See § 1018.

§ 962. It is not necessary that any particular article or its specific properties should be indicated in the advertisement. *Ibid*.

§ 963. Section 8893, Revised Statutes, makes it an offense to mail a notice showing where, or how, or of whom, or by what means certain articles (to prevent conception or procure abortion) can be obtained or made. Where the indictment alleges in the conjunctive "where they may be had and made," the proof of either is an offense, and the indictment is not bad for the conjunctive allegation. *Ibid*.

§ 964. Under the act of July 12, 1876, prohibiting the sending through the mails anything designed or intended to prevent conception or procure abortion, the fact that the articles sent in answer to letters asking for something which might have that effect would not have that effect is not material, the articles being sent with the statement that they were just what the writer wanted. *Bates v. United States*, §§ 1010-14.

§ 965. It is no defense to an indictment for depositing in the mail an article designed or intended to prevent conception, etc., to show that in fact the powder was harmless. The words "designed or intended for the prevention of conception, etc.," used in the statute are simply descriptive of the article made contraband and do not relate to the knowledge or intent of the sender. *United States v. Bott*, §§ 996, 997.

§ 966. On an indictment for depositing in the mail an advertisement or notice, giving information where and of whom certain articles made contraband by statute could be obtained, it is immaterial whether or not such articles could have been obtained at the place designated. *Ibid*.

§ 967. The word "indecent," as used in the statute forbidding the mailing of any written or printed communications containing lewd, lascivious, obscene or indecent matter or epithets, means immodest or impure; and language, though coarse and even profane, is not within the inhibition of the act. So the epithet, "d—n scoundrel and rascal," is not indecent, within the meaning of the act. *United States v. Smith*, § 998. See § 1021.

§ 968. Section 3892, Revised Statutes, as amended by the act of July 12, 1876, declaring that "every obscene, lewd or lascivious book, pamphlet, picture, paper, writing, print, and every letter upon the envelope of which, and every postal card upon which indecent, lewd, obscene . . . terms or language may be written or printed, are hereby declared to be non-mailable matter," and punishing the mailing of such matter, does not include a private sealed letter, outwardly unobjectionable, addressed to a certain person, although it contains obscene and indecent matter. *United States v. Williams*, §§ 999-1003.

§ 969. The statute forbidding the deposit in the mails of any "obscene, etc., paper, writing, print, or other publication of an indecent character," does not include a sealed letter though obscene and indecent. It is not a publication within the meaning of the statute, if sealed. Though it seems that such matter on the outside of an envelope would be within the law. *United States v. Loftis*, §§ 1008, 1004.

§ 970. The act of congress of July 12, 1876 (10 Stat. at Large, 90), which punishes any one who shall knowingly deposit in the mails any letter giving information where any article designed to prevent conception can be procured, does not apply to a case where a person, in answer to a decoy letter written by a detective in the name of a fictitious person, mails an answer which, of itself, conveys no information as to where such article can be obtained. *United States v. Whittier*, §§ 1005-1009. See § 1016.

§ 971. Congress has plenary power over the mails and postal service of the United States; and while it has no power to conserve public morals or to prevent the use of means to prevent conception or procure abortion, yet it has the right to declare such articles or anything

relating thereto to be unmailable, and to punish any one depositing such unmailable matter in the mails. *Ibid.* See § 1015.

§ 972. In construing the statute forbidding the sending through the mails of anything to prevent conception or to procure abortion, or anything relating thereto, regard must be had to the limitations of the powers of congress, and the purpose of congress to prevent the mails from being used to transport matter corrupting to public morals. *Ibid.*

§ 973. To an indictment under the act of July 12, 1876, punishing any person who shall deposit or cause to be deposited for mailing or delivery anything declared to be non-mailable, it is no objection that a detective of the postoffice department sent letters to the defendant requesting him to send the communications under fictitious names, and they were sent to the detective and received by him under those names. They were communications sent to a real person under a fictitious name. *Bates v. United States*, §§ 1010-14.

§ 974. The act of July 12, 1876, declaring that any person who shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared to be non-mailable matter, is deemed to be guilty of a misdemeanor, applies as well to one causing such matter to be mailed by another person as to one mailing it himself. *Ibid.*

[NOTES.— See §§ 1010-1021.]

UNITED STATES v. NOELKE.

(Circuit Court for New York: 17 Blatchford, 554-572; 1 Federal Reporter, 436-444. 1890.)

Opinion by CHOATE, J.

STATEMENT OF FACTS.—The defendant was indicted under section 3894 of the Revised Statutes, which provides as follows: "No letter or circular concerning lotteries, so called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail, in violation of this section, shall be punishable by a fine of not more than \$500, nor less than \$100, with costs of prosecution." The indictment contained two counts. The first count charged that the defendant did "unlawfully and knowingly deposit in the mail of the United States, and send to be conveyed by the said mail, a certain letter and circular concerning a lottery, which said letter and circular was then and there of the tenor and in the words and figures following, that is to say:

"NEW YORK, Nov. 7, 1879.

"Chas. D. J. Noelke, Banker and Broker,

"238 Grand Street, bet. Christie and Bowery.

"*Dear Sir:*—Yours of 5th inst., inclosing \$2, received. Inclosed please find 2 $\frac{1}{2}$ La. tickets, as pr. your order.

"Very respectfully,

"CHAS. D. J. NOELKE.

"All prizes payable in full on presentation of ticket.

"Official copy of drawings mailed as soon as received."

which said letter and circular was then and there inclosed in an envelope and addressed as follows, that is to say:

"M. Many,

"c. o. P. Howell, Esq.,

"Trenton, New Jersey,

"Mercer Co."

The second count charged that the defendant "did unlawfully and knowingly deposit in the mail of the United States, and send to be conveyed by the said

mail, a certain circular concerning a lottery, which said circular was then and there inclosed in an envelope, which said envelope was addressed as follows:

“ ‘M. Many,

“ ‘c. o. P. Howell, Esq.,

“ ‘Trenton, New Jersey,

“ ‘Mercer Co.’

and which said circular purported to be an announcement of the one hundred and fourteenth grand monthly distribution of the Louisiana State Lottery, to take place at New Orleans, Tuesday, November 11, 1879, describing the list of prizes, the plan of the lottery, a list of capital prizes, and a statement of their authority for and method of doing business.” The defendant pleaded “not guilty,” and, after a trial before Benedict, J., and a verdict of “guilty” on both counts, he now moves in arrest of judgment, and for a new trial, upon exceptions.

§ 975. *Under the statute forbidding the mailing of lottery papers, the same instrument may be both a letter and a circular.*

The first objection taken to the first count is, that the writing set out in that count is improperly described as a “letter and circular.” It is insisted that the statute, in proscribing a letter or circular, recognizes the distinction between the two things; that by a circular is intended a written or printed communication, general, and not personal, in its character, and that by a letter is intended a communication personal and individual in character, and not general; that, if the paper set forth is a letter, then it is not, and cannot be, a circular, within the meaning of the statute, and, if it is a circular, then it cannot be a letter. We think, however, that the same paper may be both a letter and a circular. No doubt there may be many circulars that are not letters, but a circular which is in the form of a letter may be well described as a letter and a circular, and there is no reason for excluding such a circular from the operation of the statute. There is nothing on the face of the paper set forth in the first count indicating that it was not a circular, that is, a paper intended to be issued to a great number of persons, or for general circulation; yet it undoubtedly is a letter in form. This mode of describing it may, perhaps, have imposed on the government the necessity of proving that the paper was both a letter and a circular; although, where an instrument is set out in full, the description has been held to be surplusage. *Regina v. Williams*, 2 Den. C. C., 61; *United States v. Trout*, 4 Biss., 105 (§§ 2340–43, *infra*); *United States v. Bennett*, 16 Blatch., 338 (§§ 2480–89, *infra*). But, whether these cases apply to the present case or not, we think the count is not for this reason bad.

§ 976. — *the indictment need not charge that it was concerning a lottery offering prizes.*”

(2) It is also objected to the first count that it omits to charge that the paper was one “concerning a lottery offering prizes.” This objection is based on an erroneous reading of the statute. The things proscribed are (1) “lotteries;” (2) “so-called gift concerts;” (3) “similar enterprises offering prizes;” and (4) “schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses.” The words “offering prizes” qualify and limit the words “similar enterprises.” They indicate the nature of the similarity to “lotteries” and “so-called gift concerts,” which must characterize other “enterprises” than “lotteries” and “gift concerts,” to bring them, also, within the embrace of the statute. The words are wholly unnecessary, and would be tautological, as descriptive of “lotteries” and “gift

concerts," for the offering of prizes is well understood to be an essential part of a "lottery" or a "gift concert." This, we think, is the obvious construction and meaning of the statute.

§ 977. *Omissions that are matters of form and cured by verdict.*

(3) It is also objected to the first count that it omits averments necessary to show the illegal quality of the writing set forth; that, as set out, the paper does not, on its face, and without explanation, concern a lottery; that the expression "La. tickets" is unintelligible until more than intrinsically appears is supplied by innuendo; and that there is no allegation of the existence of a lottery of and concerning which the paper was written.

It is, undoubtedly, an established rule of criminal pleading that, in setting out a writing as an alleged violation of a statute, where words constitute the gist of the offense, if the paper itself, in its own terms, does not purport to be the thing prohibited, the indictment should, by further averment or innuendo, set forth that essential fact. The word "lottery" is not used in the paper set out in the first count. The expressions "La. tickets," "all prizes," and "official copy of drawings," do not, perhaps, necessarily refer to a lottery, although it is difficult to imagine any other subject to which they could be reasonably attributed; but the paper is averred to be "a certain letter and circular concerning a lottery," and although this is an artificial and informal mode of averring that the words "tickets," "prizes" and "drawings," used in the paper, were used in reference to tickets, prizes and drawings of and in a lottery, we think that the defect is not available to the defendant after verdict. By section 1025 of the Revised Statutes it is provided: "No indictment found and presented by a grand jury, in any district or circuit or other court of the United States, shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." This statute was passed July 1, 1872, being the eighth section of "An act to further the administration of justice" (17 U. S. Stat. at Large, 198), and, while its operation is necessarily limited by that provision of the constitution (Amdt. 6) which secures to every person accused the right "to be informed of the cause and nature of the accusation," which has been held to mean that the offense must be set out "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged" (*United States v. Cruikshank*, 92 U. S., 558; *Constr.*, §§ 898-911), yet we think that the informality of the averment that the expressions used in the paper set forth were used concerning a lottery was one which it was competent for congress to allow the accused to waive by going to trial on the indictment, and that this kind of imperfect and informal averment of a fact essential to make the offense complete was one of those "matters of form" designed by the statute to be disregarded, where it appears that the defendant was not prejudiced thereby. It is not the case of an entire want of an averment of a material fact, but rather a case of an informal averment of such fact, and yet an averment such that no person of ordinary intelligence would fail to understand, from reading this indictment, that the meaning was that these expressions were used with reference to a lottery. The design of the statute was to discourage the practice, on the part of defendants, of lying by till after trial and verdict, and then urging, as ground for arrest of judgment, mere defects of form, where, to all reasonable certainty, they had not been misled or prejudiced. And, whatever might be the effect of this defect in the indictment, on a motion to quash, or on demurrer,

we think it no sufficient ground in arrest of judgment. It is quite clear that the defendant suffered no prejudice on this account. We think, also, that this defect in the indictment is one of those defects of informal averment, which, as distinguished from a defect consisting in the total want of an essential averment, is cured after verdict, even at common law. *Heymann v. The Queen*, 12 Cox, C. C., 383; *Bradlaugh v. The Queen*, L. R., 3 Q. B. Div., 642.

§ 978. *Letters designed to promote the lottery business are within the statute. All letters concerning lotteries are not within it.*

(4) It is also objected to the first count, that it omits necessary allegations to show that, in the sense contemplated by the statute, the letter set forth was one concerning a lottery. The argument is that the statute was not intended to prohibit *all* letters concerning a lottery, but only such as were designed to promote and further the illegal or immoral business of setting up and carrying on lotteries. It is true that, where an act is prohibited, and, upon the necessary construction of the statute, it is evident that the act is intended to be proscribed only under certain circumstances, or upon facts coming within the well understood reason of public policy which led to the enactment of the statute, it is not, generally, sufficient to charge the offense in the words of the statute. *Non constat* the act may be within some of the implied exceptions (*United States v. Gooding*, 12 Wheat., 460; *United States v. Pond*, 2 Curt., 268; §§ 2454-59, *infra*), and, no doubt, many innocent letters may be written and sent by mail concerning lotteries, as, for instance, a letter from a man to his son, cautioning him not to be induced to spend his money for lottery tickets. This statute, clearly, has many implied exceptions. But we think that, assuming that there is, as we have held that there is, an averment, in substance, that the expressions in the letter set out referred to a lottery, it does appear clearly, on the face of the paper, that it is such a letter as is within the prohibition of the statute. It admits of no possible meaning unless it is understood to be a communication in the course of a direct dealing in lottery tickets. Such a letter is, unmistakably, within the reason and the prohibition of the statute.

§ 979. *When an offense consists of written or spoken words, the words must be set out in hæc verba in the indictment.*

(5) The alleged defect in the second count is, that the circular should have been set forth, not as it is, by a description of its contents, but *in hæc verba*. Where the offense consists of words spoken or written, the general rule is, that those words must be set forth in the indictment. This rule has been applied in a large number of cases, including the offense of sending threatening letters. *Rex v. Lloyd*, 2 East, 1122. It seems to us that the present case is within the general rule. In the recent case of *United States v. Bennett*, 16 Blatch., 338 (§§ 2480-89, *infra*), the rule was recognized in the case of an indictment for sending obscene matter through the mail, but it was held that the rule did not apply where it appeared by the indictment that the matter was too indecent to be put upon the records of the court, in which particular case the courts in this country have held that the rule does not apply. This objection appears to have been regarded as one of substance and not of form merely, and, therefore, not aided by verdict at common law (*Bradlaugh v. The Queen*, L. R., 3 Q. B. Div., 618); and, for the same reason, we think it is not cured by the statute above referred to (R. S., § 1025).

The motion in arrest must, therefore, be sustained as to the second count, and overruled as to the first count.

§ 980. *In a prosecution for using the mail to promote lotteries, it is no objection to the competency of a juror that he is in favor of enforcing the laws against lotteries.*

The first three exceptions taken upon the trial were during the impaneling of the jury. A juror being called, was asked by the defendant's counsel: "Have you any prejudice against the lottery business or those who are engaged in it?" This was objected to and excluded, and the defendant excepted. The juror was then asked: "Are you disposed, in your mind, to put an end to the traffic in lottery tickets?" This was objected to and excluded, and the defendant excepted. The juror was then asked: "Are you in favor of active measures for the suppression of the lottery business?" This was objected to and excluded, and the defendant excepted. The juror had previously testified that he knew nothing about the case; and he subsequently testified, being further interrogated by the defendant's counsel, that he had heard nothing, and read nothing, nor talked with anybody at all, about the prosecution of lottery dealers, and that he felt that he could go into the jury box without any prejudice for or against the defendant and decide the case strictly within the evidence, without regard to anything that he had heard or known outside of the evidence. He was then sworn as a juror. It must be assumed that the juror might have answered these questions in the affirmative, and the question is, whether he would be rendered incompetent as a juror by the fact that he had a prejudice against the lottery business or those who engaged in it, or that he was disposed, in his mind, to put an end to the traffic in lottery tickets, or in favor of active measures for the suppression of the lottery business.

Parties have a right to be tried by an impartial jury. This does not mean that they have a right to have jurors who have no prejudice or no opinion as to the policy of enforcing the laws. If the juror had answered all these questions in the affirmative, it would only show that he entertained a prejudice in favor of enforcing the laws of the state of New York against lotteries, which have been in force for a great number of years. We see nothing in this prejudice to disqualify him. In fact, if he is a good citizen, and fit to sit on the jury at all, he is bound to have a prejudice against what is forbidden by law, and against those who break the law, and is bound, also, to be in favor of active measures for the enforcement of the criminal laws of the state. The cases cited by the defendant as analogous to this are not in point. *Albrecht v. Walker*, 73 Ill., 69, was an action for damages for the sale of intoxicating liquor to the plaintiff's husband. A juror testified that he had a prejudice against the business in which the defendant was engaged, but not against the defendant himself, and, although he might have a prejudice against the man engaged in the business, he did not know that he would start out in the investigation with a prejudice against the man engaged in it. In reference to this, Mr. Justice Breese says: "All honest men have a prejudice, so to speak, against larceny and other crimes, but, if no prejudice exists against a party charged with the crime, we do not think that, of itself, is ground of challenge for cause." In *Winnesheik Ins. Co. v. Schneller*, 60 Ill., 472, the juror testified that he had a prejudice against insurance companies generally; that it was founded on the fact that he could not comprehend their proceedings; but that the prejudice would not affect his verdict. On this the court said: "It was error to overrule the challenge of the juror. . . . A man may have a prejudice against crime, against a mean action, against dishonesty, and still be a competent juror."

This is proper, and such prejudice will never force a juror to prejudge an innocent and an honest man. As to this juror, the feeling he entertained against insurance companies was of a bigoted and reprehensible character." The case of *Maretzek v. Cauldwell*, 2 Abb. Pr. (N. S.), 407, was an action for libel respecting the plaintiff's conduct as a theatrical manager. A juror testified that he was opposed to theatrical representations. It was held that he should not have been, as matter of law, excluded on that account, but that it was ground only for challenge to the favor. But it will be observed that the juror had a prejudice against a whole class of persons, to which the plaintiff belonged, by reason of their being engaged in a business which was not unlawful. So where defendants, who were Roman Catholics, were indicted for a riot growing out of prejudices between Roman Catholics and others, it was held proper to allow a juror to be asked if he had any bias or prejudice against Roman Catholics. *The People v. Christie*, 2 Abb. Pr., 256. Where the subject-matter inquired about is one on which there is public agitation or diversity of opinion in the community, and strong feelings are excited, greater latitude of inquiry must clearly be allowed than where the question relates simply to a matter about which there is no such agitation or diversity of opinion. As to the business of dealing in lottery tickets, it seems to us that there is no such diversity of opinion or public agitation in respect to the policy of the laws prohibiting it, and in respect to its injurious effects upon the morals and well-being of the community, as to make these questions proper or reasonably necessary to ascertain the impartiality of the jurors. Moreover, at the time these questions were asked, it had not appeared that the defendant was a dealer in lottery tickets; and if the questions would have been competent all, as tending to disclose a prejudice against the defendant, that fact should, it seems, have been shown or evidence of it offered. Without regard to that point, however, we think the facts offered to be shown immaterial, because they did not tend to disclose any prejudice which would render the juror incompetent. If the counsel expected to follow these questions up by others more material, he should have put such further questions or suggested the point. As the record stands it cannot be assumed that he desired to show, against the competency of the juror, anything more than would have been shown by the affirmative answers to these questions.

§ 981. *In a prosecution for using the mail to promote lotteries it is competent to give in evidence other papers contained in the same envelope as part of the res gestæ.*

(7) Objection was also made to the admission in evidence of other papers inclosed in the same envelope with the letter or circular set forth in the first count, as it was put in the mail. Those other papers tended strongly to show that the paper set forth related to a lottery. They were the circular described in the second count and two tickets purporting to be tickets in a lottery called "The Louisiana State Lottery." There can be no doubt that they were competent evidence, as part of the *res gestæ*.

§ 982. *Evidence of other persons who have visited the place of business named in the circular and seen lottery tickets sold there is admissible.*

(8) A witness for the prosecution testified that he visited the place of business referred to in the letter set forth in the first count, No. 238, Grand street, a few days after the time alleged in the indictment when the letter was mailed, and that he saw there several other papers bearing the same device or monogram as were on the papers inclosed with said letter, and saw the defendant

there, with a hand stamp, make the same impression on a slip of paper. The witness was then asked: "What else did you see and do there at that time?" This question was objected to. The objection was overruled and the defendant excepted. The witness then testified to seeing a lottery ticket sold there by the defendant's clerk while the defendant was present, and to statements made by the defendant to the witness; that this clerk was in his employ and that this was his business, and that the defendant tried to prevent a deputy marshal, who was with the witness, from entering the place. The defendant objected to this evidence, and moved to strike it out. The motion was denied, and the defendant excepted. The witness further testified, under the defendant's objection and exception, that he found in the front office a place for the sale of lottery tickets, and in the back part a policy shop. It is now insisted that this testimony was wholly irrelevant and "utterly foreign to the charge." It seems to us, however, that it tended to trace to the defendant the possession, prior to their mailing, of the papers inclosed in the envelope, and that his declarations as to his business, so soon after the mailing of this letter, were competent as bearing on the question, whether or not it was he who mailed the letter. It tended to show that he had motive and opportunity to commit the offense with which he was charged, and such circumstantial evidence is always competent.

§ 983. *Court may grant time to prosecution to supply proof.*

(9) After the district attorney had announced the testimony for the prosecution closed, the defendant moved for an acquittal, on the ground that no evidence had been introduced tending to show the existence of a lottery of and concerning which the papers in question were written or made. The district attorney then asked time to supply this proof, which was granted under objection and exception on the defendant's part, and an adjournment was had for this purpose. It is now insisted that this was error, but we are of opinion that it was within the discretion of the presiding judge to permit the case to be reopened.

§ 984. *Louisiana statute concerning lotteries is a public act. Proper proof of such statute.*

(10) On the coming in of the court, the district attorney offered in evidence pages 24, 25 and 26 of a volume entitled "Laws of 1868, of the State of Louisiana," being an act to authorize the incorporation and establishment of the Louisiana State Lottery Company, to be referred to. This was objected to, on the ground that a private act cannot be proved by the introduction of the book containing it. The objection was overruled, and the defendant excepted. The book from which this act was read has been before us. It bears the imprint, "Published by Authority," on the title page. The act in question, passed August 11, 1868, is entitled "An act to increase the revenues of the state, and to authorize the incorporation and establishment of the Louisiana State Lottery Company, and to repeal certain acts now in force." The first section is as follows: "That, whereas many millions of dollars have been withdrawn from and lost to this state by the sale of Havana, Kentucky, Madrid and other lottery tickets, policies, combinations and devices, and fractional parts thereof, it shall hereafter be unlawful to sell, offer or expose for sale any of them, or any other lottery, policy or combination ticket or tickets, devices or certificates, or fractional parts thereof, except in such manner and by such persons, their heirs, executors or assigns, as shall be hereinafter authorized." The second section declares that certain persons named "are hereby constituted and declared

a corporation for the objects and purposes, and with the powers and privileges, hereinafter specified and set forth," and then follow "articles of incorporation," which declare, among other things: "The objects and purposes of this corporation are, First. The protection of the state against the great losses heretofore incurred by sending large amounts of money to other states and foreign countries, for the purchase of lottery tickets and devices, thereby impoverishing our own people. Second. To establish a solvent and reliable home institution for the sale of lottery, policy and compensation tickets, etc., at terms and prices in just proportion to the prizes to be drawn and to insure perfect fairness and justice in the distribution of such prizes. Third. To provide means to raise a fund for educational and charitable purposes for the citizens of Louisiana." The articles also provide that the corporation shall pay to the state of Louisiana \$40,000 per annum, to be credited to the educational fund. The third section of the act imposes a penalty on any person for selling or offering for sale any lottery tickets in violation of the act. The fourth section grants to the corporation the exclusive privilege, for twenty-five years, of establishing a lottery and selling tickets. The seventh section repeals certain laws, namely, an act passed February 17, 1866, entitled "An act to license the vending of lottery tickets;" "An act to authorize the sale of stamps to venders of lottery tickets," passed February 28, 1866; and an act to amend the last named act, passed March 22, 1866; and "all other laws or parts of laws inconsistent with or contrary to the provisions of this act." The acts thus expressly repealed are clearly general statutes. The act of February 17, 1866, was an act creating offenses and imposing penalties.

We have no doubt that this statute, read in evidence, is to be regarded as a general statute or public act, and not as a private act. It is largely made up of provisions in the nature of general legislation, and the fact that, incidentally, and as a means towards making such general legislation effectual, it grants corporate powers to certain persons, does not make it the less a general law. Laws are either public or private, and this is clearly public. The objection that it was not proved as a private law has no force.

§ 985. *It is not necessary, in a prosecution for violating the lottery law, to show that the lottery had a legal existence or was authorized by law.*

(11) The prosecution having rested again, the defendant's counsel renewed his motion to direct a verdict of acquittal, upon the ground specified in the former motion, that there was no evidence of the existence of a lottery of and concerning which the papers in question could have been written or made, or that they are letters and circulars concerning any lottery; also, on the further ground that, be the act what it may, there is no evidence of any action in acceptance of the charter there tendered, or that an organization under that act was ever effected by the corporators named therein, or that the corporation, if it ever existed, had not been dissolved by some one of the various methods known for the dissolution of corporations at the time the indictment was found, or that the charter had not been forfeited or withdrawn by subsequent legislation. This motion was denied and the defendant excepted. This exception is based upon the theory that it was necessary for the government to prove that the lottery was one established by law, having a legal existence, and that it was necessary to prove that the party or parties who issued the tickets inclosed in the envelopes, which purported to be issued by the Louisiana State Lottery Company, were a corporation, as they purported to be, and that they had or carried on a real lottery. There was abundant evidence in the case to justify

the denial of this motion, that there were some parties purporting to be and calling themselves by the name of the Louisiana State Lottery Company, who were carrying on a lottery; but it was wholly immaterial whether they were the same persons named in this act, or whether those persons had accepted their charter or not. It was none the less a lottery in fact, and within the prohibition of the statute, whether legally established or wholly illegal, whether its promoters were duly incorporated or not. Indeed, we think that the mailing of a letter or circular concerning a projected lottery, one not yet in existence, would clearly be within the letter and the spirit of the statute, if it were a letter or circular promoting or designed to aid in the organization and setting up of a lottery. There was, therefore, no reason why, at this stage of the case, the court should direct an acquittal of the defendant when the papers themselves, with the mailing of which he was charged, bore on their face strong, if not conclusive, evidence that they related to an existing or established lottery. No more evidence of the existence of a lottery need to have been given to justify a conviction than the papers and tickets inclosed in the envelope.

§ 986. *The occupation of the defendant and other extraneous circumstances are properly to be considered by the jury.*

(12) The remaining exceptions are to the judge's charge to the jury. The judge charged the jury, among other things, as follows: "In order to convict you must find that it is a letter concerning a lottery, in the one case, and a circular concerning a lottery in the other; and in determining that question you are not confined to the words in the paper. You may look at the surrounding circumstances—the letter sent, which was the order, the tickets inclosed in Exhibit No. 1 (*i. e.*, the letter set out in the first count), apparently in compliance with the order, the occupation of the defendant, and all the other circumstances in the case, in order to determine whether or not that letter, forming the subject of the first count, was concerning a lottery. If you find that it was concerning a lottery, then it was an illegal article in the mail, in case you find it to have been there deposited. If you find that this Exhibit No. 1 was deposited in the mail, and you find that these two papers that were in it, in one case, a letter, and, in the other case, a circular, were concerning a lottery, then the question arises: Who deposited these papers in the mail? Before proceeding to that, I should remark that there has been evidence going to show the existence of a lottery known as the Louisiana State Lottery. The evidence from the statute book of the state of Louisiana, together with the sale of the tickets put in evidence, in the absence of any evidence to the contrary, will justify you in finding that there is such a lottery as the Louisiana State Lottery. If you find that this letter, Exhibit No. 1, was deposited in the mail, and that the papers in it are concerning a lottery in existence, the Louisiana State Lottery, you then come to the question whether the defendant is shown to have deposited Exhibit No. 1 in the mail, as charged." The court further charged the jury that they must be satisfied, beyond a reasonable doubt, that the letter, Exhibit No. 1, was mailed, that the papers in it were concerning a lottery, and that the man who deposited it, or caused it to be deposited, was the defendant. The defendant excepted to that part of the foregoing portion of the charge which states that the occupation of the defendant is to be considered in determining whether the letter concerns a lottery, and that the jury may resort to surrounding circumstances to determine as to the character of the letter and circular; also, to the language, "that the evidence of the

statute book and the sale of the tickets here prove that there is such a thing as the Louisiana Lottery."

Thereupon the court further charged, that the evidence of the statute of Louisiana, and of the sale of tickets, was evidence from which the jury might conclude that there was such a lottery, in the absence of proof to the contrary. To this further charge the defendant excepted.

That the defendant's occupation, of a dealer in lottery tickets, and the other extrinsic circumstances, were proper to be considered by the jury, on the question whether the letter related to a lottery, if, in their judgment, they threw any light on the meaning of the letter, in case its meaning was doubtful, which it does not seem to us to have been, we think there can be no question. A party's acts and declarations may always be resorted to to show the meaning of his writings, and obscure or doubtful expressions can often be elucidated only by a reference to surrounding circumstances.

There was no ground of exception in that part of the charge which, upon the question whether the letter was concerning a lottery, allowed the jury to consider the fact that there was such an act on the statute book of Louisiana. In determining whether or not there was such a lottery as that named upon the papers inclosed with the letter, the fact that such an act had been passed was a circumstance that was competent evidence. The tickets and papers inclosed were such as would be likely to follow and result from the passage and acceptance of such an act, and, although there was no other evidence that the statute had been ever acted upon, these papers were, we think, some evidence of that fact, and there was a correspondence and apparent connection between the act and the tickets and papers, which made the act, without further evidence of any action taken under it, a circumstance tending to show that there was, in fact, such a lottery. As we have held above, the regularity of the organization of the company, or the legality of the acceptance of the charter, or its continued legal existence, were wholly immaterial, and aside from the question in this case. In the particulars thus excepted to, we think the defendant has no just ground of complaint.

(13) The judge also charged the jury as follows: "If you find that the accused received an order for two half tickets, such as were in the letter, Exhibit No. 1, together with \$2 inclosed therefor, sent to him under a fictitious name, and if you find that Exhibit No. 1 was thereafter deposited in the postoffice for mailing, and was a compliance with the order which the accused had received, those circumstances, together with the undisputed fact that the accused was engaged in selling lottery tickets, that the name used in the address of the letter in Exhibit No. 1 was the same as that signed to the order, and was fictitious, and that the letter was accompanied with tickets bearing his stamp and his business card, in the absence of evidence tending to show the contrary, will justify the conclusion that the defendant was the person who did deposit in the postoffice, for mailing, the letter, Exhibit No. 1, or procured it to be so deposited." To this part of the charge the defendant excepted. The judge also, in the same connection, distinctly charged the jury that this was a question of fact for them to pass upon, and that they should give the defendant the benefit of any reasonable doubt arising from the lack of sufficient evidence; that, if the evidence given on the part of the government did not satisfy their minds on the disputed question of fact, they were to give him the benefit of the doubt; but that, if they were satisfied beyond a reasonable doubt, it was their duty to convict him. We think there was no error in this portion of the

charge. The question of fact was fairly submitted to the jury, and the matters referred to by the court were such as they had the right, and were bound, to consider, in determining that question.

§ 987. *The presumption from a postmark that a letter was mailed is not overthrown by proof that sometimes envelopes have been postmarked which were not in fact mailed.*

(14) The defendant's counsel requested the court to charge as follows: "No presumption arises, in this case, from the impression of a postoffice stamp upon the envelope inclosing either of the papers in evidence, as to the mailing of any or either of such papers." The court refused so to charge, and the defendant excepted. The letters in question bore the stamp or mark of the New York postoffice, and it is conceded that the general rule is that such a stamp or mark would be *prima facie* evidence that the letter had been in the mail; but it is contended that no such presumption arises in this case, because there is evidence that the witness Comstock, who testified that he took these letters from the mail, also testified that he had received from the postmaster at Trenton, New Jersey, and other postmasters, during the past twelve months, a large number of empty envelopes, bearing the stamp of their postoffices, which had never been through the mail. The letter or order referred to in the charge to which the letter, Exhibit No. 1, appeared to be an answer, was testified to by the witness as being inclosed in such a stamped envelope, bearing the postmark of the Trenton office; and he testified that he delivered it to the superintendent of the registered letter department of the New York postoffice, on the 6th of November, 1879, the day after its date, and the day before the date of Exhibit No. 1. The argument is, that this evidence shows such a deviation from the system of business on which this presumption rests, that the presumption fails. We think, however, that there is nothing in this evidence which controls, or prevents the application of, the general rule of evidence, that the regular postmark is presumptive evidence of the mailing of the letter. It does not show, as the defendant's counsel claims, any "gross irregularities on the part of officials of the postoffice," or that "the supposed system is so disregarded as to be no system." Notwithstanding the occasional departures from the rule shown, which appears to have been in aid of justice, the general rule still remains, that the postmark is an indication that the letter offered in evidence has been through the mail.

Upon the whole case, therefore, we find no error upon the trial, and the motion for a new trial must be overruled.

IN RE JACKSON.

(Circuit Court for New York: 14 Blatchford, 245-253. 1877.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—On the 8th of March, 1877, a United States commissioner for this district issued a warrant to the marshal, which recited that complaint on oath had been made to him, charging that A. Orlando Jackson did, on or about the 23d of February, 1877, "at the southern district of New York, unlawfully, wilfully and knowingly deposit and cause to be deposited in the postoffice and mails of the United States, then and there, for mailing and delivery, certain circulars concerning lotteries," and commanded him to apprehend said Jackson. Jackson was arrested under this warrant, and brought before the commissioner on the 13th of March, and was

identified as the party charged, and discharged on bail to await trial. Subsequently he was surrendered by his surety, and he demanded an examination before the commissioner on the charge, and it was had, and the commissioner, on the 2d of May, decided that there was probable cause to believe that Jackson committed the offense charged, and he committed him to the custody of the marshal, to await the action of the grand jury, in default of \$500 bail. Thereupon he has been brought before this court on a writ of *habeas corpus* issued to inquire into the cause of his imprisonment, and the proceedings which took place before the commissioner have been brought before this court by a writ of *certiorari*. It appeared before the commissioner that Jackson, on the 23d of February, 1877, deposited in the postoffice at New York city, to be conveyed by mail, a sealed letter envelope, addressed as follows: "J. Ketcham, Lock Drawer 164, Gloversville, N. Y.," and which contained circulars concerning a lottery described as "The Kentucky State Lottery, Simmons and Dickinson, Managers," and also circulars concerning Louisiana and Havana lotteries, the postage on which was duly prepaid by stamps, and that the above named lotteries were authorized by the laws of the respective states of Louisiana and Kentucky, and of the kingdom of Spain.

§ 988. *Section 3894 of the Revised Statutes, as amended by the act of July 12, 1876, prohibiting the carrying in the mails of circulars or letters (sealed or unsealed) concerning lotteries, is constitutional and valid. (a)*

The prosecution in this case is founded on section 3894 of the Revised Statutes, which, as amended by section 2 of the act of July 12, 1876 (19 U. S. Stat. at Large, 90), provides that "no letter or circular concerning lotteries, so-called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretenses, shall be carried in the mail;" and that "any person who shall knowingly deposit or send anything to be conveyed by mail, in violation of this section, shall be punishable by a fine of not more than \$500, nor less than \$100, with costs of prosecution." The amendment of 1876 consisted in striking out the word "illegal" before the word "lotteries," from the section as originally enacted in the Revised Statutes. A part of the statutory provision embodied in section 3894 of the Revised Statutes was originally enacted July 27, 1868, as section 13 of the act of that date (15 U. S. Stat. at Large, 196), in these words: "It shall not be lawful to deposit in a postoffice, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." No specific penalty or punishment was imposed for a violation of this provision. On the 8th of June, 1872, it was enacted as follows, by section 179 of the act of that date (17 U. S. Stat. at Large, 302): "It shall not be lawful to convey by mail, nor to deposit in a postoffice to be sent by mail, any letters or circulars concerning illegal lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, and a penalty of not more than \$500, nor less than \$100, with costs of prosecution, is hereby imposed, upon conviction, in any federal court of the violation of this section." It is to be noted that the word *illegal* was not in the act of 1868, but was inserted in the

(a) The power possessed by congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. *Ex parte Jackson*, 6 Otto, 727.

act of 1872, and continued in the Revised Statutes, and stricken out by the act of 1876.

Congress has, at various times, exercised the power of excluding from the mail various articles, capable of being conveyed in sealed letter envelopes, and of declaring it to be a punishable offense to deposit such articles in the mail. By section 148 of the act of June 8, 1872 (17 U. S. Stat. at Large, 302), it was enacted that no obscene book, pamphlet, picture, print or other publication of a vulgar or indecent character, shall be carried in the mail, and that any person who shall knowingly deposit for mail or for delivery any such obscene publication shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every such offense, be fined not more than \$500, or imprisoned not more than one year, or both, according to the circumstances and aggravation of the offense. By section 2 of the act of March 3, 1873 (17 U. S. Stat. at Large, 599), such inhibition was extended to every "obscene, lewd or lascivious book, pamphlet, picture, paper, print or other publication of an indecent character," and to every "article or thing designed or intended for the prevention of conception or procuring of abortion," and to every "article or thing intended or adapted for any indecent or immoral use or nature," and to every "written or printed card, circular, book, pamphlet, advertisement or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means, either of the things before mentioned may be obtained or made;" and it was enacted that any person who shall knowingly deposit, or cause to be deposited, for mail or delivery, any of said articles or things, or any notice or paper containing any advertisement relating to said articles or things, and any person who, in pursuance of any plan or scheme for disposing of any of said articles or things, shall take, or cause to be taken, from the mail any such letter or package, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offense, be fined not less than \$100, nor more than \$5,000, or imprisoned at hard labor not less than one year, nor more than ten years, or both, in the discretion of the judge. These provisions were re-enacted in section 3893 of the Revised Statutes, and by section 1 of the act of July 12, 1876 (19 Stat. at Large, 90).

It is contended for the relator, that, if section 3894 can be construed to cover sealed letters, it is void, as not within any power conferred on congress by the constitution. The argument is, that prior to the adoption of the constitution, which conferred on congress (art. 1, sec. 8) the power "to establish postoffices and post-roads," the states and the people had enjoyed for many years the right of having conveyed by post all sealed letters, without reference to their contents (unless such contents were liable to destroy, deface or otherwise injure the contents of the mail-bag, or the persons of those engaged in the postal service, such as liquids, poisons, glass or explosive materials); and that such grant of power must be construed as not authorizing congress to exclude from the mail what was legitimate mail matter at the time of the adoption of the constitution. It is further said that congress is bound to provide for carrying by mail everything which it prohibits from being carried otherwise than by mail; and that it has made it a punishable offense to carry letters for hire outside of the mail. It is further said that the exercise of a power absolutely to prohibit the carrying in the mail of sealed letters containing information of a certain character is not the exercise of a power which is either proper or necessary for carrying into execution the power of establishing postoffices and post-roads; that a power of exclusion, based upon the contents of sealed letters, is an arbitrary power, and

may be extended to the exclusion of matters which depend on caprice or whim; and that the exclusion in the present case extends to matters which are lawful under the laws of some of the states of the Union, and to matters over which the federal government has no jurisdiction.

On the part of the United States it is contended that it is within the constitutional power of congress to determine what shall be mail matter; and that, in pursuance of such power, it may lawfully exclude certain articles and things from the mail, although such articles and things are contained in sealed envelopes, and may declare it to be an offense to deposit such articles and things in the mail.

The meaning of the clause in the constitution (art. 2, sec. 8), that congress shall have power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers," has been settled by judicial construction. It does not mean that no law is authorized which is not indispensably necessary to give effect to a specified power. Congress possesses the choice of means, and is empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution. *United States v. Fisher*, 2 Cranch, 358, 396. The necessity spoken of in the clause is not to be understood as an absolute one, but congress is to be allowed that discretion with respect to the means by which the powers conferred on it are to be carried into execution which will enable it to discharge the high duties assigned to it in the manner most beneficial to the people. If the end is legitimate and within the scope of the constitution, then all means which are appropriate, and are plainly adapted to that end, and are not prohibited, but consist with the letter and spirit of the constitution, are constitutional; and, if a particular law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, an inquiry by a court into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. *McCulloch v. State of Maryland*, 4 Wheat., 421, 423 (Constr., §§ 380-398); *Legal Tender Cases*, 12 Wall., 539.

The principal argument on the part of the relator is, that, inasmuch as the exclusive power is given to congress to establish postoffices and post-roads, it is not authorized to refuse to carry in the mail anything which was lawful mail matter at the time the constitution was adopted. This line of reasoning has been sought to be applied to other matters of federal cognizance, but has not met with favor. Thus, congress is authorized to establish uniform laws on the subject of bankruptcies throughout the United States; and it has been contended, in respect to laws on that subject which have been enacted by congress, that the power of congress is limited to the principle on which the English bankruptcy system was founded when the constitution was adopted, and cannot extend to authorizing voluntary bankruptcies, or to putting into involuntary bankruptcy others than traders, or to granting discharges without the consent of creditors, or to authorizing such compositions as are now provided for. But the view has prevailed, that congress, in passing laws on the subject of bankruptcies, is not restricted to laws with such scope only as the English bankruptcy laws had when the constitution was adopted, and that it is sufficient if the statute relates to the subject of bankruptcies. *In re Klein*, 1 How., 278; *In re Silverman*, 1 Saw., 410; *United States v. Pusey*, 6 N. B. R., 284; *In re Reiman*, 7 Ben., 455, and 12 Blatch., 562. So, also, in respect to admiralty and maritime jurisdiction. The constitution declares (art. 3, sec. 2) that the judicial power of the United States shall extend to all cases of admiralty and mari-

time jurisdiction. Prior to the decision in the case of *The Propeller Genesee Chief v. Fitzhugh*, 12 How., 443, it had always been understood and held that, under the constitution, such jurisdiction was confined to tide-waters. In that case it was held that, according to the true construction of the grant in the constitution, the admiralty jurisdiction extended to all public navigable waters, whether influenced by the tide or not. In England, in the text-writers and the decisions, the jurisdiction of the admiralty had always been spoken of as confined to tide-water; tide-water and navigable water being, in England, synonymous terms, and "tide-water" meaning, in England, nothing more than public rivers as contradistinguished from private ones. At the time the constitution was adopted, and our courts of admiralty went into operation, the English definition of the jurisdiction, that it was confined to the ebb and flow of the tide, was adopted here by the courts. But it afterwards became evident that a definition which would limit public rivers in this country to tide-water rivers was utterly inadmissible, and it was held that the lakes and the waters connecting them were public waters and within the grant of admiralty and maritime jurisdiction in the constitution.

§ 989. *In what manner a grant of power to congress in the constitution is to be construed.*

These illustrations serve to show that, in construing a grant of power in the constitution, it is to be construed according to the fair and reasonable import of its terms, and its construction is not necessarily to be controlled by a reference to what existed when the constitution was adopted. A power to establish postoffices and post-roads is executed by the single act of making the establishment; but under such power it has always been held to be lawful to carry the mail along the post-road, from one postoffice to another, and to punish those who steal letters from the postoffice or rob the mail. So, under the power to establish postoffices and post-roads, it must be held that congress has the right to prescribe what it will carry along the post-road as part of the mail, and what it will not carry, and to render its enactments efficient by punishing as an offense the violation of them. Whether certain things shall be excluded or not is a matter for the sound discretion of congress, and the discretion of a court cannot be substituted for the discretion of congress. The discretion of congress cannot be fettered by the consideration that a given thing was generally or even universally allowed to be carried in the mail when the constitution was adopted. To argue against the existence of such discretion because it is possible for congress to abuse its exercise, by excluding from the mail letters containing matter of a given character, through caprice or from partisan prejudice, is to argue against the existence of all discretion in congress in the exercise of any of the powers conferred on it. All such discretion may be abused, but the correction of the abuse must be left, under our form of government, to the expression of the will of the people by means of the elective franchise. The existence of the abuse is no argument against the existence of the power. Because an individual judge might not, if a legislator, have thought it wise to exclude from the mail a sealed letter containing matter of a given character, it is not for him, in the exercise of his judicial functions, to hold that such exclusion is not within the constitutional authority of congress.

Whether the provisions of law which forbid and punish the carrying of letters outside of the mail will be construed as applying to letters which congress forbids to be carried in the mail is a question which does not arise in this case. It is, undoubtedly, not indispensably necessary to the exercise of the power of

establishing postoffices and post-roads, that letters or circulars concerning lotteries should be excluded from the mails. But congress is not prohibited from excluding them, and, if congress regards it as most beneficial to the people, and as calculated to effect in the most proper manner the objects of establishing postoffices and of carrying the mail, to exclude from the mail letters concerning lotteries, whether legal ones or illegal ones, it is for congress, and not for a court, to judge of the degree of necessity for such exclusion. It is also contended, for the relator, that section 3894 of the Revised Statutes does not create any crime or offense against the United States. This is not so. The word "punishable," and the fact that the amount of the fine imposed is discretionary, indicate that a crime is intended and not a pecuniary penalty to be recovered by a civil action.

§ 990. *Although the only punishment prescribed by a statute be a fine, the offender may be arrested and imprisoned or bailed and held for trial.*

It is further urged that, because the only punishment is a fine, and there can be no imprisonment except for the non-payment of the fine, the relator cannot be arrested and deprived of his liberty in the first instance. But section 1014 of the Revised Statutes provides that, for any crime or offense against the United States, the offender may be arrested and imprisoned or bailed for trial. If there be a crime or offense, an arrest for trial may be made, to be followed by imprisonment if no bail is taken, or by bail, even though the punishment, on conviction, be a fine alone. The arrest is made to secure a trial for the offense.

The writ is dismissed and the relator is remanded to the custody of the marshal under the process of commitment by which he was held.

UNITED STATES v. JONES.

(Circuit Court for New York: 10 Federal Reporter, 469-471. 1882.)

Opinion by BENEDICT, D. J.

STATEMENT OF FACTS.—The accused was tried upon an information framed under section 5480 of the Revised Statutes. Having been convicted he now moves for a new trial. One ground of the application is that the evidence failed to make out an offense such as is described in section 5480. The evidence was, and the jury under the charge must have found, that the accused devised a scheme to put counterfeit money in circulation by sending through the mail to one Bates a letter calculated to induce Bates to purchase counterfeit money at a low price, for the purpose of putting it off as good. The evidence further showed, and the jury found, that the accused, in order to carry his said scheme into effect, did place in the postoffice at New York city a letter such as described in the information, for the purpose of inducing Bates to purchase counterfeit money at a low price, in order that he might put it off as good money for its face value. This evidence was sufficient to make out an offense such as is created by the statute under which this information was framed, notwithstanding the absence of any evidence to show an intention on the part of the accused to defraud Bates or any other particular person.

§ 991. *What is a scheme to defraud under Revised Statutes, section 5480.*

The scheme to defraud described in the information may be a scheme to defraud any person upon whom the bad money might be passed, and it is within the scope of the statute, although no particular person had been selected as

the subject of its operation. Any scheme, the necessary result of which would be the defrauding of somebody, is a scheme to defraud within the meaning of section 5480, and a scheme to put counterfeit money in circulation is such a scheme. We are, therefore, of the opinion that the offense charged was proved by the evidence.

§ 992. *Corpus delicti may be proved by defendant's admission.*

Another point taken is that there was no evidence of the *corpus delicti* except the defendant's admission. But the gist of the offense consists in the abuse of the mail. The *corpus delicti* was the mailing of the letter in execution of the unlawful scheme. There was direct evidence of the mailing of the letter by some one, and the letter itself showed its unlawful character. This much being shown, it was certainly competent to prove that the defendant was the sender of the letter by his admission to that effect.

§ 993. *Evidence of handwriting; proof by experts.*

Another point made is that error was committed at the trial by the refusal to permit the jury to inspect a copy of the letter proved to have been mailed, which copy the accused made in the presence of the jury. In this there was no error. It is not allowable, upon an issue as to handwriting, to put in evidence papers, otherwise irrelevant, merely for the purpose of enabling the jury to institute a comparison of the writing. The statute of the state of New York, permitting a comparison of writings for the purpose of determining handwriting, has no effect upon criminal proceedings in the courts of the United States. In those courts the extent of the rule is to permit the jury to compare writings lawfully in evidence for some other purpose. It has never been permitted to introduce writings for the mere purpose of enabling the jury to institute a comparison of writings. To permit the practice here sought to be established would be to permit the defendant to make evidence for himself.

The last point made is that error was committed in refusing to permit an expert in handwriting to say whether the original letter put in evidence by the government, and the copy of it made by the accused in the presence of the jury, were in the same handwriting. Here was no error. It was not shown that the expert knew the defendant's handwriting, and whether the two letters were in the same handwriting was immaterial, except upon the assumption that because the copy of the letter was made by the defendant it was in his usual handwriting,—an assumption by no means justifiable by the circumstances under which the copy was made. The motion is accordingly denied.

UNITED STATES v. KELLY.

(Circuit Court for Nevada: 8 Sawyer, 566-571. 1876.)

STATEMENT OF FACTS.—Indictment of the publisher of a newspaper for mailing a newspaper containing an advertisement of a person proposing to furnish advice and remedies to prevent conception, and procure abortion, in violation of section 3893, Revised Statutes. There was a demurrer to the indictment.

§ 994. *Mailing an advertisement giving information where advice and material for preventing conception and procuring abortion can be procured is a violation of section 3893, Revised Statutes. Rule for construing such advertisement.*

Opinion by SAWYER, J.

We think, upon examination, that there can be no doubt as to what anybody would understand from this advertisement. In it the doctor has particu-

larly included and pointed out all diseases, private and otherwise, and then he refers to "*other troubles*." He refers to any occasion why an increase of family should not be desired. It is true he has not used the word "prevent." He has been very cautious; but what, evidently, is the meaning intended to be conveyed? He does not use language so direct as he might possibly have done, but, if the advertisement gives the forbidden information indirectly, it is as much within the prohibition of the law as if it were given in direct terms. It appears to us that the information prohibited by law is undoubtedly furnished. No one who desired to find a party with whom to confer as to these remedies, or from whom to receive advice with regard to procuring abortion or the prevention of conception, would have any difficulty in understanding that this party, W. K. Dougherty, had given notice that he could and would give that advice, and furnish those remedies. The language of this advertisement must be understood as its author intended it should be. Chief Justice Shaw thus states the doctrine of intent: "It is a general rule of construction in actions of slander, indictments for libel, and other analogous cases, where an offense can be committed by the utterance of language, orally or in writing, that the language shall be construed and understood in the sense in which the writer or speaker intended it. If, therefore, obscure and ambiguous language is used, or language which is figurative or ironical, courts and juries will understand it according to its true meaning and import, and the sense in which it was intended, to be gathered from the context, and from all the facts and circumstances under which it was used." *Commonwealth v. Kneeland*, 20 Pick., 206; 1 Bish. Cr. L., sec. 914.

"In like manner the form of the libel is immaterial; for, if the language is ironical, or is otherwise so framed as not to convey directly the idea meant, yet, if it is adapted to accomplish the evil purpose, it is sufficient." *Id.*, sec. 915. Hawkins adds, "that a defamatory writing expressing only one or two letters of a name in such a manner that, from what goes before and follows after, it must needs be understood to signify such a particular person, in the plain, obvious and natural construction of the whole, and would be perfect nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say that a writing which is understood by every, the meanest, capacity, cannot possibly be understood by a judge and jury." *Id.* It seems to us that this language is particularly applicable to this case. Is it possible to doubt that the language of this advertisement is so framed as to convey, if not directly the idea meant, at least indirectly, or that it accomplishes the evil purposes sought to be avoided by the statute? Is it possible for anybody to read this advertisement and not understand that he can find medicine, advice and treatment at the place mentioned for the purposes which are by the statute forbidden? We think that no private party in search of such remedies and no judge or juror would be at a loss to understand the meaning of this advertisement, however cautiously worded to escape the penalty of the law. Indeed, we think the information prohibited by statute is directly conveyed.

§ 995. *It is not necessary that an indictment should allege the particular articles intended to prevent conception, etc.*

It was further said, in objection to this indictment, that some particular article or thing should be specifically described in the advertisement mailed, and that none is so described. We do not think it necessary that any particular

article or its specific properties should be indicated in the advertisement. W. K. Dougherty advertises that he will not only give advice, but furnish the remedies to accomplish the forbidden purposes. He does not point out the remedies specifically and state what they are; and it is not necessary that he should do so. It is sufficient if he advertises that the remedies can be furnished by him, and where and under what circumstances they can be obtained. We think the language used is sufficiently specific to sustain the indictment. This law was not passed without an occasion for it. Usually statutes are not passed to meet an emergency until an emergency arises or is anticipated in some way. It is not to be expected that a quack doctor will advertise in plain express terms that he will furnish the means for the prevention of conception or to procure abortion. Such an advertisement probably never has been and never will be published. It is doubtful if any one more specific than this has ever been published. Undoubtedly advertisements of this character have been published for many years extensively; and to meet this class of cases, among others, the statute was passed. If this advertisement does not fall within the purview of the statute, it may well be regarded as a useless enactment. It will certainly fail to accomplish the purposes intended.

This indictment charges the defendant with mailing a paper which gave information where the remedies or article or thing could be "obtained and made." It is claimed that it is insufficient on that ground, whatever the proof may be. We do not think it necessary to prove the conjunctive. Two cases were cited by defendant's counsel, which were supposed by him to sustain his views, but we do not think his position is sustained by those cases; on the contrary, the authorities cited, properly considered, are against him. "Thus," says Mr. Bishop, "if the charge is that the defendant did such and such things to the disturbance of a public meeting, so much of those specific things must appear in the evidence to have been done as were necessary to constitute the offense; it not being permissible to show instead other acts of disturbance which would have been sufficient had they been alleged." Bish. on Cr. Pro., sec. 234. "And where a statute made it an offense to be a common seller of 'spirituous or intoxicating liquors' without license, and the defendant was charged with being such common seller of 'spirituous and intoxicating liquors,' it was held that, though proof of the liquor being either spirituous or intoxicating, would satisfy the demands of the statute, yet, to meet the allegation of the indictment, it must be shown to be both." Id. That is very true in that case. The words spirituous and intoxicating describe the particular liquors—they are descriptive of the liquors, *i. e.*, those liquors were both spirituous and intoxicating. See, also, sec. 336, Bish. on Cr. Pro. The proof of a sale of spirituous but not intoxicating, or intoxicating but not spirituous, liquors would not establish the sale of the kind of liquors alleged, and thus there would be a variance.

In this case the statute makes it an offense to mail a notice showing where or how, or of whom, or by what means the articles may be obtained or made; but the indictment alleges it, in the conjunctive, "where they may be had and made." The proof of either is an offense, and proof of either would be sufficient to support the charge made in the indictment. This, however, is a question of proof which does not affect the decision on demurrer.

We are of the opinion that the indictment is good, and that the demurrer should be overruled.

UNITED STATES v. BOTT—SAME v. WHITEHEAD.

(Circuit Court for New York: 11 Blatchford, 346-349. 1873.)

Opinion by BENEDICT, J.

STATEMENT OF FACTS.—The above named defendants were separately indicted under section 148 of the act of June 8, 1872 (17 U. S. Stat. at Large, 302), as amended by section 2 of the act of March 3, 1873 (id., 599), which provides "that no obscene, lewd or lascivious book, pamphlet, picture, paper, print or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means, either of the things before mentioned may be obtained or made, . . . shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things, or any notice or paper containing any advertisement relating to the aforesaid articles or things, . . . shall be deemed guilty of a misdemeanor."

§ 996. *It is not a defense to an indictment for depositing in the mail an article "designed to prevent conception," etc., that such article so deposited was harmless and would produce no such effect.*

The first question which it is proposed to consider is, whether, upon an indictment charging the defendant Bott with depositing in the mail a certain powder designed and intended for the prevention of conception or procuring of abortion, he may show, as matter of defense, that the powder which he deposited in the mail would not, in fact, have any tendency to prevent conception or procure abortion, and that its harmless character was known to the defendant when he made the deposit in the mail. Upon this question my opinion is, that such facts do not constitute a defense. Congress has exclusive jurisdiction over the mails, and may prohibit the use of the mails for the transmission of any article. Any article of any description, whether harmless or not, may, therefore, be declared contraband in the mail, by act of congress, and its deposit there be made a crime. But the protection of the mails is the limit of the power of congress over the matter in question, and the words of the statute under consideration must be construed with reference to this limitation. The prevention of abortion in the several states is not within the power which, under the constitution, belongs to the United States. That duty is upon the states. It cannot, therefore, be thought that congress proposed by the words, "designed or intended for the prevention of conception or procuring abortion," to make the intent to prevent conception or to procure abortion an element of an offense against the United States. These words, consequently, should not be considered as intended to describe the intent which must be an element of the crime against the United States, but simply as descriptive of the article made contraband; and the phrase must be understood to indicate as contraband in the mail any article or thing designed, in a manner calculated to secure its use by any one, for the purpose of preventing conception or procuring abortion. The crime against the United States relates only to matter in the mails. The unlawful act of depositing contraband matter, coupled with the intent to deposit such matter, constitutes the crime. The guilty intent appears from the fact of the deposit of such matter by one knowing what article he deposits.

The evidence of the crime is, therefore, complete, when the act and the knowledge are shown. Whether the article would, in reality, accomplish the result represented to be its effect, or whether the defendant desired or expected such a result, thus appears immaterial.

If this view of the law be correct, evidence tending to show the harmless character of the powders, and also evidence that the powders were known to the defendant to have been ordered of him by a man, and for the purpose of obtaining evidence on which to base a prosecution, and were made harmless in order to dupe, was properly excluded. If such facts were shown, it would still be true that the defendant deposited in the mail powders which have been found to be put up in a form, and described in a manner, calculated to insure their use, for the prevention of conception, by any one desiring to accomplish that result, and into whose hands they might fall.

§ 997. *On an indictment for depositing in the mail, etc., the fact that the contraband articles are not procurable at the place designated in the advertisement or notice is no defense.*

A similar question arises under the indictment against Whitehead, which charges the deposit of an advertisement or notice giving information where and of whom certain of the articles made contraband by the statute could be obtained. The evidence showed the deposit of a notice stating that certain articles contraband by the statute could be obtained at a designated place. This being shown, whether, in point of fact, the information in the notice was true, and whether such articles were at the place designated, is of no consequence. The paper in the mail is the same, whether its statements be true or false; and the object of the statute is to keep such papers out of the mails. Whether such articles should be procurable or not, it is not for congress to say, but congress can prohibit the transmission, in the mails, of papers containing such objectionable matter, as a notice that indecent pictures, and articles to be used for the purpose of procuring abortions, are obtainable at certain places. This power has been exercised in the enactment of the present statute, and the crime created by the statute is complete when such objectionable matter is knowingly deposited in the mail.

The same conclusion may be arrived at by giving to the word "designed," as used in this statute, the signification of "designated," which is one of the ordinary meanings of the word. The powders which the defendant Bott deposited in the mail were clearly designated as articles for the prevention of conception, and were, therefore, within the prohibition of the statute. These views dispose of all the questions which have been raised in these cases, and the result is, that the motions for new trials are denied.

UNITED STATES v. SMITH.

(Circuit Court for Kentucky: 11 Federal Reporter, 663-665. 1893.)

Opinion by BARR, D. J.

STATEMENT OF FACTS.—The information in this case alleges that the defendant Smith did knowingly deposit, for mailing and delivery in the mails of the United States, "a certain postal card, upon which indecent and obscene epithets, terms and language" were written, to wit:

"Oct. 19, 1881.

"DR. SIR: Your P. C. this date rec'd & in reply having had one business transaction with you which fully developed you to me as a d—n scoundrel

and rascal, I beg that all transactions in a business manner cease between us & that no further business relations ever to exist.

“Respectfully, F. A. SMITH.”

This was directed to “F. M. Laswell, Esq., Glasgaw, Kenty.”

The defendant admits writing, and depositing in the mail, this postal card, and the question arises whether this is an offense within the meaning of an act approved July 12, 1876, amending section 3893 of the Revised Statutes, providing a penalty for mailing obscene books, etc. That law enacts that section 3893 of the Revised Statutes shall be and is hereby amended so as to read as follows: “Every obscene, lewd or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where or how or of whom, or by what means, any of the hereinbefore mentioned matters, articles or things may be obtained or made, and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene or lascivious delineations, epithets, terms or language may be written or printed, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any postoffice, nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, . . . shall be deemed guilty of a misdemeanor, and shall for each and every offense be fined not less than one hundred nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court.” Supp. R. S., 229.

§ 998. *What is the meaning of the word “indecent,” as used in the act of July 12, 1876, prohibiting the mailing of improper matter.*

The language of this postal card is not obscene, but it is insisted that it is indecent within the meaning of this law. A brief review of the legislation of congress upon this subject will aid in coming to a correct conclusion as to the meaning of the word “indecent” as used in this act. The first act upon this subject was approved March 3, 1865, and in that act the language was “no obscene books, etc., . . . or other publication of a vulgar and indecent character.” The next act was approved June 8, 1872, and provided that “no obscene book, etc., . . . or other publication of a vulgar or indecent character, or any letter upon the envelope of which, or postal card upon which, scurrilous epithets may have been written or printed, or disloyal devices printed or engraved, shall be carried in the mail.” The next act was March 3, 1873, and that provided “no obscene, lewd or lascivious book, etc., . . . or other publication of an indecent character, . . . nor any written or printed card, circular, . . . upon which scurrilous epithets may be, . . . shall be carried in the mails,” etc. The title of this act is “An act for the suppression of trade in and circulation of obscene literature and articles of immoral use.” Section 3893 of the Revised Statutes provided that postal cards upon which “indecent or scurrilous epithets are written or printed should be non-mailable.”

It will be noticed, from this review of the legislation of congress, that the act of 1873 omitted the words “disloyal devices,” which was in the act of 1872, but retained the word “scurrilous,” which was used in the Revised Statutes:

but that the act of 1876 omitted the word "scurrilous," and the law is now substantially as originally enacted in 1865. It is quite clear that the purpose of the act of 1865 was to prevent the mails from being used to circulate obscene literature, pictures, etc., and prevent their use for immoral purposes, such as would give information in regard to abortions, etc. The connection in which the word "indecent" is used, taken with the history of the legislation upon the subject, leads me to the conclusion that it means immodest, impure, and that language which is coarse or unbecoming, or even profane, is not within the inhibition of this act. This construction harmonizes with the other provisions of the act, and a broader definition of the word "indecent" would lead us beyond its spirit, and into an uncertain and boundless field of construction. The information should be quashed.

UNITED STATES *v.* WILLIAMS.

(Commissioner's Court, New York: 3 Federal Reporter, 494-491. 1890.)

ALLEN, Commissioner.

STATEMENT OF FACTS.—The defendant is charged with having violated the provisions of section 3893, U. S. Revised Statutes, as amended by section 1, act of July 12, 1876 (19 U. S. St., 90). The portion of the statute to which the charge relates is as follows: "Every obscene, lewd or lascivious book, pamphlet, picture, paper, writing, print or other publication of an indecent character, . . . and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene . . . terms or language may be written or printed, are hereby declared to be non-mailable matter. . . . And any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, . . . shall be deemed guilty," etc.

The particular act complained of is the depositing in the mail of the Greenpoint station, Brooklyn, on or about September 23, 1879, an obscene and indecent letter, inclosed in an envelope, addressed to Mr. George Rowland, of Greenpoint.

Several questions are involved in this case: Is the letter referred to obscene or indecent? Is it such an one as is embraced by the statute? Was it deposited in the mail? And is the evidence such as to justify the belief that the defendant violated the statute, as alleged? The letter is evidently obscene and indecent. Obscene matter is that which tends to deprave and corrupt the morals of those whose minds are open to such influences. This is the test given by Chief Justice Cockburne, in *Regina v. Hicklin*, L. R., 3 Q. B., 360, and adopted in later cases (*United States v. Bennett*, S. D. N. Y., 1879). In the case of *Heywood* (Mass.), an obscene writing was defined as one offensive to decency, indelicate, impure, and an indecent one, as one unbecoming, immodest, unfit to be seen. Applying these tests, it is manifest that the letter in question is both obscene and indecent.

§ 999. *Of what the postmark of a letter is evidence.*

The proof of deposit in the mail consists of the postmark upon the envelope and the testimony of the postoffice officials. Both the English and American courts have held that postmarks afford presumptive proof of deposit in the mail, and, although some effort has been made to show that these postmarks might have been affixed otherwise than by the postal officials, there is sufficient evidence that the letter was deposited in the mail as charged.

The question next to be considered is whether the letter referred to is shown by the evidence to be within the scope of the law. The offense charged is statutory, and the determination of this question depends upon the construction to be given to the statute upon which the charge is based. I find no reported case in which this precise question has been discussed and decided, and it will be necessary, therefore, to refer to the series of legislation upon the subject. The act of March 3, 1865, section 16, provided that "no obscene book, pamphlet, picture, print or other publication of a vulgar and indecent character" should be admitted into the mails, and punished their deposit therein. The act of June 8, 1872, section 148, added to the prohibited matter "any letter upon the envelope of which, or postal card upon which, scurrilous epithets may have been written or printed," and prescribed a penalty for deposit of any "such obscene publications." Then followed the acts of March 3, 1873, and July 12, 1876, which will be referred to hereafter. It is evident that no statute, prior to 1873, declared an obscene private letter contraband. Such a letter is not a "book," "pamphlet," "picture" or "print," and is not covered by the words "other publication," because they refer only to the classes specifically named.

§ 1000. *The transmission through the mails of obscene publications, etc., prohibited by the acts of 1872 and others.*

In the case of Woodhull, S. District N. Y., June, 1873, Judge Blatchford held that as the word "newspaper" was not mentioned in the act of 1872, it was not included within the meaning of the words "other publications;" that the statute, being penal, must be strictly construed, and it meant that, with other publications of the same character, books, pamphlets and prints were included. In the act of 1876 the language is, "obscene book, paper, writing, print or other publication," which means, according to the rule of construction laid down in the Woodhull case, that among the publications prohibited were obscene books, writings and prints. It would seem, therefore, that congress intended the statute to embrace only such writings as are "publications" within the meaning of the law.

§ 1001. — *publication defined.*

A "publication" is defined in the dictionaries as a book or writing published, especially one offered for sale or to public notice; and to publish is defined to issue, to make known what before was private, to put into circulation. Writings are either printed matter or manuscript. The idea of publicity, of circulation, of intended distribution, seems to be inseparable from the term "publication." That only such papers and writings as partake of this character were intended to be declared contraband seems to be indicated by a further review of the series of legislation upon the subject. The words "paper" and "writing" first appear in the act of 1873, the title of which is "An act for the suppression of trade in and circulation of obscene literature and articles of immoral use." The statute is thus declared to be directed only to such literature and articles as are intended for sale and circulation. Section 1 of this act imposes a penalty upon any one who, in any place within the exclusive jurisdiction of the United States, "shall sell, give away, exhibit, or otherwise publish, or have in possession for such purpose, any obscene book, pamphlet, paper, writing, or shall advertise the same for sale."

This section does not punish the preparation of an obscene paper or writing, but the publishing it after it is prepared; nor does it forbid the possession of the same, but possession with intent to publish; thus showing clearly that

congress did not intend that the preparation of a paper or writing should be regarded as the publication of it. The next section provides that "no obscene book, pamphlet, picture, paper, print, or other publication," etc., shall be mailable, and is merely a declaration that the mails shall not be used for the accomplishment of the purposes prohibited in section 1; section 3 forbids the importation of the articles and things previously mentioned; section 4 punishes government officers who abet the violation of the act; and section 5 authorizes a search for and seizure of the things named, by United States marshals, that they may be condemned. The statute was intended to be complete in its scope, and to prevent — *First*, the sale and circulation; *second*, the distribution by mail; *third*, the importation of the literature and articles referred to; and, *fourth*, the seizure and condemnation of the same; and, in order to determine what things are embraced by the act, its several provisions must be construed together.

It will be noticed that "writing" appears only in section 1, as also do "drawing," "representation," "circular;" but it cannot be presumed that congress intended to prohibit the sale and circulation of these things, and yet permit them to be distributed by mail. Manifestly they were intended to be covered by the general designations used in section 2, and the latter, therefore, indicate to what class the things specified in section 1 must belong in order to be within the scope of the statute. Hence, although the word "writing" is not in section 2, it was evidently intended by that section to exclude from the mails all obscene writings which were "publications" of the classes known as books, pamphlets, or papers; and I think it manifest, from what has been said, that congress did not regard a private letter as such a publication, or within the act of 1873. If covered by that act, private letters could be examined and destroyed under the authority given marshals to search for and seize "any such article or thing." So far as "papers" or "writings" are concerned, the act of 1873 does not appear to have been changed by subsequent legislation. Section 2 of the act was revised by the act of July 12, 1876, in which the word "writing" was inserted in the list of non-mailable publications; but this was evidently done, not to enlarge the scope of the act of 1873, but because, in incorporating that act into the Revised Statutes of 1873, its several sections had been separated and classified, and, as they could not readily be viewed together as explaining each other, so much of section 1 was repeated in each separate section as was deemed necessary to make the meaning of the law clear. This repetition of the word "writing" in the revision, therefore, did not render non-mailable any writing not made so by the act of 1873, or not belonging to the classes of publications, the sale and circulation of which that act sought to suppress. Similar repetitions of words of section 1 are found in the other, now separated, sections. Section 1 became section 5399 of the Revised Statutes, in the division of crimes; section 2 appears in section 3893, among the postal laws; section 4 is found in section 1785, relating to the duties of officers; and section 5 is section 2492, concerning imports. In each of these the words "paper," "writing," etc., now appear, although previously section 1 alone contained a full list of the prohibited articles, the other sections referring back to it by general terms. These separated sections also serve to further explain the meaning of the original statute.

Section 1785, Revised Statutes, provides that whoever, being "an officer, agent or employee of the government of the United States, shall knowingly aid or abet any person engaged in any violation of any of the provisions of

law prohibiting importing, advertising, dealing in, or exhibiting or sending or receiving by mail obscene and indecent publications, . . . shall be deemed guilty," etc. The language of this section shows that the provisions of law prohibiting sending or receiving by mail written or printed matter relates to publications. The words "paper" and "writing" appear in each of the above sections relating to the dealing in and circulating, the mailing, the importing, and the seizing and destroying of obscene matter; and those sections, being intimately related and contributory to one design, it must be assumed that all refer to the same class of papers and writings, and to none other. As private letters are evidently not among the papers or writings to which some of those sections relate, it follows that congress did not intend to embrace them within any of the provisions referred to. The term "publication," in the revision, must also be presumed to have the same meaning as in the original act, wherein it expresses more than mere preparation, and possesses the added characteristic of proposed circulation and distribution. The latter part of the statute, relating to the taking of these contraband articles from the mails, also carries out this idea: it punishes not the mere taking, but the taking "for the purpose of circulating or disposing of" them. If it be urged that mailing a letter to another is a publication of it, the reply is that its mailable or non-mailable character must be determined prior to its admission to the mails and before such a publication can occur.

§ 1002. *Transmission of obscene matter in a letter by mail is not prohibited unless the letter is intended to be seen by others besides the person addressed.*

There appears, therefore, little room for doubt, in view of the apparent intention of congress as expressed in the series of legislation referred to, that the scope of the statute does not extend to papers or writings which are not publications within the evident meaning of the law. The object of congress has been declared by the United States supreme court to be to refuse the facilities of the mails for the "distribution of matter deemed injurious to the public morals." *Ex parte Jackson*, 96 U. S., 727. And in the case of *Bennett*, S. Dist. N. Y., 1879, it was said to be the prevention of the use of the mails "for the purpose of disseminating obscene literature." Both these declarations seem to except from the purview of the statute written communications of a private, personal nature, emanating from a single person, and exhibiting no purpose of going beyond the one directly addressed. As the court, in the *Woodhull Case* cited, remarked of newspapers, so it may here be said of private letters, that if it were the intention to include them, nothing could have been easier than to add those words to the general list; but, on the contrary, the statute specifically refers to letters of a single class as contraband. After declaring indecent papers and writings non-mailable, it adds, "and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene . . . terms or language may be written." This addition would be needless if the words "paper" and "writing" were intended to cover every paper and all written matter, because postal cards and envelopes on which obscene language is written are both obscene papers and obscene writings. Hence, the special designation of postal cards and letters indicates that they were not embraced by the preceding words, "paper, writing, or other publications," and that it was not intended to exclude from the mails other letters than those so specifically described.

The reference to letters shows that congress had them in mind, and, by designating a certain class of them as non-mailable, there seems to have been

an intention to confine the prohibition to that class, namely, those wherein the indecent matter is exposed to the inspection of others than the person directly addressed—a distinction in accordance with the spirit of the statute before suggested. The statute is a penal one, and must be strictly construed, and cannot be extended by implication even for the purpose of embracing cases clearly within the mischief intended to be remedied. *Ferrett v. Atwill*, 1 Blatch., 151. A strict construction of the statute in question leaves little doubt as to its proper interpretation. Desirable as it may be that private letters containing indecent expressions should not be admitted to the mails, congress may not have seen fit to exclude them. Until 1865 it permitted the admission to the mails of all sorts of obscene and indecent matter, and it was not until 1873 that it excluded newspapers containing indecent articles; and it may well be doubted whether it has as yet deemed it wise to interfere with private letters which are outwardly unobjectionable. To determine whether the letter in question is within the scope of the statute, it is necessary to refer both to the letter itself and to the testimony relating to it. There is nothing indecent upon the envelope. It is addressed to the person to whom it was delivered, sealed, from the mail, and was first opened by him, and there is no evidence that, prior to that time, the letter inclosed, which is in the form of a private letter, was seen by or known to any one but its author.

There seems to be no doubt that such a letter is not among the class of letters which congress has declared non-mailable, and, if this view of the law is correct, the deposit of it in the mail was not a violation of the statute. If there is a fair doubt whether the act charged is embraced within the prohibition of the statute, the doubt is to be resolved in favor of the defendant. *United States v. Morris*, 14 Pet., 464; *United States v. Wiltberger*, 5 Wheat., 76 (§§ 1633-36, *infra*); *United States v. Whittier*, 18 Alb. L. J., 110 (§§ 1005-1009, *infra*).

This conclusion renders it unnecessary for me to review the evidence bearing upon the question by whom the letter referred to was deposited in the mail, or to express an opinion thereon.

UNITED STATES v. LOFTIS.

(District Court for Oregon: 12 Federal Reporter, 671-674. 1882.)

Opinion by DEADY, D. J.

STATEMENT OF FACTS.—The defendant is accused by the information in this case of “the crime of depositing for mailing and delivery in the postoffice of the United States a publication of an indecent character, and a letter containing indecent and scurrilous epithets, contrary to section 3893 of the Revised Statutes, committed by knowingly mailing at Rainier, in a sealed envelope, postage paid, and addressed to ‘Mr. Joish Way Thayer, Oregon City, Oregon,’ a certain obscene and indecent writing and publication” in words and figures as herein set forth.

The defendant demurs to the information because it does not state facts sufficient to constitute a crime, and upon the argument thereof made the point that however the act of the defendant may be characterized by the general charge in the information, its true character must be ascertained from the particular facts stated therein; and that it appeared therefrom that the alleged indecent “publication” was only a private, sealed letter, and not a publication at all, or anything within the purview of the statute; and it was also suggested in sup-

port of the demurrer that the language contained in the letter, however filthy, was not "obscene, lewd or lascivious."

The legislation upon this subject, it appears, commenced with section 148 of the postoffice act of July 8, 1872 (17 St., 302), which provided "that no obscene book, pamphlet, picture, print or other publication of a vulgar or indecent character, or any letter upon the envelope of which, or postal card upon which, scurrilous epithets may have been written or printed, or disloyal devices printed or engraven, shall be carried in the mail." By the act of March 3, 1873 (17 St., 599), said section 148 was amended so as to omit the word "vulgar," and all mention of "disloyal devices," and to include "lewd or lascivious" books, etc., as well as "obscene" ones, and a "paper" as well as a "picture or print;" and the word "indecent" was added to the word "scurrilous," in describing the epithets prohibited on a postal card or the envelope of a letter. A new clause was also added, prohibiting the transportation in the mails of any "article or thing designed or intended" to prevent conception or procure abortion, or "for any indecent or immoral use or nature," or any communication or notice giving any information where, how, or of whom, or by what means, any such things may be obtained or made. This section, as thus amended, became section 3893 of the Revised Statutes, which was again amended by the act of July 12, 1876 (19 St., 90), so as to add the word "writing" to the category of non-mailable books, etc., and in regard to such letters and postal cards substituted the following: "And every letter upon the envelope of which, or postal card upon which, indecent, obscene, lewd or lascivious epithets, terms or language may be written or printed," is hereby declared to be non-mailable matter.

The punishment for mailing such matter is a fine not less than \$100 nor more than \$500, or imprisonment at hard labor not less than one year nor more than ten years, or both. It is admitted that the language used in this letter is indecent. Indeed, it is grossly so. The term is said to signify more than indelicate and less than immodest—to mean something unfit for the eye or ear. Worcester. Dict. And I think it is obscene, also. This latter word has a wide range in both the Latin and English languages. It includes on the one hand what is merely inauspicious, foul or indecent, and on the other what is immodest and calculated to excite impure emotions or desires. Worcester. Dict.

§ 1003. *A sealed letter deposited in the mail is not a writing or publication within the purview of Revised Statutes, section 3893.*

It is also admitted that the case made in the information does not come within the clause of the statute directed against letters *eo nomine*; but it is contended by the district attorney that the letter in question is a "writing" within the meaning of that term as used in the first clause of the section which reads: "Every obscene, lewd or lascivious book, pamphlet, picture, paper, *writing*, print, or other publication of an indecent character," is declared non-mailable. Speaking generally, this letter is a writing; but to bring it within this clause of the statute it must be also a "publication." This word "writing" occurs in an enumeration of things—books, pamphlets, pictures, prints and papers—which *ex vi termini* are *prima facie* publications.

The general phrase with which the enumeration ends, "or other publication of an indecent character," impliedly asserts that the things before enumerated are publications. The expression "John and James and other men" is one in which, by a necessary implication, it is asserted that John and James are men. A publication is something—as a book or print—which has been published—made public or known to the world. And a writing, as well as a printing, may

be published. What constitutes a publication or a making public is a question, and must generally depend upon the circumstances of each case. But a private letter sent by one individual to another in a sealed envelope cannot be considered a "publication" within this statute. But the fact that the statute has expressly provided for the case of a "letter" in a separate clause, in which the offense that may be committed by means of it is confined to indecent, obscene, etc., language on the envelope in which it is inclosed, is conclusive to my mind that congress did not intend to include it in the term "writing" as used in the clause concerning obscene publications.

§ 1004. *Indecent matter on the envelope of a letter is within the purview of section 3893.*

It never was the intention of the law to take cognizance of what passes between individuals in private communications under the sanctity and security of a seal. And probably the chief reason for making it a crime to put indecent or obscene delineations or language on the envelope inclosing such communications is to prevent the postoffice from being used as a means for committing cowardly and indecent assaults at a safe distance, or anonymously, upon the feelings and character of any one, by the use of indecent or immoral and offensive epithets and suggestions openly addressed to him on the envelope of a letter or a postal card. But what is said privately — within the envelope and under the seal — the statute does not notice. It could not well do so without establishing an espionage over private correspondence, which would never be thought of in a free country.

As was said by Mr. Justice Field in *Ex parte Jackson*, 96 U. S., 727, "the difficulty attending the subject arises, not from the want of power in congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail." This statute is largely preventive in its character. It defines non-mailable matter by its external appearance when a letter or sealed package, and by its contents when not, and therefore open to inspection by the postoffice officials. But if it was intended that it should extend to the contents of a sealed letter, some provision would have been made for a legal examination when there was reason to believe that its contents were obnoxious to the law, and its enforcement not left to the chance complaint of the person to whom it might be addressed. But as the case stands it is apparent that the matter to be excluded from the mails, and which is made a crime to deposit therein, is such that its illegal character is open to inspection, and can be ascertained without breaking the seal of private correspondence.

Therefore, in the case of a letter, unless it is non-mailable by reason of something upon the outside of it, or the envelope in which it is contained, it is mailable without reference to the character or morality of its contents. And yet it is quite certain that the public good would be promoted and no private right injured by including such a case as this within the statute, upon the complaint of the party injured, and thereby prevent the mails from being used as a comparatively safe means by one person to annoy and wound the feelings of another by applying to him in a letter indecent or obscene epithets, or accusing him in gross and beastly language of criminal or immoral conduct. The demurrer is sustained.

UNITED STATES *v.* WHITTIER.

(Circuit Court for Missouri: 5 Dillon, 35-45. 1878.)

STATEMENT OF FACTS.—The defendant was charged with having mailed a letter giving information where articles to prevent conception could be had. It appeared that the defendant wrote and mailed a letter in answer to a decoy letter written by an agent of the Society for the Suppression of Vice. The decoy letter had a fictitious name signed, and asked for “an absolutely sure way to prevent conception.” The answer of defendant was: “I have what you desire. It is perfectly safe,” etc. It seems that the detective in mailing the decoy letter had the advice and assistance of the postoffice authorities. There was a motion to quash.

Opinion by DILLON, J.

The question submitted has given the court some difficulty. Certain propositions and principles will aid in its correct decision:

§ 1005. *Doubts in the construction of criminal statutes resolved in favor of accused.*

1. Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If this rule is lost sight of, the courts may hold an act to be a crime when the legislature never so intended. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused. *United States v. Morris*, 14 Pet., 464; *United States v. Wiltberger*, 5 Wheat., 76 (§§ 1633-36, *infra*); *United States v. Sheldon*, 2 Wheat., 119; *United States v. Clayton*, 2 Dill., 219 (§§ 344-348, *supra*).

§ 1006. *Congress has plenary power over the mails.*

2. Congress has, it is conceded, no power to make criminal the using of means to prevent conception, or to procure abortion, etc., in the several states. That power belongs to the respective states. But congress has plenary power over the mails and postal service, and may, undoubtedly, declare what shall not be mailable matter, and punish violation of its criminal enactments in this regard. The protection of the public morals in such cases is incidental to the protection of the mails. *United States v. Botts*, 11 Blatch., 346 (§§ 996, 997, *supra*); *In re Jackson*, U. S. Sup. Ct., Oct. Term, 1877. The statute upon which this indictment is founded must be construed with reference to this limitation upon the federal function and the supposed federal purpose in the enactment of the statute. Congress meant by this legislation to prevent the mails from being used to transport matter corrupting to the public morals. *In re Jackson*, *supra* [6 Otto, 727].

§ 1007. *When and for what decoy letters may be used.*

3. Where persons are suspected of being engaged in the violation of criminal laws, or of intending to commit an offense, it is allowable to resort to detective measures to procure evidence of such fact or intention. Many frauds upon the postal, revenue and other laws are of such a secret nature that they can be effectually discovered in no other way. Accordingly, there have been numerous convictions upon evidence procured by means of what are called decoy letters—that is, letters prepared and mailed on purpose to detect the offender,—and it is no objection to the conviction, when the prohibited act has been done, that it was discovered by means of letters specially prepared and mailed by the officers of the government, and addressed to a person who had no actual ex-

istence. The books contain many cases where such convictions have been sustained. *United States v. Cottingham*, 2 Blatch., 470; *Regina v. Rathbone*, 2 Moody, Cr. Cas., 310; S. C., Carr. & M., 220; *Regina v. Gardner*, 1 Carr. & K., 628; *Regina v. Williams*, id., 195; *Regina v. Mence*, 1 Carr. & M. 234.

§ 1008. *Difference between moral and legal guilt.*

There is a class of cases in respect of larceny and robbery in which it is held that where one person procures, or originally induces, the commission of the act by another, the person who does the act cannot be convicted of these particular crimes, although he supposed he was taking the property without the consent or against the will of the owner. Archb. Cr. Pr. and Ev., 364; *Rex v. Eggington*, 2 Bos. & P., 58; *State v. Covington*, 2 Bailey (S. C.), 569; *Dodge v. Brittain*, Meigs (Tenn.), 84, 86; *Alexander v. State*, 12 Tex., 540; 3 Chitty, Cr. L., 925; 2 East, P. C., 665; 1 Bish. Cr. L. (5th ed.), secs. 262, 263. The reason is obvious, viz.: The taking in such cases is not against the will of the owner, which is the very essence of the offense, and hence no offense, in the eye of the law, has been committed. The offender may be as morally guilty as if the owner had not consented, but a necessary ingredient of legal guilt is wanting. This is strikingly shown by *Rex v. McDaniel*, Foster, 121; S. C., 2 East, P. C., 665, where "Salmon, McDaniel and others conspired to procure two persons, ignorant of the design, to rob Salmon on the highway, in order that they might obtain the reward at that time given for prosecuting offenders for highway robbery. Salmon, accordingly, went to the particular place fixed upon, with some money, and the two men who were procured, being led there by one of the conspirators, robbed him, and they were afterwards prosecuted and convicted; but the conspiracy being afterwards detected, the conspirators were indicted as accessories before the fact to the robbery, and, the facts being found by a special verdict, the case was argued before all the judges, who held that the taking of Salmon's money was not a larceny, being done not only with his consent, but by his procurement." But this principle must be limited to the cases where the consent will, as a matter of law, neutralize the otherwise criminal quality of the act. 1 Bish. Crim. Law (5th ed.), sec. 262. Thus, where a prosecution was founded on an act of the legislature imposing a penalty on any one who should deal or traffic with a slave without a written ticket or permit from the owner, it is held that the offense is consummated, although the trading was done by the slave in pursuance of instructions of the owner, and in his presence, when the accused was ignorant of such instructions and presence. The reason is that, "like Eggington's Case, *supra*, this is a contrivance to detect the offender." *State v. Covington*, 2 Bailey (S. C.), 569, 573. See, also, *Regina v. Williams*, 1 Carr. & K., 195; *Regina v. Gardner*, id., 628.

The facts in the case now under consideration show that the defendant is as morally guilty as if the letter he was answering had been written by a person seeking the prohibited information, and not by a detective. But I am of the opinion that these facts do not clearly bring the case within the particular clause of the statute on which the indictment is founded. The indictment charges that the defendant knowingly deposited in the mail a letter *giving information* where, how, and of whom an article or thing designed and intended to prevent conception could be procured. This was in answer to a fictitious letter of inquiry. The letter written and mailed by defendant was addressed to a person who had no existence. *On its face it did not show that it was*

within the prohibited statute. If it had been suffered to go through the mail to the place to which it was addressed, it would not have been called for, but would have been sent to the dead-letter office, and could not have given to any person the prohibited information. The defendant doubtless intended to give the inhibited information, but the statute does not apply to a letter merely intended by the writer to give such information, but to a letter “‘actually’ giving the information.” If a letter of inquiry seeking the prohibited information had been written by an actual person, although under a feigned name, an answer in reply, giving such information, would present a case distinguishable, it would seem, from the one under consideration.

I place my judgment in this case upon the single ground that the sealed letter written by the defendant, addressed to a person who had no existence, and which *on its face gave no information of the prohibited character*, and which is brought within the statute only by the fictitious letter of inquiry written by a detective, is not the “giving of information” within the meaning of the statute. At all events, it is not certain that congress intended to punish such an act; and, therefore, upon the principle above mentioned, that criminal statutes are not to be extended by judicial construction to cases not clearly and unmistakably within their terms, my judgment is that this prosecution, on the admitted facts, cannot be sustained. It is a case of clear moral guilt, but not of legal criminality. There is no legal crime committed, although the defendant did not know of the fact which deprived his act of its criminal quality. 1 Bish. Cr. L. (5th ed.), sec. 262. In this respect the case falls within the principle strikingly illustrated by *Rex v. McDaniel*, above referred to.

In order to prevent misconception of the decision now made, it may be proper to add that we only decide the narrow and single point that the letter written and deposited by the defendant did not give the prohibited information, and hence is not within the statute. It would present a different case for consideration if the letter written and deposited by the defendant had been capable, into whosoever hands it might have fallen or come, of imparting the prohibited information.

§ 1009. *When decoy letters may be used.*

We do not decide that decoy letters cannot be used to detect persons engaged, or suspected to be engaged, in violating criminal laws, but recognize the doctrine that such letters may be so used. We only decide that the defendant, by his answer to the decoy letter, did not, under the special circumstances of the case, bring himself within the criminal prohibition of the act of congress.

It would also present a different case if the letter of inquiry had been written by some person actually seeking the prohibited information for immoral purposes, although written under an assumed name, and the defendant had mailed such a letter as he actually wrote and deposited in this case. Congress has not, and probably cannot, make the business in which it is claimed the defendant is engaged, viz., of furnishing to whoever may apply therefor the means of preventing conception, to procure abortion, etc., illegal, and punish the same; but the state of Missouri may do so. If the state has done so, and the defendant is suspected of being engaged in the illegal business, undoubtedly decoy letters may be used for the purpose of discovering his violation of the law, as the cases above cited show. And if, in answer to a decoy letter, the prisoner deposits in the mail any written or printed card, circular, etc., which on its face gives information of the prohibited character, there is nothing in this

decision which precludes us from holding such a case, if it should arise, to be within the act of congress.

On the admitted facts, I am of opinion, for the reasons above given, that the prosecution cannot be maintained.

TREAT, J., concurred.

BATES v. UNITED STATES.

(Circuit Court for Illinois: 10 Federal Reporter, 92-96. 1881.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—This was an indictment against the plaintiff in error, charging him with violating different provisions of section 3893 of the Revised Statutes. He was found guilty by the jury and sentenced to fine and imprisonment. A motion in arrest of the sentence on account of the insufficiency of the indictment was made in the district court, and the refusal of the court to grant the motion is one of the principal errors relied on in this court. The section of the statute referred to, as amended by the act of July 12, 1876, declares the following shall be non-mailable matter: Any book, pamphlet, picture, paper, writing, print, or other publication which is obscene, lewd, lascivious or indecent, or any article or thing designed or intended for the prevention of conception or procuring abortion, or any article or thing intended or adapted for any indecent or immoral use, or any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means any of these matters, articles or things before mentioned may be obtained or made, or any letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene or lascivious delineations, epithets, terms or language may be written or printed; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared to be non-mailable matter, is deemed guilty of a misdemeanor, and liable for every offense to a fine or imprisonment at hard labor, or both.

§ 1010. *What is a sufficient description, in an indictment, of improper matter sent by mail.*

One of the counts of the indictment charges the defendant with sending by mail a book, the title of which is given, and it is alleged that it was of so indecent and obscene a character that it was improper to state its contents. Various other counts of the indictment allege that a letter addressed to a particular person, naming him, contained indecent matter. Other counts state that circulars were sent by mail from and to a place named and to a particular person, naming him, giving information where the article referred to [to prevent conception] could be obtained. The main ground of objection to the various counts of the indictment is that they do not set forth in language what was contained in the book, in the letters, or in the circulars. It is said that whether a book, or letter, or circular is within the terms of the law is a conclusion, and the court must be permitted to judge by the use of the special language, or if the case be a picture, or representation, or article, by a copy, or description of the same. I think this objection is not well taken. The object of the law is to exclude certain articles from the mail. If a book, pamphlet, picture, representation or article, it is sufficient as to that to describe it so as to identify it, or by stating to whom it was addressed, and then to allege that it is within the

terms of the statute, as that it is an obscene book, pamphlet, paper, print, picture, or otherwise, or an indecent thing. This is a rule which has been established by the supreme court of the United States in relation to offenses against the statute which prohibits interference with or the opening of letters intrusted to the mail by persons other than those to whom they are addressed (*United States v. Mills*, 7 Pet., 138; §§ 2452-53, *infra*), so that I think it is sufficient, in an indictment under section 3393, to describe the particular book, paper, pamphlet, etc., so as to identify the same, and then allege, in the language of the statute, that it was of the character there described. Consequently a count which declares that the plaintiff in error caused to be deposited in a postoffice of the United States (naming it), for mailing and delivery to the address of a certain person (naming it and him), an envelope then and there containing a printed advertisement and a written letter, which together were then and there a notice giving information where, how, and of whom might be obtained an article (naming it) designed and intended for the prevention of conception, was sufficient.

§ 1011. *Mailing of improper matter in reply to a decoy letter is indictable.*

An objection was also taken because these various communications were sent through the mail in consequence of what are called "decoy letters," addressed to the plaintiff in error. The fact was that a detective of the postoffice department did send letters to the plaintiff in error under fictitious names, but he was requested to send the communications under fictitious names, and they were received by the detective under these various names. It was the case, therefore, where a person used another name to cause a communication to be sent by the mail to him under that name, and such communications were accordingly so received. They were, therefore, communications sent to a real person under a fictitious name, and of course it was as much an offense against this statute for the plaintiff in error to cause non-mailable matter to be deposited for mailing as though there had been no fiction in the case.

It is also objected that the district court erred in admitting testimony relating to an article transmitted by express. That testimony was admitted on the assumption that it was sent by the plaintiff in error in answer to a letter addressed to him, and simply for the purpose of explaining the facts connected with the offenses charged in the indictment, and not constituting an offense in itself, which, of course, it was not, under this statute. This testimony was received, under proper caution to the jury, with a statement explanatory of the reason why and for what it was admitted, and I think could not have prejudiced the jury against the defendant.

§ 1012. *That articles sent were incapable of producing the alleged effect is no defense against an indictment for sending by mail improper matter.*

It was also objected that the district court refused to allow the defendant to prove that certain pills which were sent by mail would not, of themselves, prevent conception or procure abortion. I think the ruling of the district court was correct upon that point. The language of the statute is not that the article must necessarily procure abortion or prevent conception, but that it is designed or intended to procure the one or to prevent the other; and these pills were sent in answer to a letter asking for something which might have that effect, and they were sent with the statement that they were just what the writer wanted.

§ 1013. *Party properly indicted for acts done by an agent.*

It is further objected that the deposit of the book, letters, circulars, etc., in

the mail was not done by the plaintiff in error himself, but by another person. The language of the statute shows clearly that it was intended to prevent any one from violating the law by another as well as by himself, and the jury were specially instructed by the district court that they must be satisfied that the act done was authorized by the plaintiff in error; in other words, that he caused it to be done through another. The district court was requested by the plaintiff in error to give numerous instructions which in terms were refused by the court, but the court instructed the jury generally upon the law of the case, and so far as there was anything material in the instructions asked for in favor of the plaintiff in error which the law justified the court in giving, they were given by the court, and I cannot see that there was any error in this respect.

§ 1014. *On error to district court in criminal cases the circuit court may, in affirming the judgment, change the punishment.*

On the whole, I am of opinion that the judgment of the district court must stand and be affirmed as to the rulings made during the trial.

This being so, it is insisted by the district attorney that this court cannot change in any way the punishment which was imposed upon the plaintiff in error by the district court; but in proceeding to pronounce final sentence and to award execution, this court must follow the precise terms of the conviction in the district court. I am not of that opinion. The language of the third section of the act of March 3, 1879, relating to this subject, is as follows: "And in case of an affirmance of the judgment of the district court, the circuit court shall proceed to pronounce final sentence and to award execution thereon." If this court must adopt the terms of the conviction of the district court, it is where the judgment of that court is affirmed, not only as to the rulings made during the trial of the cause, but also as to the sentence. The first section of the statute describes the cases in which a writ of error will lie — where the sentence is a fine of \$300 or imprisonment. *In such case* the party aggrieved by a decision of the district court may tender his bill of exceptions. I think one object of the statute was to give to the circuit court authority, not only over the rulings of the district court during the trial, but also over the degree of punishment imposed upon the party, if, upon the whole record before the circuit court, it should appear in the judgment of the court that the penalty was not in conformity with law; as where a fine was imposed when the statute authorized imprisonment only, or imprisonment where it authorized a fine only, or otherwise was unlawful, or where it was too lenient or too severe. In all these cases I think the opinion of the district court is subject to review by the circuit court, and may be changed. It is not necessary to decide whether the circuit court might alter the degree of punishment upon facts which might be established in the circuit court, but did not appear in the record. It is sufficient in this case that, upon the facts apparent upon the record as to the degree of punishment imposed, the opinion of this court differs from that of the district court; and this court will proceed, therefore, to pronounce final sentence, and to award execution in conformity with its own opinion as to the degree of punishment which should be imposed upon the party convicted.

§ 1015. *Mailing prohibited articles.*— Congress has the power to provide for the punishment of any person who shall send lottery tickets through the mails. *Ex parte Jackson*, 6 Otto, 736. See §§ 971, 972.

§ 1016. It is no ground for directing an acquittal upon the trial of an indictment for having deposited a lottery circular in the mail, contrary to section 3894, Revised Statutes, declaring that "no letter or circular concerning lotteries . . . shall be carried in the mail," and

that "any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punishable," etc., that the letter was directed to a fictitious name. *United States v. Duff*, * 19 Blatch., 9. See §§ 970, 973.

§ 1017. Where the defendant was indicted under section 5480, Revised Statutes, punishing any person who, having devised any scheme to defraud, to be effected by opening correspondence with any other person by means of the postoffice establishment, shall, in executing such a scheme, or in attempting to do so, place any letter or packet in the postoffice; and the jury had been instructed that the fact had been established that some person had devised a scheme to defraud, to be effected by the agency of the postoffice, and this instruction was not excepted to, it was no error for the court to instruct the jury that the fact that the letter, charged to have been mailed in execution of the scheme, was in the handwriting of the defendant, was evidence from which the jury might infer that such letter was mailed by the defendant. *Brand v. United States*, * 18 Blatch., 387.

§ 1018. It is an offense against the laws of the United States to deposit in the mails a notice giving information where an article designed for the prevention of conception can be obtained, though it is in the form of a sealed letter, unobjectionable as to its outward appearance. It is not the form in which such matter is mailed, but its character, which fixes the criminality of the act. *United States v. Foote*, * 13 Blatch., 418. See §§ 938, 961-965, 970, 972.

§ 1019. A written slip, without address or signature, giving information where an article designed for the prevention of conception can be obtained, which is sent in response to an inquiry, is a "notice" within the meaning of the statute prohibiting the mailing of a "notice" of that character. *Ibid.*

§ 1020. In the absence of any statutory limitation, the language used in relation to the sending of forbidden articles or information through the mails must be given its full and natural meaning, and must be held to exclude everything prohibited, from whomsoever or howsoever coming. *Ibid.*

§ 1021. An instruction, given upon the trial of an indictment under the act of July 12, 1876, for depositing non-mailable matter in the mails, that "the test of obscenity within the meaning of the statute" is, as to "whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall," was held not to be erroneous. *United States v. Bennett*, 16 Blatch., 338 (§§ 2480-99). See § 937.

XIII. UNDER PENSION LAWS.

[See CONSTITUTION AND LAWS, §§ 432-433. Also § 2033, *infra*.]

SUMMARY — *Withholding money from pensioner; offense complete, when, § 1022. — Retaining fees for other services, § 1023. — Withholding check or money, § 1024.*

§ 1022. The offense of withholding money from a pensioner is complete when the money is received and is not paid over on demand, and is not a continuing offense unbarred by the statute of limitations so long as the money is retained. *United States v. Bennett*, §§ 1025, 1026.

§ 1023. Where a pension agent, in pursuance of a contract entered into between himself and a soldier's widow, retained out of a pension procured by him for her his legal fees, and a certain sum in addition for removing the imputation of desertion resting upon her late husband upon the rolls of the war department, and his costs and expenses, it was held that such retention was lawful, and not an offense under the law relating to the retention of pensions by pension agents. *United States v. Snow*, § 1027. See § 1033.

§ 1024. Under the laws of congress forbidding a pension agent or attorney to withhold the pension or any part thereof from the pensioner, it is an offense to withhold either the check or the money; and even when the agent was authorized to receive the money by valid power of attorney, the money thus collected is under the protection of the statute until paid to the pensioner unconditionally. *United States v. Ryckman*, § 1023.

[NOTES. — See §§ 1029-1043.]

UNITED STATES v. BENNETT.

(Circuit Court for New York: 12 Blatchford, 345-353. 1874.)

Opinion by HUNT, J.

STATEMENT OF FACTS. — The defendant was indicted in the district court in November, 1873. It was charged in the first count of the indictment that, as

the agent of Ellen Mack, a pensioner, on the 23d of September, 1872, he received from the United States officer appointed to pay pensions the sum of \$765.40 due to said pensioner, and that he then and there wrongfully withheld from said pensioner \$405.33 of such money, contrary to the form of the statute, etc. The second count was the same as the first. The third count contained the same allegations as the first, as to receiving the money on the 23d of September, 1872, but charged that the sum mentioned was wrongfully withheld on the 31st of March, 1873. The jury found the defendant guilty on the first three counts of the indictment, and found him not guilty as to certain other counts, to which it will not be necessary further to refer. The defendant now insists that at the time of the alleged commission of the offense of withholding pension money, to wit, September 23, 1872, such withholding was not an offense under the statutes of the United States. This offense, it is said, was created by the statute of July 14, 1862 (12 U. S. Stat. at Large, 563, §§ 6, 7), and by the statute of July 4, 1864 (13 id., 389, §§ 12, 13). The provisions of these statutes, it is argued, were repealed by the act of July 8, 1870 (16 id., 195, § 7), and were not in force at the time specified in the first two counts, viz., September 23, 1872.

The statutes referred to are as follows: By section 6 of the act of 1862 it was enacted that the fees of agents and attorneys, in obtaining pensions for those entitled to pension money under that act, should not exceed certain rates therein specified. By section 7 it was enacted that any agent or attorney who should demand or receive any greater compensation for any services under that act than was thus specified, "or who shall wrongfully withhold from a pensioner, or other claimant, the whole, or any part, of the pension or claim allowed and due to such pensioner or claimant," should be guilty of a high misdemeanor, to be punished by a fine not exceeding \$300, or by imprisonment not exceeding two years, or by both such fine and imprisonment. By section 12 of the act of 1864 a different tariff of fees is prescribed, and the sixth and seventh sections of the act of 1862 (above set forth) are declared to be repealed. By section 13 of the act of 1864 it is provided that any agent or attorney "who shall demand or receive any greater compensation for his services under this act than is prescribed in the preceding section of this act, . . . or who shall wrongfully withhold from a pensioner, or other claimant, the whole, or any part, of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor," to be punished by "a fine not exceeding \$300, or by imprisonment not exceeding two years, or by both." By the act of July 8, 1870 (16 U. S. Stat. at Large, 194, 195, §§ 7, 8), still another rate of fees is prescribed for agents obtaining pensions, under any or all the acts of congress on that subject, and the agreement on the subject of fees is required to be filed with the commissioner of pensions. It was further enacted, in section 8 of that act, that any agent or attorney who should receive a greater compensation for obtaining a pension than was allowed in the preceding section should be deemed guilty of a misdemeanor, to be punished by a fine not exceeding \$500, or by imprisonment not exceeding five years, or by both. This statute contains nothing upon the subject of wrongfully withholding from a pensioner the whole or any part of the sum found due and allowed to him. By the thirty-first section of the act of March 3, 1873 (17 U. S. Stat. at Large, 575), it is enacted that any agent or attorney who shall receive any greater compensation for prosecuting any pension claim than the commissioner of pensions shall direct, not exceeding \$25, "or who shall wrongfully withhold from

a pensioner or claimant the whole, or any part, of the pension or claim allowed and due such pensioner or claimant," shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding \$500, or by imprisonment not exceeding two years, or by both.

Upon these statutes the question is made, whether, on the 23d of September, 1872, the withholding of pension money by an agent was an offense punishable by indictment. The argument to sustain the negative of this question is this: The alleged offense was created and made punishable by sections 6 and 7 of the act of 1862, above cited. By the express terms of section 12 of the act of 1864 (above cited), these sections 6 and 7 are repealed. The offense, however, is renewed and recreated by section 13 of the last mentioned act, which provides that an agent who shall receive a greater compensation for services under that act than is permitted by the preceding section, or who shall wrongfully withhold from a claimant or pensioner **any portion** of the sum allowed and due to him, shall be guilty of a **misdemeanor**, punishable by a fine not exceeding \$300, or by **imprisonment** for two years, or by both. Assuming, for the present purpose, that the last clause applies to all the pension acts of the United States, it is insisted that it was repealed by the act of July 8, 1870 (16 U. S. Stat. at Large, 194, 195, §§ 7, 8). The substance of these sections has been already stated.

§ 1025. *Where a statute is intended to embrace the whole subject-matter of previous statutes, it operates as a repeal of the former acts and annuls those portions not found in the new act.*

The statute of 1870 intended, apparently, to embrace the whole subject-matter of pension fees, the excess of charges, the withholding of pension money, and the liability of pension agents. It enacted different provisions, retaining some of the previous regulations, omitting others, and making contradictory provisions respecting still others. It enacted a new tariff of fees. It prescribed a different punishment from that before existing for the offenses retained, and it omitted one class of the cases which constituted an offense under the former acts. This, upon principle, operates as a repeal of the former act, and annuls those portions of it which are not found in the new act. *Norris v. Crocker*, 13 How., 429; *United States v. Tynen*, 11 Wall., 88. In *Bartlet v. King*, 12 Mass., 537, a statute passed in 1754 concerning bequests and donations to pious and charitable uses, was held to be repealed by the passage of an act, in 1785, upon the same subject, and which act did not contain the provisions of the former act. In *Dash v. Van Kleeck*, 7 Johns., 477, the court say that a subsequent statute, making a different provision on the same subject, is not to be construed as an explanatory act, but as a repeal of the former act. In *Daviess v. Fairbairn*, 3 How., 636, it is laid down that, though a subsequent statute be not repugnant in all its provisions to a prior one, yet, if it is clear that the latter was intended to prescribe the only rule which should govern in the case provided for, it repeals the prior one. See, also, *Stewart v. Kahn*, 11 Wall., 502; *United States v. Tynen*, 11 Wall., 92; *Ellis v. Paige*, 1 Pick., 43; *Nichols v. Squire*, 5 Pick., 168.

By the statute of 1864, the offense of taking excessive fees, and the offense of withholding pension money, are each punishable by a fine not exceeding \$300, or by imprisonment for two years. By the statute of 1870, the offense of taking excessive fees may be punished by a fine of \$500, or by imprisonment for five years. There is no other repeal of the former statute as to the offense of taking excessive fees than that arising from the repugnancy of the provisions

of the two statutes. It is not contended, however, that the former statute remains in force as to that offense. It is impossible that there should be in force, at the same time, a statute punishing the offense of taking excessive fees by a fine not exceeding the sum of \$300, and an imprisonment not exceeding two years, for each offense, and a statute punishing the same offense by a fine of \$500 and an imprisonment for five years. The latter statute, in such case, operates as a repeal of the former statute.

I have said, and I place my decision upon the ground that the statute of 1870 was intended to embrace the whole subject-matter of the duty of pension agents, including excessive charges and withholding pension moneys. It was intended as a revision or a codification of the existing laws on those subjects. Thus, the act of 1862 is entitled "An act to grant pensions," and is devoted chiefly to enacting who shall have pensions. The sixth and seventh sections, already cited, referring to the fees of pension agents, and making excessive charges of agents, or the withholding of pension money by agents, a criminal offense, are the only ones referring to any other subject. The act of 1864 is entitled "An act supplementary" to the act of 1862, and, as might be expected, is devoted mainly to the same subject. Sections 12 and 13 are the only exceptions, these sections being substituted for sections 6 and 7 in the former act. Then comes the act of 1870, which is entitled "An act to define the duties of pension agents, to prescribe the manner of paying pensions, and for other purposes." This act is made up of provisions touching the duties of agents, their liabilities, their rights and their exclusions, and the manner of conducting business with them by the departments. When, under such circumstances, it is enacted that one act described in the former statute shall remain an offense punishable by a larger fine and a longer imprisonment, and when all reference to another act on the same subject, described and made punishable in the former statute, is omitted in the later statute, it is a reasonable conclusion that such omission was intended as a repeal of the offense thus omitted. In 1873 the offense of withholding was again created and its punishment declared, but, from the passage of the act of 1870 until the passage of the act of 1873, there was a *hiatus*, a space of time when the offense did not exist.

This view is sustained, also, by the course of legislation respecting the right of attorneys or agents of this class to receive the money allowed to claimants. By the statutes of April 10, 1806 (2 U. S. Stat. at Large, 376), and of July 4, 1836 (5 id., 127), on the subject of pensions, as well as by the statutes of 1862 and 1864, above quoted, the employment of agents and attorneys was recognized, their relation to the claimants was regulated, their fees were fixed, and the manner in which payment should be made to or through them was pointed out. This so continued until the passage of the law of 1870. By the third section of that act, payment to the claimant alone was authorized, and it was expressly declared that no power of attorney should be recognized, nor should any pension be paid thereon. It was quite in accordance with this idea, and a part of the same scheme of legislation, that the offense of withholding a pension should at the same time be dropped from the category of offenses. While congress permitted and authorized attorneys to receive the money due to pensioners, it was well to make the withholding of such money an offense. When it declared that the money should be paid directly to the claimant, and no power of attorney should be recognized, it was natural to drop the offense of withholding. Indeed, if the statute was complied with, the offense could not exist. The attorney not being allowed under any circumstances to receive the

money, a statute prohibiting his withholding it is not to be expected. In pursuance of the same scheme, when, in 1873, congress again authorized the action of agents and attorneys, and the payment of pension money to them, it was to be expected that the offense of illegally withholding such money would be renewed, and, accordingly, we find such offense renewed and recreated by section 31 of that act.

The statute of February 25, 1871 (16 U. S. Stat. at Large, 432, § 4), has been cited in support of the indictment. That statute provides "that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." In the case before us, there was no "liability incurred under such statute." When the act was committed, the statute forbidding it did not exist. The act of 1871 contemplates the case of an offense committed while a statute forbidding it is in force, and provides that the repeal of such statute shall not prevent a prosecution for the offense. It does not meet the case of an act unforbidden by statute at the time of its commission.

§ 1026. The offense of unlawfully retaining money is complete at the time of reception and refusal to pay over. The retention does not create a new, subsequent and perpetual offense unbarred by statutes of limitation.

The district attorney contends that the prisoner was lawfully convicted under the third count of the indictment, which charges a receipt of the money on the 23d of September, 1872, and a wrongful withholding thereof on the 31st of March, 1873. He insists that section 31 of the act of March 3, 1873, covers the case. The jury convicted the prisoner on the first and second counts, which charged the withholding to have been on the 23d of September, 1872, as well as upon the third count. It is conceded that but one offense was committed, and punishment is only asked as upon the commission of one offense. The transaction, in fact, occurred in September, 1872, and the withholding is transferred to March, 1873, only upon the principle that the offense is continuous; that it continues as long as the money is retained by the prisoner. The money was actually received in September, 1872. At that time, as the record shows and the jury have found, in convicting upon the first and second counts, the prisoner illegally withheld \$405 thereof. He then put it into his pocket, and refused to deliver it to the claimant. His offense was then complete. He could have been indicted at once under the United States statute, for illegally withholding the money, if forbidden by such statute. He could have been sued at once in a civil action for the amount so withheld. The offense and the liability being complete, the statute of limitations at once commenced to run. The offense charged is the act and fact of withholding. What the prisoner afterwards does with the money cannot create, alter or continue the offense. He, surely, could not set up as a defense, that, after the 23d of September, 1872, he had returned the money to the pensioner. It was never heard that a larceny could be purged by a return of the stolen property. It would not mitigate the offense that he should bestow the money in pious uses. Nor, in my judgment, does it create a new, a subsequent and a perpetual offense, unbarred by all statutes of limitation, that the prisoner should retain the money. He stands or falls upon the act as and when it was committed. It is provided by the statutes of certain states that, when stolen property is tran-

ferred into a county different from that from which it was taken, the thief may be indicted for larceny in the latter county. So, in some states, it is held that, when stolen property is brought into another state, the taker may be indicted in the latter state. The rule on this point varies in the different states. In all these cases there is a subsequent and additional act besides the one constituting the original offense. Thus, a thief steals property in the county of Albany. That is of itself an offense. Stopping there the offense is limited to the original taking, and the thief can be indicted in the county of Albany only. When the thief also carries the property into the adjoining county of Rensselaer, he adds another fact to the case. He transports stolen property to another jurisdiction, and the sin of the original taking accompanies such transportation. But I know of no principle upon which the original act itself, nothing additional being said or done, can be converted into a new offense or carried on indefinitely; that is, can be made perpetually continuous.

The judgment must be arrested, and as the objection goes to the foundation of the indictment, the indictment must be quashed and the prisoner discharged.

UNITED STATES *v.* SNOW.

(Circuit Court for Tennessee: 2 Flippin, 1-5. 1877.)

STATEMENT OF FACTS.—Indictment for charging more than is allowed by law for obtaining a pension for a soldier's widow. The defense was that the husband of the applicant was charged on the records of the war department with being a deserter, and that the extra charge was for services in having that charge removed. There was a demurrer to the plea.

Opinion by BROWN, J.

By Revised Statutes, section 5485, it is provided that "any agent or attorney; or any other person, instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand or receive, or retain, a greater compensation for his services" than is elsewhere provided "shall be deemed guilty of a high misdemeanor."

This compensation is such as the commissioner of pensions shall direct to be paid to him, not exceeding \$25 (§ 4785). And in case no agreement is made with the applicant, and filed with and approved by the commissioner, the fee shall be \$10, and no more (§ 4786). The section first above quoted being not only penal in its character, but in derogation of the common law right of every person to make his own bargain, should receive a strict construction. The design of the act was to prevent exorbitant charges being extorted by pension solicitors from a class of persons who are usually illy able to pay them, or to assert their rights against parties who hold the money in their hands. It was intended to fix a fair compensation for the labor usually and ordinarily necessary in obtaining a pension, but not for extraordinary services performed in a different department for a different purpose, although the ultimate object of those services may be the obtaining of a pension. The labor involved in procuring a widow's pension is ordinarily very slight, consisting merely in filling out a blank petition and affidavits showing the enlistment and death of the soldier, his marriage to the petitioner, and the number and ages of her minor children. The records of the war department are then referred to to confirm the fact of enlistment and death. For these services \$10 was regarded as a fair compensation, although the parties may contract for the payment of \$25, provided a prior agreement be made to that effect, and filed

with and approved by the commissioner. Clearly the statute covers only services, and the attorney would still be entitled to charge for expenses incurred in procuring testimony.

§ 1027. *Charge for a distinct service in connection with services rendered in obtaining a pension.*

But in the case under consideration, defendant was called upon to perform a service entirely distinct from that usually required in such cases. The soldier was registered as a deserter on the rolls of the war department, and until that charge was disproved his widow could not recover her pension (§§ 2433, 4749). Although in the particular case the service was performed in aid of the pension, it was essentially a distinct service and might have been required for another and different purpose. A deserter loses his right of citizenship (§ 1996); he cannot enlist in the army or navy of the United States (§§ 1118, 1420); and an officer mustering him in would be subject to punishment (§ 1342, article 3). The records of the war department will only be corrected by plenary proof of mistake, and when a claim for a pension has once been advanced it must be prosecuted to completion in five years (§ 4717). It will be readily perceived that it may become an object of the utmost importance to have a charge of desertion stricken out for other purposes than obtaining a pension. The difficulty of securing the requisite evidence is frequently very great, and in this case it was admitted that an expense of over \$300 had been incurred by the defendant for that purpose. To limit his compensation in such a case to \$10 would be an adherence to the letter of the statute which congress could not have contemplated.

It is believed no authority can be found exactly in point; but a class of cases arising under the usury laws announce the principle here involved, viz., that when a lender has made unusual effort or incurred extraordinary expense in connection with the loan, an agreement to repay his charges for services and disbursements, if made in good faith and not merely as an evasion, will not be deemed usurious. In the early case of *Auriol v. Thomas*, 2 Term R., 52, it was held that where a bill indorsed over is not duly paid, the indorsee may charge the indorser with exchange, and other incidental expenses beyond the amount of legal interest, if such charges be reasonably warranted by custom and not made a color for usury. This authority was followed in *Palmer v. Baker*, 1 Maule & Sel., 56; and in *Baynes v. Fry*, 15 Ves. Jr., 120. In *Harger v. McCullough*, 2 Denio, 119, it was held that where a creditor, at the request of the debtor, and upon his express promise to pay the expenses, took a journey to the residence of the latter, with a view to settling the demand, and afterwards included such expenses in a security taken for the debt, the security was not usurious. This case was approved in *Thurston v. Cornell*, 38 N. Y., 281, in which it was held that where a party solicited to make a loan, and to procure the means of doing so must spend time and incur trouble and expense in collecting the same from others, and does this at the request of the borrower, and upon his agreement to pay for such services and expenses, the transaction is not usurious. Whether the payment upon a loan of more than the legal rate of interest is usurious depends upon the particular facts of the case and the intention of the parties, and these are questions for the jury. If paid for the loan or forbearance of money it is usury, but if the excess is for other good and valuable considerations, not interposed as a device to cover usury, the transaction is not usurious. The same principle was stated in *Eaton v. Alger*, 2 Keys, 41, in which the court observe: "Even where the lender, without any

special agreement with the borrower, in addition to lawful interest, takes a commission, by way of compensation for trouble and expense necessarily incurred in and about the business of the loan, the transaction would be supported, provided such commission was not intended as a device to cover a usurious loan."

See, also, to the same effect, *Eldridge v. Reed*, 2 Sweeny, 155; *Beadle v. Munson*, 30 Conn., 175; *Gambriel v. Doe*, 8 Blackf., 140; *Smith v. Silvers*, 32 Ind., 321; *Smith v. Muncie Nat. Bank*, 29 Ind., 153; *Tyler on Usury*, 130.

In the case under consideration, if the agreement set up in the plea were made in good faith, for services actually performed as therein stated, and not as a mere pretext for charging more than the statute allowed for obtaining a pension, the defendant is entitled to an acquittal. I am not called upon to determine whether his charge be reasonable or not; that must be litigated in another forum; the question of good faith only is here involved, and that must be submitted to a jury. An order will be entered overruling the demurrer.

UNITED STATES v. RYCKMAN.

(District Court for Tennessee: 12 Federal Reporter, 46-50. 1892.)

STATEMENT OF FACTS.—*Ryckman* was indicted for withholding pension money from *Mrs. Simmons*, a pensioner. The check for the money was sent in a letter addressed to *Mrs. Simmons*, and the letter was taken from the postoffice by the defendant on the deposit by him of a power of attorney with the postmaster. The defendant indorsed the check (with the name of *Mrs. Simmons*), and delivered it to one *Irvine*, a merchant, who credited *Mrs. Simmons* with the sum of \$35, owing by her for goods, and also credited the defendant in the sum of \$100, and delivered to him a small sum in money and a due bill for the balance of the check. On learning that the power of attorney to defendant did not authorize him to indorse the check, *Irvine* paid *Mrs. Simmons* the amount of the check, less the \$35 due him from her.

Charge by *HAMMOND, J.*

The indictment in this case charges a violation of section 5435 of the Revised Statutes, which is as follows: "Any agent or attorney, or other person, instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand or receive, or retain, any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is provided in the title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall, for every such offense, be fined not exceeding \$500, or imprisoned at hard labor not exceeding two years, or both, at the discretion of the court."

The statute, you will perceive, prescribes the punishment for two offenses in relation to the prosecution of a claim for pension,—one the contracting for, demanding, etc., of greater compensation for the agent's services than allowed by law; the other, the withholding by the agent of the whole or any part of the pension or claim allowed; and the case under consideration relates only to this latter offense. The plain purpose of all those stringent provisions of the pension laws which the district attorney has read in your hearing is to secure absolutely to the pensioner the bounty of the government. It cannot, on any

pretext, be lawfully diverted, directly or indirectly, while in transit to his hands. It is not assets for the payment of debts, and can be in no way pledged or impounded for that purpose, and all dealings in that direction are null and void. There is a somewhat analogous policy which protects the salaries of officers of the state and federal governments, and it is generally recognized everywhere. But here congress has, by the most stringent special legislation, sought to protect these pensioners, so munificently endowed, against all possibility of being defrauded by the agents they employ to collect their dues from the government.

Nothing less than the unconditional payment of the full amount, less the small fee allowed, will discharge the agent from the penalties of this statute, whenever, by any contrivance of his, he comes into possession of the warrants or the money they represent. All else is a wrongful withholding under this statute. It is the duty of the courts and juries to so enforce these legislative commands that there shall be no evasion of them.

§ 1028. *Under Revised Statutes, section 5485, withholding from a pensioner the check or warrant to which he is entitled is equally an offense with withholding the money itself.*

The words of the statute do not in terms confine the offense to a wrongful withholding of *money* collected on the claim, which would, of course, be a violation of it, but extend to "the whole or any part of the *pension or claim* allowed or due such pensioner or claimant." If the statute is to be restricted to withholding the *money* actually paid by the treasury on the check or warrant of the government to the agent, it would be very much limited in its operation as a protection to the pensioner. The practice of the department under these pension laws is to send the warrant drawn on the treasury direct to the pensioner, to be paid by the treasurer on demand of the holder by proper indorsements, and every effort is made to prevent this warrant from falling into the hands of the agent, who is prohibited from receiving it, and to whom postmasters are forbidden to deliver it by the postal laws and regulations. The offense cannot be restricted to withholding money collected on valid indorsements, and the statute construed to turn loose all who, by forgery or other frauds, succeed in capturing the warrant, notwithstanding these prohibitions, collect the money or obtain its value, and neglect to pay it to the pensioner.

The argument of the defendant's counsel, and the instructions asked for by him, would result in punishing all who withhold the money realized on a pensioner's genuine signature, and in discharging all who obtain and withhold it on his forged signature, because the government, it may be, would remain liable to the pensioner for the amount due, the payment on a forged signature not being in law a payment. This would be a strange result, and I cannot give the instructions asked for. It was the duty of the defendant to have delivered this check itself to the pensioner, and his failure to do so was a violation of this statute, unless he collected the money on it and paid it to her. Even if the power of attorney operated to authorize the defendant to collect and receive the money, the money itself, when so collected, was under the protection of the statute until paid unconditionally to the pensioner. *United States v. Hall*, 98 U. S., 343, 354. If you believe from the evidence that the defendant received the check, passed it to Irvine by indorsing her name upon it, and received for it any cash or credit or property and Irvine's due-bill or note, and thus appropriated the money to his own use, and that he subsequently neglected or failed, on demand, to pay the amount of the check, or any part of it, to the pensioner, it is your duty to find him guilty under this indictment. The fact

that Irvine has seen fit to pay the money to her cannot be a defense to the defendant on the facts of this case. Take the case, gentlemen, and consider your verdict. (Verdict, guilty. New trial refused.)

§ 1029. **Power of congress.**—Congress has the power to prescribe what fees a pension agent may charge for his services in procuring a pension, and to punish the taking of fees in excess thereof. *United States v. Fairchilds*,* 1 Abb., 74. And laws punishing embezzlement by guardians are constitutional. *United States v. Hall*, 8 Otto, 843 (CONSTR., §§ 492-495).

§ 1030. **As to date of act.**—To withhold a pension granted by an act passed subsequently to the act making the withholding of a pension an offense is punishable under the former act, when its terms are general, and not limited to the provisions of the former act. *United States v. Chaffee*,* 4 Ben., 336.

§ 1031. **Banker.**—Where a pensioner delivers to a banker the check received by her from the pension agent, and receives in return a certificate of deposit, intending to rely on the personal credit of the banker, he is not her agent in such a sense that, if he fails to pay her, he renders himself criminally liable under the statutes of the United States for withholding a pension, or a part thereof, from a pensioner. *United States v. Howard*,* 7 Biss., 56.

§ 1032. **Retaining money to pay other claims.**—Where the agent of a pensioner receives the money due the pensioner, and, after retaining his lawful fees, retains, in pursuance of a fair understanding with the pensioner, money enough to pay certain bills due from such pensioner, and a sum to pay for his services in matters unconnected with the procurement of the pension, he is guilty of no offense under the laws of the United States by so doing; otherwise if there is no such understanding or agreement, or the latter sum is not so retained. *United States v. Hewitt*,* 11 Fed. R., 243. See § 1023.

§ 1033. **Fraudulent claims.**—Section 5438 of the Revised Statutes, which forbids the presentation of false and fraudulent claims against the government, includes a false claim presented by a person as a pensioner. *United States v. Goggin*,* 9 Biss., 416.

§ 1034. A person by fraud and the manufacture of evidence procured his name to be inserted on the rolls as a pensioner, and procured a genuine certificate to that effect, and obtained his pension thereon regularly. *Held*, that although the offense of filing the false proof and the procurement of the certificate was barred by the statute of limitations, still the pensioner was liable under section 5438 for presenting a false and fraudulent claim against the government every time he made a claim on such certificate. *Ibid*.

§ 1035. **Party having no authority to receive pension.**—To an indictment for an unlawful withholding by the defendant of a part of the pension money due to a certain person, which the defendant had received as her agent for the prosecution of her claim, it is no objection that the law requires all pension money to be paid directly to the pensioner. *United States v. Mason*,* 8 Fed. R., 412; *United States v. Connally*,* 9 Biss., 338.

§ 1036. **Indictment charging no offense.**—Section 4785 of the Revised Statutes declares that no agent or attorney shall receive a greater compensation for his services in the prosecution of a pension claim than such as the commissioner of pensions shall direct, not exceeding \$25. Section 5485 provides that if any agent or attorney shall receive a greater compensation for such services "than is provided for in the title pertaining to pensions," he shall be indictable. Subsequently an act was passed fixing the fee of agents and attorneys for such service at \$10. This act does not profess to repeal the foregoing sections or any part of them, but necessarily supersedes so much of the first section as vests in the commissioner of pensions authority to determine the amount of charges. An indictment, therefore, based on these two sections, which charges that the defendant, as agent in the prosecution of a certain pension claim, received a greater compensation for his services than is provided for in the title of the Revised Statutes pertaining to pensions, charges no offense. *United States v. Mason*,* 8 Fed. R., 412.

§ 1037. The withholding by an attorney of "pay and bounty," and "arrears of pay and bounty," is not an offense under section 18 of the act of July 4, 1864. *United States v. Benecke*,* 8 Otto, 447.

§ 1038. An indictment, found September 11, 1875, charged an attorney with withholding "pay and bounty" from a claimant in 1868. *Held*, that the offense could not be punished under the act of March 3, 1875. *Ibid*.

§ 1039. The word "claimant," in section 18 of the act of July 4, 1864, punishing the withholding by an agent or attorney of the whole or any part of the pension due a claimant, means a claimant before the pension bureau. *Ibid*.

§ 1040. **Repeal of law.**—Section 5485 of the Revised Statutes declares it to be a misdemeanor for any agent or attorney to receive for his services, in prosecuting any pension claim, any greater sum than is provided in the title pertaining to pensions. The section re-

ferred to. No. 4785, declares that no agent or attorney shall demand or receive any other compensation for his services in prosecuting a claim for a pension than such as the commissioner of pensions shall direct to be paid, not exceeding \$25. A later act declares it to be unlawful for any agent or attorney to receive for his services in a pension case a greater sum than \$10. It is held that an indictment based on section 5785, charging the defendant with receiving, for prosecuting a certain pension claim, a greater sum for his services than is allowed by law, will not be quashed on the ground that section 4785 is repealed by the later act referred to. It was not the intention of congress that the subsequent act should so far repeal section 4785 as to render an indictment based on section 5485 of no value. *United States v. Dowdell*, * 8 Fed. R., 881.

§ 1041. **What persons included.**—Section 5485 of the Revised Statutes, which makes it an offense for "any agent or attorney, or any other person, instrumental in prosecuting any claim for a pension," to wrongfully withhold from a pensioner the whole or any part of the pension allowed and due such pensioner, is not intended to be confined to the regular attorney for the pension claimant, but extends to any person instrumental in prosecuting a pension claim. *United States v. Schindler*, * 18 Blatch., 237.

§ 1042. When the commissioner of pensions has passed upon the claim, and directed the pension to be paid to the claimant, the fact is conclusive against the defendant, under the above statute, that the pension has been allowed and is due, and he will not be permitted to contend that it was not due to the claimant. *Ibid.*

XIV. PERJURY.

[See XXVI, 7, *infra*. Also § 3023.]

SUMMARY—*Perjury defined*, § 1043.—*Rash statements on oath*, § 1044.—*Oath taken before a justice of the peace*, § 1045.

§ 1043. In order to constitute the crime of perjury there must be some fact falsely stated with knowledge of its falsity. *United States v. Moore*. §§ 1046, 1047.

§ 1044. *Quere*: Whether perjury can be committed by mere rash and reckless statements on oath? *Ibid.*

§ 1045. After the passage of the act of congress of July 5, 1832, "An act for liquidating and paying certain claims of the state of Virginia," the secretary of the treasury established a regulation authorizing affidavits made before any justice of the peace of a state to be received and considered in proof of claims under the act. It is held that a false affidavit made in pursuance of this regulation before a justice of the peace of a state, in support of such a claim against the United States, may be punished under the third section of the act of March 1, 1823, providing that "if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he or she shall upon conviction suffer as for wilful and corrupt perjury." *United States v. Bailey*, §§ 1048-1054.

[NOTES.—See §§ 1055-1101.]

UNITED STATES *v.* MOORE.

(District Court for Massachusetts: 2 Lowell, 232-233. 1878.)

STATEMENT OF FACTS.—The defendant was indicted for false swearing. It appeared that in order to procure the redemption of a treasury note he presented a fragment of the note, and made an affidavit to the effect that the note, except the part presented, had been destroyed. The note had never been destroyed, but had been redeemed. Verdict, guilty. Motion for a new trial.

Opinion by LOWELL, J.

I have made up my mind that my instruction to the jury upon one point was not sufficiently full and explicit, and may, perhaps, have misled them, to the injury of the defendant. I charged in the words attributed to Judge Sprague, in *United States v. Atkins*, 1 Spr., 553, "that the jury must be satisfied that the defendant swore to a declaration which, at the time, he knew to be false; and that may be either by swearing to a fact which he knows is not true, or by swearing to his knowledge of the fact when he knew he had no such knowledge." There appears to be a much fuller report of the charge in that case,

19 Law Rep., 95, from which, and from an examination of the records of the court, vol. XXXIX, p. 696, I find that there was but one trial of the action, and that there was a count for perjury and one for false swearing, under the statute of 1823, which is the law on which the second count proceeds in this case, and on which the report in the Law Reporter says the government relied in that case. It seems, therefore, that the authority is fully in point; but by the more ample report of it I find that the learned judge explained his meaning carefully, giving very full examination to the point whether the defendant had intended to state the fact as being within his own knowledge. Even with these explanations I do not regard the ruling as being precisely accurate, as I will hereafter explain.

§ 1046. *As to rash and reckless statements on oath.*

There is some difference of opinion in the United States as to whether perjury, or false swearing in the nature of perjury, can be committed by mere rash and reckless statements on oath; and though my charge, rightly understood, did not authorize the jury to convict the defendant, if the evidence only showed recklessness, yet I am not sure it may not have been understood in that sense. Indeed, I think my own views were not quite distinct upon the point. Mr. Bishop, in his treatise on Criminal Law (3d ed.), vol. I, § 396, says: "Probably the better opinion is that perjury is not committed by any mere reckless swearing to what the witness would, if more cautious, learn to be false; but the oath must be wilfully corrupt." In a note, he quotes, as opposed to his own opinion, an extract from a report of the penal code commissioners of New York: "An unqualified statement of what one does not know to be true is equivalent to a statement of that which one believes to be false." The latter proposition may be nearly true, so far as the effect of the statement on others is concerned, but it is not a sound legal definition of perjury. I agree, rather, with Mr. Bishop's opinion, that there must be some fact falsely stated, with knowledge of its falsity, before there can be perjury. It has been held, indeed, by an able and learned court, that rash swearing, without any reasonable or probable cause of belief of the fact sworn to, is perjury. *Com. v. Cornish*, 6 Binn., 249. That was a case in which the defendant had been wounded in a riot at night and had sworn to the prosecutor as the person who wounded him. The doctrine was denied to be law, in an able and careful charge to the jury in the circuit court of the United States, sitting in the same state. *United States v. Shellmire*, Bald., 370. It has been virtually denied in this state, in *Com. v. Brady*, 5 Gray, 78, where the defendant swore that he saw a man running from a burning building whom he believed to be A. The judge charged in the language of the court in Pennsylvania, and the ruling was set aside. The court, to be sure, put their decision upon the ground that the defendant only swore to his belief; but personal identity is almost always a matter of belief. An affidavit or statement that I saw a certain person does not usually import anything more than that I saw some one whom I believed, and still believe, to be that person. If I saw no one, or if I believed the person to be different from him I have named, it is perjury, but not otherwise. If any material circumstance is falsely stated, such as that the witness was present and heard a certain conversation, it has been held to be perjury if he were not present, though the conversation really occurred. *People v. McKinney*, 3 Park. C. C., 510. In such a case the materiality of the circumstance would be the only question. Granting the materiality of the fact whether it be a statement of knowledge or of information or belief, or a simple statement of a fact, if

the witness knows that the fact is not so, or that he has no such information, or no such belief, he is guilty. But if he only swears rashly to his belief of a matter of which he does not profess to have personal knowledge, the jury cannot be permitted to decide on the reasonableness of his belief except as tending to show whether he did believe. In short, perjury is always of some matter of fact, and belief may be a fact. In this case the only questions of fact put in issue by the indictment and by the law are: Was the statement false, and did the defendant know it to be false? In this respect it is like the offense of passing a counterfeit note, knowing it to be counterfeit. Proof of reasonable cause of belief may warrant a jury to find knowledge, but it is not the legal equivalent of knowledge.

§ 1047. *An affidavit to a fact does not necessarily mean that the affiant had personal knowledge of the fact.*

It was proved that the defendant made oath to the statement set out in the second count; but it does not expressly appear by the paper itself that he professed to have personal knowledge of the fact. If he only intended to state his belief, there were some circumstances sworn to which, whether satisfactory to the jury or not, were proper to be considered by them on the question of belief. There was some evidence that the fragment of the note was picked up in the street on St. Patrick's Day, and that the father of the boy who found it gave it to the defendant, and suggested to him that perhaps the note had been torn up in a riot or street fight that took place then and there. In the case of *United States v. Atkins*, *ubi supra*, the false oath was that a certain shipping paper was the original agreement with the crew; and the evidence tended to show that the defendant knew nothing whatever about it personally. The form of the oath, as in this case, was positive, without saying anything about knowledge, or means of knowledge or belief. Judge Sprague, in charging the jury, said: "Did the defendant, by swearing positively, mean to swear that he had personal knowledge that it was the original agreement? The defendant could not swear that it was the original agreement, unless he was present when it was made. All else would be information and hearsay. The question is, Did he mean to make the collector understand that he had knowledge it was the original contract; or did he merely mean to swear that it was such to the best of his knowledge and belief? The matter for you to decide, gentlemen, is, whether you are satisfied that the defendant, in order to deceive the collector, wilfully and intentionally swore to what he knew was false, either as to the agreement being genuine, when he knew it was not, or to his knowledge of the fact, when he was conscious he had no such knowledge." 19 Law Rep., 98. Now, this ruling is undoubtedly sound in the abstract, and it is what I told the jury; but the difficulty in my mind is, that there was no sufficient evidence in the case from which they could infer that the defendant did state the destruction of the note to be within his personal knowledge; and therefore I should not have brought that secondary fact to their notice at all. And here I differ from the charge in *Atkins' Case*. The ruling in that case, with all the limitations and qualifications which it appears that Judge Sprague put about it, would probably do no harm; but I must say that in my opinion the learned judge should have ruled, on an affidavit wholly in writing, that it did or did not, as matter of law, import a statement of personal knowledge, and not have left that question to the jury. In that case the jury were unable to agree. In the similar case of *United States v. Smith*, 19 Law Rep., 91, they acquitted the defendant. The court and jury in those cases agreed that an

affidavit to a fact does not necessarily include an affirmation that the affiant has personal knowledge of the fact; and my own observation of the conduct and opinion of men in general in this matter agrees with that view. I consider the affidavit in this case ought not to be held to import such a statement, none such being expressed, and the fact not being one which was personal to him. The true question, therefore, for the jury was the one which the indictment points out. Did the defendant swear to this fact, knowing it to be false? I do not mean to say that there was not evidence from which the jury might have answered this question in the affirmative; but, as I cannot say how they would have answered it, I feel it my duty to grant a new trial.

New trial ordered.

UNITED STATES v. BAILEY.

(9 Peters, 298-265. 1835.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a criminal case, certified from the circuit court of the district of Kentucky, upon a division of opinion of the judges of that court. The defendant, John Bailey, was indicted for false swearing under the third section of the act of congress of the 1st day of March, 1823, ch. 165, which provides “that if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury.” The indictment charges the false swearing to be in an affidavit made by the defendant, before a justice of the peace of the commonwealth of Kentucky, in support of a claim against the United States, under the act of congress of the 5th day of July, 1832, ch. 173 (4 Stats. at Large, 563), to provide for liquidating and paying certain claims of the state of Virginia; and there are various counts in the indictment, stating the charge in different manners. It appears from the record that, at the trial, “the attorney for the United States read in evidence the papers set out in the indictment, purporting to be the affidavit of the prisoner, with the certificates of the said Josiah Reed and William Suddeth, and gave evidence to the jury conducing to prove that the prisoner did, at the time and place charged in the indictment, take oath as charged, and subscribe the paper set out in the indictment as his affidavit, before the said Reed; and that the said Reed was then and there a justice of the peace of the commonwealth of Kentucky, in and for the said county of Bath, duly commissioned, qualified, and acting as such; and also gave evidence conducing to prove that immediately after the passage of the said act of congress of the 5th day of July, 1832, entitled “An act for liquidating and paying certain claims of the state of Virginia,” the secretary of the treasury did establish as a regulation for the government of the department and its officers, in their action upon the claims in said act mentioned, that affidavits made and subscribed before any justice of the peace, of any of the states of the United States, would be received and considered to prove the persons making claims under said act, or the deceased whom they represented, were the persons entitled under the provisions thereof; and that the said regulations had been ever since acted under at the department, and numerous claims heard, allowed and paid on such affidavits; and also gave evidence conducing to prove that the prisoner, acting as the executor of his father, John Bailey, had, before the time of making and subscribing said affidavit, asserted the claim therein men-

tioned, and employed Thomas Triplett to prosecute the same, and receive money thereon; that the said Triplett did afterwards present the said affidavit and certificates in support of said claim at the said department, on which, together with other affidavits, the same was allowed and the money paid, and a part thereof paid to the prisoner. The above being all the evidence conducing to prove the authority or jurisdiction of said Josiah Reed to administer said oath and take said affidavit, the counsel for the prisoner moved the court to instruct the jury that the said Josiah Reed had no authority or jurisdiction to administer said oath or take said affidavit; and that, whatever other facts they might find on the evidence, the prisoner could not have committed the crime of perjury, denounced by the thirteenth section of the act of congress, more effectually to provide for the punishment of certain crimes against the United States and for other purposes, "approved on the 3d of March, 1825" (4 Stats. at Large, 118), nor of false swearing denounced by the third section of the act "in addition to the act" entitled "An act for the prompt settlement of public accounts, and for the punishment of the crime of perjury," approved on the 1st of March, 1823, and their verdict ought to be for the prisoner; which motion the attorney for the United States opposed.

On this question the judges were divided and opposed in opinion, whereupon, on the motion of the attorney of the United States, the said question and disagreement were stated, and ordered to be certified to the supreme court.

It is admitted that there is no statute of the United States which expressly authorizes any justice of the peace of a state, or indeed any officer of the national government, judicial or otherwise, to administer an oath in support of any claim against the United States under the act of 1832, ch. 173. And the question is, whether, under these circumstances, the oath actually administered in this case was an oath upon which there would be a false swearing, within the true intent and meaning of the act of 1823, ch. 165.

It is unnecessary to consider, in this case, whether an oath taken before a mere private or official person, not authorized to administer an oath generally or in special cases, or not specially authorized, recognized or allowed by the regulations or practice of the treasury department, as competent to administer an oath in support of any claim against the United States, would, though the claim should be admitted or acted upon in the treasury department, under such a supposed sanction, be within the provision of the act of 1823, ch. 165. These questions may well be reserved for consideration until they shall arise directly in judgment. In the present case, the oath was administered by a state magistrate, having an admitted authority under the state laws to administer oaths, *virtute officii*, in many cases, if not in the present case; and it is further found in the case, that there was evidence at the trial conducing to prove (and for the purposes of the present argument it must be taken as proved) that the secretary of the treasury did establish a regulation, authorizing affidavits made before any justice of the peace of a state to be received and considered in proof of claims under the act of 1832, so that the solution of the question, now before us, depends upon this: whether the oath, so administered, under the sanction of the treasury department, is within the true intent and meaning of the act of 1823.

§ 1048. *Offense created by the act of May 1, 1833. The oath need not be administered in a judicial proceeding.*

Admitting, for the sake of argument, that it is true (on which, however, we express no opinion) that a state magistrate is not compellable to administer an

oath, *virtute officii*, under a law of the United States which expressly confers power on him for that purpose, still, if he should choose to administer an oath under such a law, there can be no doubt that it would be a lawful oath, by one having competent authority; and as much so as if he had been specially appointed a commissioner under a law of the United States for that purpose. And we think that such an oath, administered under such circumstances, would clearly be within the provision of the act of 1823. That act does not create or punish the crime of perjury, technically considered. But it creates a new and substantive offense of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case of which the state magistrate, under the state laws, had judicial jurisdiction, so as to make the false swearing perjury. It would be sufficient that it might be lawfully administered by the magistrate, and was not in violation of his official duty.

§ 1049. *The secretary of the treasury had power, under the act of July 5, 1832, to authorize state magistrates to administer oaths.*

There being no express authority given by any law of the United States to any state magistrate to administer an oath in the present case, the next inquiry naturally presented is, whether the secretary of the treasury had an implied power to require, authorize, allow or admit any affidavits sworn before state magistrates, in proof or in support of any claim under the act of 1832; for if he had, it would be very difficult to show that such an affidavit is not within the true intent and meaning of the act of 1823, as it certainly is within the very words of the enactment. The policy of the act clearly extends to such a case, and the public mischief to be remedied is precisely the same as if the affidavit had been taken under the express and direct authority of a statute of the United States. And we are of opinion that the secretary of the treasury did, by implication, possess the power to make such a regulation, and to allow such affidavits in proof of claims, under the act of 1832. It was incident to his duty and authority, in settling claims, under that act. The third section provides: "That the secretary of the treasury be, and he is hereby, directed and required to adjust and settle those claims for half pay of the officers of the aforesaid regiment and corps, which have not been paid, etc., which several sums of money herein directed to be settled or paid shall be paid out of any money in the treasury not otherwise appropriated by law."

§ 1050. *Where power is given to an officer to adjust and settle claims the appropriate means follow.*

It is a general principle of law, in the construction of all powers of this sort, that where the end is required the appropriate means are given. It is the duty of the secretary to adjust and settle these claims, and in order to do so he must have authority to require suitable vouchers and evidence of the facts which are to establish the claim. No one can well doubt the propriety of requiring the facts which are to support a claim, and rest on testimony, to be established under the sanction of an oath; and especially in cases of the nature of those which are referred to in the act, where the facts are so remote in point of time, and must be so various in point of force and bearing. It cannot be presumed that congress were insensible of these considerations or intended to deprive the secretary of the treasury of the fullest use of the best means to accomplish the end, namely, to suppress frauds and to ascertain and allow just claims.

§ 1051. *The practice of the departments and the course of legislation looked to in construing statutes.*

It is certain that the laws of the United States have, in various cases of a similar nature, from the earliest existence of the government down to the present time, required the proof of claims against the government to be by affidavit. In some of these laws authority has been given to judicial officers of the United States to administer the oaths for this purpose, and at least as early as 1818 a similar authority was confided to state magistrates. The citations from the laws, made at the argument, are direct to this point, and establish in the clearest manner a habit of legislation to this effect. Act of 28th of February, 1793, ch. 61 (1 Stats. at Large, 324) [17]; Act of 3d March, 1803, ch. 90 (2 Stats. at Large, 242); Act of 10th of April, 1806, ch. 25 (2 Stats. at Large, 376); Act of 18th of March, 1818, ch. 19 (3 Stats. at Large, 410); Act of 1st of May, 1820, ch. 51 (3 Stats. at Large, 569); Act of 3d of March, 1823, ch. 187 (3 Stats. at Large, 782). It may be added that it has been stated by the attorney-general, and is of public notoriety, that there has been a constant practice and usage in the treasury department in claims against the United States, and especially of a nature like the present, to require evidence by affidavits in support of the claim, whether the same has been expressly required by statute or not; and that, occasionally, general regulations have been adopted in the treasury department for this purpose.

Congress must be presumed to have legislated under this known state of the laws and usage of the treasury department. The very circumstance that the treasury department had, for a long period, required solemn verifications of claims against the United States, under oath, as an appropriate means to secure the government against frauds, without objection, is decisive to show that it was not deemed an usurpation of authority.

§ 1052. *Legislative acts should be construed with reference to known usage.*

The language of the act of 1823 should, then, be construed with reference to this usage. The false swearing and false affirmation, referred to in the act, ought to be construed to include all cases of swearing and affirmation required by the practice of the department in regard to the expenditure of public money or in support of any claims against the United States. The language of the act is sufficiently broad to include all such cases; and we can perceive no reason for excepting them from the words, as they are within the policy of the act, and the mischief to be remedied. The act does no more than change a common law offense into a statute offense.

§ 1053. *By the common law, the taking of a false oath, with a view to cheat the government or to defeat the administration of public justice, is punishable as a misdemeanor.*

There is nothing new in this doctrine. It is clear, by the common law, that the taking of a false oath, with a view to cheat the government or to defeat the administration of public justice, though not taken within the realm or wholly dependent upon usage and practice, is punishable as a misdemeanor. The case of *O'Mealy v. Newell*, 8 East, 364, affords an illustration of this doctrine. In that case it was held that a person making or knowingly using a false affidavit of debt sworn before a foreign magistrate in a foreign country for the purpose of holding a party to bail in England, although such affidavit was not authorized by any statute, but was solely dependent upon the practice and usage of the courts of England, was punishable as a misdemeanor at

common law as an attempt to pervert public justice. Upon this occasion Lord Ellenborough, after alluding to the practice of receiving such affidavits made in Ireland and Scotland, as well as in foreign countries, said the practice in both cases must be equally warranted or unwarranted. In none of these cases can the party making a false affidavit be indicted specifically for the crime of perjury in the courts of this country. But in all of them, as far as he is punishable at all, he is punishable for a misdemeanor in procuring the court to make an order to hold to bail, by means and upon the credit of a false and fraudulent voucher of a fact produced and published by him for that purpose. And the court held the practice perfectly justifiable.

§ 1054. *A false oath administered by a state magistrate, admissible in support of a claim against the United States, is a criminal offense under the acts named.*

Upon the whole, we are of opinion that where the oath is taken before a state or national magistrate, authorized to administer oaths, in pursuance of any regulations prescribed by the treasury department, or in conformity with the practice and usage of the treasury department, so that the affidavit would be admissible evidence at the department in support of any claim against the United States, and the party swears falsely, the case is within the purview of the act of 1823, ch. 165. It will be accordingly certified to the circuit court that the said Josiah Reed, named in the certificate of division of the judges of the circuit court, being a justice of the peace of the commonwealth of Kentucky, authorized by the laws of that state to administer oaths, had authority and jurisdiction to administer the oath, and take the affidavit in the said certificate of division mentioned; and that, if the facts stated therein were falsely sworn to, the case is within the act of congress of the 1st day of March, 1823, referred to in the same certificate.

Mr. Justice McLEAN dissented.

§ 1055. *Criminal intent.*—Where a person, before and at the time of making an affidavit, states all the facts in relation to the matter, and is induced to swear to the affidavit by the representations of his friends, one of whom is a lawyer, that it contains substantially the statements made by him, he is not guilty of perjury. *United States v. Stanley,* 6 McL., 409.*

§ 1053. To constitute perjury there must be a wilful and corrupt statement of a falsehood, material to the matter in hand. *Ibid.* See § 1043.

§ 1057. The internal revenue laws provided that a person "knowingly and wilfully" making a false sworn statement of his income should be guilty of perjury. *Held*, that in order to convict, the false swearing must appear to have been done corruptly, and that such corrupt intent might appear from circumstances; that corrupt intent is reasonably inferred from knowingly making a false under-statement of such income. *United States v. Mayer,* Deady, 127.*

§ 1058. If a person is honestly mistaken in his sworn statement it is not perjury; or, it seems, if he makes it honestly upon the advice of counsel after stating to him all the facts, if the question involves a question of law; but if he rashly and foolhardily swears to what he knows nothing about, or has no good reason to believe true, it is perjury, and he will not be heard to claim it was a mistake. *Ibid.*

§ 1059. In a prosecution for perjury, whether the false oath was taken under a misconstruction of the law is a question of fact for the jury. *United States v. Smith,* 1 Saw., 277.*

§ 1060. It is perjury to swear falsely, "wilfully and corruptly," contrary to the witness' belief, but not to swear "rashly and inconsiderately" according to such belief. *United States v. Shellmire,* Bald., 370.*

§ 1061. The false affidavit of a person to his income return is not perjury unless the false oath be made knowingly, wilfully and corruptly. If the defendant believed that he was not bound to return a certain class of profits, and the failure to return these constitutes the falsehood in the affidavit, then he has not committed the crime. But if the oath was intentionally taken by the defendant, knowing it to be false, or having no reason to believe it to be

true, and for the purpose of gaining some advantage to himself or defrauding or injuring another, then he has committed perjury. *United States v. Smith,* 1 Saw., 277.*

§ 1062. In a prosecution for perjury, whether the false oath was taken knowingly and corruptly is a question for the jury. And the court will not set aside a verdict in such a case as being against the evidence, unless it is manifest from all the evidence that the verdict is not right. *Ibid.*

§ 1063. **Materiality.**—The defendant was indicted for alleged perjury in his examination before a commissioner to be used at the hearing of a motion for a preliminary injunction against him, the defendant, in an equity suit to restrain him from infringing a patent for exploding torpedoes in oil wells. His testimony alleged to be false was to the effect that he did not own any of the wells but one. But he admitted that all the wells were under his control. His alleged false testimony was not therefore material in the injunction proceeding, as his control of the wells rendered him liable for the infringement. And evidence of the falsity of the testimony with regard to the ownership of the wells was therefore rejected. *United States v. Perdue,* 4 Fed. R., 897.*

§ 1064. **Two witnesses.**—The old rule that two witnesses were required to convict of perjury has been so far modified that now, in a prosecution for perjury in making a return under the revenue laws, the perjury can be proved by the books and papers kept by the defendant. *United States v. Mayer,* Deady, 127.*

§ 1065. Statements made the ground of perjury must, to authorize a conviction, be disproved by two witnesses, or by one witness and corroborating circumstances. *United States v. Coons,* 1 Bond, 1.*

§ 1066. The general rule is, that in order to convict of perjury it is necessary to produce, on the part of the prosecution, at least one living witness, corroborated by another witness or by circumstances, to contradict the oath of the defendant. The rule applies to all cases where, to prove the perjury assigned, oral testimony is exclusively relied upon; but it is held not to apply in the following cases: Where a person is charged with perjury directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent. In cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; the oath only being proved to have been taken. In cases where a party is charged with taking an oath contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to, or by other written testimony existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited in it. *United States v. Wood, 14 Pet., 430.*

§ 1067. **Voluntary oath.**—Although the statute imposing the income tax does not require that a person shall make oath to his return of income, yet it permits him to take the oath and be a witness in his own favor in the matter of ascertaining the amount of his income; and if he voluntarily avails himself of this privilege, he must tell the truth, and if he knowingly and wilfully swears falsely, he is guilty of perjury. *United States v. Smith,* 1 Saw., 277.*

§ 1068. On an application for naturalization, the accused volunteered as a witness, and testified that he was well acquainted with the applicant. It appeared that he did not know the applicant at all. *Held,* that he was properly convicted of perjury under section 5392, Revised Statutes. *United States v. Jones,* 14 Blatch., 90.*

§ 1069. **Second affidavit.**—To sustain an indictment for perjury in the making of an affidavit it is not sufficient to prove that, subsequently, the defendant made an affidavit directly contradicting the one on which perjury is assigned; and the defendant cannot be found guilty, though he may have committed perjury in the second affidavit. *United States v. Mayer,* Deady, 127.*

§ 1070. **Proof of a part of testimony.**—In a trial for perjury, it is not necessary to prove all that the defendant testified to at the trial. When it is proved that particular facts, positively and deliberately sworn to by the defendant in any part of his testimony, were falsely sworn to, it is incumbent on him to prove, if he can, that in other parts of his testimony he explained or qualified that which he had so sworn to. *United States v. Erskine, 4 Cr. C. C., 299.*

§ 1071. **National banks.**—An oath made by the cashier of a national bank, verifying a report of the condition of the bank, made by himself as cashier to the comptroller of the currency, is a declaration within the meaning of section 5292, Revised Statutes. The law requires such a report to be made five times during the year, and verified by the oath of the president or cashier. Where the indictment for false swearing in such a case contains an averment that the report was "made to the comptroller of the currency, and verified as aforesaid as by law required," it need not contain any specific averment that the report was made in pursuance of a request or requirement of the comptroller, or according to a form

prescribed by the comptroller. Such are matters of inducement, and do not require exact certainty. *United States v. Bartow*, * 10 Fed. R., 873.

§ 1072. In a judicial proceeding.—A false affidavit to an account for the board of a child, for the purpose of getting it passed by the orphans' court, was held to be taken in a judicial proceeding, and to constitute perjury, if knowingly made. *United States v. Thomas*, 3 Cr. C. C., 293.

§ 1073. Authority to administer oath.—Where one was indicted for perjury in swearing to his accounts as clerk of the United States court for Ohio, it was held, on objection that the district judge who administered the oath in connection with which the perjury was alleged to have been committed had no authority to administer such oath, that this being a matter touching the government of the United States, in which he was serving as judge, he had authority to administer the oath. *United States v. Ambrose*, * 2 Fed. R., 551.

§ 1074. Although a deputy clerk may not have power to administer an oath, yet he may have the power to administer it in the presence of the court, and by its express order, so that perjury may be assigned if the affidavit is false. *United States v. Nichols*, * 1 McL., 21.

§ 1075. Where an order of court authorizes clerks to administer oaths to residents of their respective counties, a conviction for perjury cannot be sustained where the affidavit was made before the clerk of a county other than the one in which the accused resided. *United States v. Deming*, * 4 McL., 3.

§ 1076. The act of March 3, 1817, declares that every collector "shall have authority, with the approval of the secretary of the treasury, to employ within his district such number of proper persons as deputy collectors of the customs as he shall judge necessary, who are hereby declared to be officers of the customs." No limitation being placed upon the authority of the deputies so appointed, they have the same authority as their principals. Being substitutes for the temporary deputies through whom the collectors are authorized, by the act of March 2, 1799, to perform their duties and functions in case of sickness, etc., they have the same powers as the collectors themselves. Whenever, therefore, in the subsequent acts of congress, it is declared that the collector may administer oaths, etc., the deputy has the same power without being mentioned. It may be perjury, therefore, to make a false oath, before a deputy, as to the truth of an invoice of goods entered at the custom house. *United States v. Barton*, * Gilp., 439.

§ 1077. Administering oath.—The defendant was indicted for perjury in making an affidavit before a notary public. The affidavit bore the certificate of the notary that the affidavit was sworn to, and the notary testified that he said to the defendant, "Do you solemnly swear to this affidavit, and is it true?" to which the accused replied that he did, without lifting up his hand or placing it on the Bible. In another portion of his testimony he testified that there was but one form of oath in the state, which was: "Do you solemnly swear that the above affidavit subscribed by you is true, in the presence of the ever-living God?" That he used that form substantially, but did not know whether he used the phrase "in the presence of the ever-living God." Held, that this testimony, together with the certificate of the notary, is sufficient to prove that an oath was administered to the accused. *United States v. Baer*, * 18 Blatch., 493.

§ 1078. Case authorizing an oath.—A deposition given before a commissioner by a proposed surety on a bail bond as to his responsibility is an oath taken in a case "in which the law of the United States authorizes an oath to be administered" within section 5392, Revised Statutes, and perjury may be assigned thereon. *United States v. Volz*, * 14 Blatch., 15.

§ 1079. False swearing in an affidavit required by the secretary of war of all persons claiming exemption from military duty is perjury under the thirteenth section of the act of March 3, 1825, which declares that if any person in any case, matter, hearing or other proceeding where an oath or affirmation shall be required to be taken or administered under or by virtue of any law of the United States, shall upon the taking of such oath or affirmation knowingly and wilfully swear or affirm falsely, he shall be guilty of perjury. *United States v. Schuchall*, * 4 Biss., 425.

§ 1080. Under the law declaring that certain officers of the treasury department, as well as the secretary himself, may make certain rules and regulations relating to the duties of their offices, it is competent for the proper officer of the treasury to make a rule requiring that, before a bond shall be accepted which may authorize the delivery of stamps on credit to a manufacturer of matches, an affidavit shall be made showing the responsibility of the sureties. Perjury can be assigned upon such an affidavit, if the statements contained in it are false, and known to be so by the person making them. *Ralph v. United States*, * 9 Fed. R., 693.

§ 1081. To justify a verdict of conviction for perjury, under the thirteenth section of the act of March 3, 1825, it must be proved that the defendant was sworn; that he was sworn in "a case, matter, hearing or other proceeding where an oath or affirmation shall be required"

to be taken or administered under or by any law or laws of the United States," and that he knowingly and wilfully swore to that which was false; and further, that the oath was administered to him by the person named in the indictment, and that such person had authority to administer the oath. *United States v. Coons*,* 1 Bond, 1.

§ 1082. The court refuses its assent to the principle that perjury cannot be affirmed of any testimony under oath, upon an indictment for an act not constituting an offense. The statute speaks of this offense as one which may be committed "in any suit, controversy, matter or cause depending in any of the courts of the United States." *United States v. Reese*,* 4 Saw., 629.

§ 1083. A false oath made before the clerk of the circuit court by a witness, in a cause then pending, as to the distance of his abode from the court, in order to procure the payment of more mileage, is not perjury within the thirteenth section of the act of March 3, 1825, because the oath is not taken "in any case, matter . . . or other proceeding where an oath or affirmation is required to be taken or administered under or by any law or laws of the United States." *United States v. Babcock*,* 4 McL., 113.

§ 1084. A false oath made by a witness, before the clerk of the circuit court, as to the distance of his residence from court, under a usage introduced by the clerk in ascertaining the mileage that witnesses are entitled to claim, cannot be punished as perjury, under section 3 of the act of March 1, 1833, declaring it to be perjury for any person to "swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States," such oath not being required by law, nor by order of the court. *Ibid.*

§ 1085. Jurisdiction.—Perjury committed in a judicial investigation under the laws of congress is an offense against the United States, and is not cognizable by the state courts. *Ex parte Bridges*, 2 Woods, 423.

§ 1086. Perjury cannot be committed on an examination before a justice of the peace on a complaint for feloniously destroying a vessel, when the offense was not committed in such a place as to give any court of the United States cognizance of the crime. *United States v. Robinson*,* 4 Mason, 307.

§ 1087. Joint answer.—It is held that, in a joint answer, each individual would be liable for perjury, if he swore falsely. *Davis v. Davidson*, 4 McL., 136.

§ 1088. A promissory oath of an insolvent, that he would "deliver up, convey and transfer all his property," etc., cannot be made the subject of a prosecution for perjury. *United States v. Glover*,* 4 Cr. C. C., 190.

§ 1089. False oath on two different occasions.—Where the first count charges the prisoner with having sworn to a certain false story, in an affidavit presented to a certain commissioner, and the second count charges him with having again sworn to the same story, when called as a witness upon the examination before the same commissioner, and there is no dispute as to the fact that he was sworn before the commissioner on such examination, and that he then testified to the same story which he had before sworn to in his affidavit, it is no error to instruct the jury that, if they find against the defendant on the first count, a verdict will almost certainly follow on the second count. *United States v. McHenry*,* 6 Blatch., 503.

§ 1090. Fishing bounty.—Under the act of 1813, allowing a bounty to vessels that have been employed in the cod fishery under an agreement with the fisherman on shares, and declaring that "any person who shall make any false declaration in any oath or affirmation required by this act, being duly convicted thereof, shall be deemed guilty of wilful and corrupt perjury," the agent of the owner of the vessel who, in order to procure the bounty, swears to the original agreement with the fishermen, as is required by the act, is not guilty of perjury, unless he swears falsely and wilfully, and with intent to deceive. If he swears to a fact which he knows to be false, or to his knowledge of a fact when he has no such knowledge, in order to induce the collector to pay the bounty, he is guilty of perjury. *United States v. Smith*,* 19 Law Rep., 91.

§ 1091. The seventh section of the act of July 23, 1813, granting a bounty to vessels engaged in the fisheries, enacts that the owner or owners of every fishing vessel, etc., his or their agent or lawful representative, shall, previous to receiving the allowance made by the act, produce to the collector who is authorized to pay the same, the original agreement made with the fisherman employed on board of the vessel, "and also a certificate to be by him or them subscribed, therein mentioning the particular days on which such vessel sailed and returned, etc., to the truth of which he or they shall swear or affirm before the collector aforesaid." The ninth section declares guilty of perjury any person who shall make any false declaration on oath or affirmation, required by this act. It is held that where the owner signs the certificate required by this act, and his agent makes the oath to the certificate, the agent cannot be guilty of perjury in making such oath. The seventh section requires that the oath shall be taken by the same person who signs the certificate. *United States v. Kendrick*,* 2 Mason, 69.

§ 1092. Upon the trial of an indictment for perjury in swearing to the agreement of the fishermen in order to obtain a fishing bounty, the jury were instructed that in order to make the offense, under the statute, the defendant must have sworn to the declaration which, at the time, he was aware was false; and this might be either by swearing to a fact which he knew was not true, or by swearing to his knowledge of the fact when he knew he had no such knowledge; that rash swearing was not necessarily perjury; that the oath must have been taken to deceive the officer and thereby to get the bounty; and that it was not necessary that it should have been done to defraud the government. *United States v. Atkins*,* 1 Spr., 553.

§ 1093. Upon an indictment for taking a false oath to obtain the fishing bounty, under the act of July 29, 1813, it was held that section 7 of this act did not require an oath as to the agreement between the fisherman, but only as to the certificate described in the section. *United States v. Nickerson*,* 1 Spr., 232.

§ 1094. By the statute of July 29, 1813, congress having prescribed expressly what kind of proof of compliance with the requirements of that act, for obtaining the fishing bounty, which shall be necessary to entitle the owner of a fishing vessel to claim the bounty, and having directed what papers shall be produced and which of them shall be sworn to, it is not competent for any officer to require other oaths to support such claim, so as to make the false taking of such oaths legally criminal. *Ibid.*

§ 1095. Under act of 1820.—The pension act of 1820, ch. 50, § 2, declaring that "any person who shall swear or affirm falsely in the premises, and be thereof convicted, shall suffer as for wilful and corrupt perjury," does not make such false swearing a technical perjury, but only refers to it for the purpose of affixing the same punishment. *United States v. Elliot*,* 3 Mason, 153.

§ 1096. In bankruptcy.—The act of 1825 is an act defining the crime of perjury generally, and is not confined in its operations to acts passed anterior to that time. So it is held that false swearing to a schedule in bankruptcy is perjury. *United States v. Nichols*,* 4 McL., 23.

§ 1097. The bankrupt court is always open, and false swearing to a petition must be considered as having been done in court. *Ibid.*

§ 1098. The act of December 19, 1803, repealing the bankrupt law, contains no provision reserving jurisdiction of perjuries already committed against that law. *Anonymous*,* 1 Wash., 84.

§ 1099. A false oath taken in proceedings under the bankrupt law cannot be punished as perjury under section 18 of the general criminal law of the United States, punishing perjuries committed in judicial proceedings whether orally or by deposition. Nor is such a false oath punishable by the common law. The common law description of the offense of perjury is a false oath taken in some judicial proceeding, in a matter material to the issue. *Ibid.*

§ 1100. It is perjury under the bankrupt law for a bankrupt to swear, in bankruptcy proceedings, that he is the owner of a brig, when he has received a bill of sale of the brig for the purpose of covering the property under his name, when it is really the property of another. *Ibid.*

§ 1101. A false statement in a sworn schedule in a proceeding in bankruptcy does not render the party liable to the penalties of perjury, where he acted under advice of counsel, and had no fraudulent intent. *United States v. Conner*,* 3 McL., 573.

XV. RECEIVING STOLEN PROPERTY.

SUMMARY — *Variance as to the person from whom the property was received*, § 1102. — *Property recovered by owner*, § 1103. — *Property stolen from the mail*, §§ 1104-1105.

§ 1102. Where an indictment for receiving stolen property charges that the defendant received it from the thief, and the proof shows that he received it from another person, it is a fatal variance. *United States v. De Bare*, §§ 1107, 1109.

§ 1103. Where it is shown in an indictment for receiving stolen property that before the defendant received the property it had been recovered and had lost its character as stolen property by passing into the hands of the owner or his agents, the prosecution must fail. *Ibid.*

§ 1104. To constitute the guilty receiving of property stolen from the mail, as defined and punished by section 5470, Revised Statutes, it must appear that the defendant voluntarily took the property into his control and possession, or voluntarily had it in his possession and control, with intent to prevent the larceny or the thief from being discovered, or the property from being reclaimed by the true owner or for his benefit; but it need not appear that he re-

ceived it with intent to make any gain or profit thereby to himself. A guilty concealing also implies that the defendant voluntarily secreted the property or put it out of the way, or in some manner disposed of it with like intent as in the case of receiving. To aid in concealing the stolen property the defendant must do some act with intent to assist the thief or other person, then in the guilty possession of the property, in concealing it, or furtively disposing of it, with a like intent as in the case of receiving. *United States v. Montgomery*, §§ 1103-1117. See §§ 946-948.

§ 1105. The possession by the defendant of gold coin, received at the mint in exchange for gold dust stolen from the mail, will not support an indictment under section 5470, Revised Statutes, for receiving or concealing, or aiding in concealing, property, knowing that it had been stolen from the mail. *Ibid*.

§ 1106. A defendant cannot be convicted under section 5470, Revised Statutes, upon proof of receiving, or concealing, or aiding in concealing, property stolen from the mail, unless the acts were done within the judicial district in which the trial is being had. *Ibid*.

UNITED STATES v. DE BARE.

(District Court, Eastern District of Wisconsin: 6 Bissell, 338-363. 1875.)

STATEMENT OF FACTS.—The accused was indicted for receiving postage stamps, knowing them to have been stolen. The stamps were stolen by one Crawford, who put them into the express office directed to the defendant. Crawford was arrested at Quincy, Illinois, and on a written order from him the stamps were delivered to the Quincy postmaster. Subsequently, under orders from the post-office department, the postmaster permitted the stamps to go forward to defendant. The indictment charged that the defendant received the stamps from Crawford.

§ 1107. *Variance as to the person from whom defendant received the goods.*
Opinion by DYER, J.

Careful consideration of the question has confirmed me in the opinion that the instruction given to the jury was right. Undoubtedly it is not, in all cases, essential that an indictment against a receiver should allege by whom the property was stolen. A party may be indicted for receiving goods stolen by persons unknown. In a case where an indictment was objected to because it did not ascertain the principal thief, and did not, therefore, state to whom in particular the prisoner was accessory, it was held good; but "where the principal, however, is known, it seems proper to state it according to the truth." 2 East's Crown Law, 781. It is laid down in the books as a settled principle, that, if an indictment allege that the goods were received from the thief, it must be proved that they were received from the thief, and if it appear that the thief gave them to a person from whom the accused received them, it is a fatal variance. In support of this principle, *Arundel's Case*, 1 Lewis, 115, cited by defendant's counsel on this motion, is the leading authority. The prisoner was indicted for receiving stolen goods, and the indictment alleged that he received them from the person who stole them, and that this person was a certain ill-disposed person to the jurors unknown. It was proved that the person who stole the property handed it to J. S., and that J. S. delivered it to the prisoner; and Parke, J., held that on this indictment it was necessary to prove that the prisoner received the property from the person who actually stole it, and he would not allow it to go to the jury to say whether or not the person from whom he was proved to have received it was an innocent agent of the thief.

Now in the case at bar the indictment charges that the defendant received the postage stamps from Crawford. To convict, the proof should conform to the charge. If the proof is that the defendant received the stamps from the

Quincy postmaster and not from Crawford, the variance is fatal. Crawford was the principal felon. After arrest, as we have seen, the stamps passed into the possession of the Quincy postmaster, who took them from the express office, and subsequently, by direction of the department, forwarded them to the consignee. There was no relation of principal and agent between Crawford and the postmaster. The former had originally authorized the express company to carry and deliver the stamps to the defendant. By his order in writing, given to the postmaster, he withdrew that authority, ceased to be a party to the contract of transportation, and surrendered the stamps to the postmaster. The subsequent re-deposit of the stamps in the express office was the act of the postmaster under direction of the department, and I think the case is directly within the principle of *Arundel's Case*, before cited. I am convinced, therefore, that it would not have been error to have instructed the jury that the variance between the allegation in the indictment and the proof is fatal to a conviction.

§ 1108. *To support the indictment the property must be stolen property, and not have lost its character by passing into the hands of the owner before its reception by the defendant.*

If there be any doubt upon the point thus far discussed, there can be none, I think, concerning the second ground urged in support of this motion. The ownership of these stamps was in the United States. The Quincy postmaster was the agent of the owner. When Crawford surrendered them to this agent they were reclaimed property that had been stolen, but their character as stolen property ceased in the hands of the postmaster, so far as the subsequent receiver was concerned. The moral turpitude of a receiver under such circumstances may be as great as in case the property comes directly from the hands of the thief, because the criminal intent on his part exists equally in both cases. But to create the offense which the law punishes, the property, when received, must, in fact, and in a legal sense, be stolen property. If these stamps were received by the defendant, they did not, when received, upon the proof made, bear this character. They had been captured from the thief by the owner, and the act of forwarding them to the alleged receiver was the act of the owner.

I regard this point conclusively settled upon authority. In *State v. Ives*, 13 Ired., 338, it was held that an indictment for receiving stolen goods must aver from whom the goods were received, so as to show that the person charged received them from the principal felon. If received from any other person the statute does not apply. In *The Queen v. Schmidt*, 1 Crown L. C. Cas., 15, the case was this: Four thieves stole goods from the custody of a railway company, and afterwards sent them in a parcel by the same company's line addressed to the prisoner. During the transit the theft was discovered, and on the arrival of the parcel at the station for its delivery, a policeman in the employ of the company opened it and then returned it to the porter, whose duty it was to deliver it with instructions to keep it until further orders. On the following day the policeman directed the porter to take the parcel to its address, where it was received by the prisoner, who was afterwards convicted of receiving the goods knowing them to be stolen, upon an indictment which laid the property in the goods in the railway company. *Held*, that the goods had got back into the possession of the owner so as to be no longer stolen goods, and that the conviction was wrong.

The case of *Regina v. Lyons*, 41 Eng. Com. L., 122, was cited by counsel for

the prosecution in support of a conviction in this case. The report of the case is meager, but it appears that a brass weight had been stolen by a lad in the employ of the prosecutors; and it having been taken from him by another servant in the presence of one of the prosecutors, it was restored to the lad again, in order that he might take it for sale to the house of the prisoner, where he had been in the habit of selling similar articles before. The lad took it and sold it for 6½ l. The point was made that as the property had been restored to the possession of the owner it could not afterwards be considered as stolen property. Coleridge, J., said that for the purposes of the day he should consider the evidence sufficient to sustain the indictment, but would take a note of the objection. The prisoner was convicted and sentenced to transportation, and no change was subsequently made in the judgment of the court.

But this case of *Regina v. Lyons* is expressly overruled in the case of *Regina v. Dolan*, 29 Eng. L. & Eq., 533, Lord Campbell, C. J., delivering a judgment in which Justices Coleridge, Cresswell, Platt and Williams concur. Lord Campbell says: "With regard to *The Queen v. Lyons*, I think that the facts cannot be accurately stated. But if they be, I must say that I cannot concur with that decision, and I think that it ought not to be acted upon." Of his previous decision in that case, Coleridge, J., says: "Having no recollection of the case of *Queen v. Lyons*, I cannot take upon myself to say it is wrongly reported. But if it is not, I am bound to say that I think I made a great mistake." Motion for a new trial granted.

UNITED STATES *v.* MONTGOMERY.

(District Court for Oregon: 3 Sawyer, 544-553. 1875.)

Charge by DEADY, J.

STATEMENT OF FACTS.—The indictment in this case is founded upon section 5470 of the Revised Statutes, which, among other things, provides that any person who shall receive or conceal, or aid in concealing, any article of value, knowing the same to have been stolen or embezzled from the mail of the United States, shall be punishable by a fine of not more than \$2,000, and by imprisonment at hard labor not more than five years. The reason and necessity of such a statute is apparent. The postoffice is one of the principal departments of the government. Upon the security and celerity with which the mails are carried and delivered throughout the country depends to a great extent the preservation of the business and social relations of the people. Upon the long-established maxim that "A receiver is as bad as a thief," the statute has also provided for the punishment of persons who assist others in stealing or embezzling from the mails by receiving the stolen property, or concealing it, or aiding in concealing it, substantially in the same manner as the thief himself.

§ 1109. *Receiving, concealing, and aiding in concealing, etc., in an indictment under section 5479, Revised Statutes, constitute one crime.*

By this indictment the defendant is accused, in different modes or counts, of receiving, concealing, and aiding in the concealing, of three cans of gold dust, of the aggregate value of \$1,830, the same having been stolen from the mails of the United States, to the knowledge of the defendant, in October, 1874, near Canyonville. But these seventeen counts only charge one crime, that of receiving, concealing, and aiding in the concealing, of the stolen dust, under the circumstances stated, and the proof of receiving, concealing, or aiding in con-

cealing, is sufficient to establish the guilt of the defendant. To this indictment the defendant has pleaded not guilty, and the effect of this plea is to put in issue or controvert all the material allegations of the indictment. This being so, the burden of proof is upon the United States to prove to your satisfaction each of such allegations, before it can ask a verdict of guilty at your hands.

§ 1110. *A defendant indicted with another person for receiving, etc., may be tried separately when the other party has been discharged upon a plea of autrefois convict.*

The defendant stands before you as a person charged with the commission of a grave crime, and the fact that she is also a woman and a mother does not change the rules of law or the duties of jurors in such cases. In determining the question of her guilt or innocence, you are not to be swerved by any sympathy for her sex or condition, but you are to say truly whether she is guilty or not as charged, irrespective of such considerations or the consequences to her or others that may follow your verdict. Of course, the fact that the defendant is a woman may be more or less material in judging of her conduct and motives in fleeing the country as she did with Harmison, the party who appears to have stolen this dust and had it in his possession. In considering their relations and intimacy, upon the question of whether this stolen dust was received or concealed by her, or her aid, you may properly consider the fact of the difference in their sex—that they were traveling and cohabiting together as man and wife, with trunks and other traveling gear in common. The indictment charges that the defendant and Harmison both committed this crime, without alleging whether it was done jointly or severally, and counsel for defendant now insists that neither party can be found guilty of a separate receiving under such a charge. Waiving the consideration of that precise question, as not being material to the present aspect of the case, the fact being that Harmison has been discharged from this indictment upon his plea of *autrefois convict*, the defendant is now being tried upon it alone, and may be found guilty under it of committing the crime therein charged, separately.

§ 1111. *What constitutes a guilty receiving, etc., of stolen property under section 5479, Revised Statutes.*

Before the defendant can be found guilty of the charge in the indictment the United States must show that the gold dust in question was stolen or embezzled from its mails. The record of Harmison's conviction in this court of the crime of stealing three similar cans of gold dust from the mails has been introduced in evidence. This is sufficient evidence of the fact until the contrary appears, it being also shown or proven to your satisfaction that the property mentioned in the two indictments is the same. It must also be shown that the defendant, knowing it to have been so stolen or embezzled, received it from the thief, or concealed, or aided the thief or some one else in concealing it. To constitute a guilty receiving of stolen property by the defendant, it must appear that she voluntarily took it into her control and possession, or voluntarily had it in her possession and control, with intent to prevent the larceny or the thief from being discovered, or the property from being reclaimed by the true owner or for his benefit; but it need not appear that she received it with intent to make any gain or profit thereby to herself.

§ 1112. *The possession of goods for which the stolen property was exchanged will not support the indictment for receiving, etc.*

A guilty concealing also implies that the defendant voluntarily secreted this dust, or put it out of the way, or in some manner disposed of it with a like in-

tent as in the case of receiving. To aid in concealing stolen property, a party must do some act with intent to assist the thief or other person, then in the guilty possession of the property, in concealing it, or furtively disposing of it, with a like intent as in the case of receiving. The possession of property by the defendant for which the stolen gold dust was exchanged — as, for instance, gold coin for which it may have been exchanged by Harmison at the Philadelphia mint — will not support the charge in the indictment. The possession of such coin would not be the possession of the stolen property, and would not of itself tend to prove the defendant guilty of the charge in the indictment. But if the stolen dust was made into coin, this circumstance would not change its identity, and the possession of such coin would be the possession of the stolen property.

§ 1113. *To support an indictment for receiving stolen property, it must appear that the offense was committed in the district in which the indictment was found.*

But this cannot be a material question in this case because it is admitted that, if this dust was changed into or for coin by Harmison, it was done at the Philadelphia mint. Now the defendant cannot be convicted of the crime charged in the indictment upon proof of receiving, concealing, or aiding in concealing, this dust or the coin into which it may have been changed beyond this district — without the state of Oregon. Evidence has been given to you in regard to the conduct and declarations of Harmison and the defendant beyond this district, during their journey to Texas and back again, but only for the purpose of throwing light upon their acts and conduct while in this district. It being incumbent on the United States to show that this dust was stolen from the mails, instead of introducing the record of Harmison's conviction of the theft, in the first instance, the prosecution saw proper, as it had the right to do, to go into the original proof of the fact. In so doing the acts and declarations of Harmison, both within and without this state, tending to prove that the larceny was committed by him, have been given to you. But you are to remember that this evidence was only received for the purpose of proving the theft of the property, and that the defendant is not to be affected by the acts or declarations of Harmison, only so far as it appears the former were known to her or the latter were made to her, or in her presence, and assented to by her.

§ 1114. *Presumption of innocence.*

Although you should find that the defendant knew from Harmison, or otherwise, that this dust had been stolen from the mails, that itself is not sufficient to convict her of the crime charged. And, in this connection, it may be material for you to consider the sex of the defendant for the purpose of determining whether her flight, and subsequent association with Harmison, was as his accomplice in the crime or his paramour. Proof that the defendant fled the country with the thief as his wife is not sufficient to sustain the charge in the indictment. A woman who deserts her husband and flees the country with another man who has committed larceny, ought not to complain if a jury finds her guilty of receiving, or aiding in concealing, the property stolen by her paramour, upon circumstances which would be deemed insufficient in the case of an honest woman. But you are not to convict the defendant of the crime charged in the indictment because she appears to have been guilty of the crime of adultery. The defendant's illicit relation with Harmison may have afforded her favorable opportunities, and offered strong temptations, to assist him in

concealing the fruits of his crime, but it is not sufficient of itself to establish the fact that she did so assist him. But whatever her conduct or condition, the law presumes that the defendant is innocent of the crime charged against her until the contrary is proven beyond a reasonable doubt. In this respect, and so far as the crime charged in the indictment is concerned, she stands before the law as the peer of any woman, however virtuous or honorable. This presumption of innocence is the shield which the law interposes between her and her accusers, and it cannot be thrust aside or beaten down except by the force of evidence which shall satisfy your minds, beyond a reasonable doubt, of her guilt.

§ 1115. *Reasonable doubt defined.*

A reasonable doubt is a substantial one — not a mere whim, caprice or speculation. It arises out of the case, from some defect or insufficiency in the evidence which makes a juror hesitate and feel that he is not satisfied. Mathematical certainty is not attainable in criminal trials. If you are morally certain of the defendant's guilt you should say so by your verdict, but unless you are, however you may suspect it, you must say not guilty. You are the judges of the credibility of the witnesses and the weight to be given to their testimony.

§ 1116. *Circumstances properly affecting the credibility of witnesses.*

The evidence of Cardwell, tending to show that the defendant attempted to suborn him to swear falsely on the trial of Harmison, was admitted without objection, but it is my duty to say to you that it is not relevant or competent proof of the crime charged in this indictment. It may tend to show that the defendant was willing to run any risk, or even commit a crime, to save her paramour from conviction and punishment, but it does not prove that she committed the crime for which she is on trial. Montgomery, the late husband of the defendant, is contradicted by several witnesses and by the reporter's notes of his testimony on Harmison's trial. Besides, it appears from his own evidence that he knew of the theft soon after it was committed, in October, 1874, and had had the gold dust in his buggy and in his house without disclosing the fact. Besides, Cardwell, a witness called by the prosecution, testifies that Montgomery saw him at Canyonville, about the time the warrants were sworn out for Harmison and the defendant, and urged upon him the necessity of their — that is, Montgomery and Cardwell — making up a good story about the robbery, and sending Harmison and the defendant "up." Upon this trial he testified that when Harmison left this dust for him at the toll-house the defendant said he was foolish not to take it, when he spoke of their little child, and said it would ruin them. Upon cross-examination he stated that he testified to this conversation on Harmison's trial, but it appears from the reporter's notes that he did not. The witness was the husband of the defendant, and she deserted him for Harmison. He may entertain unkind feelings towards her on this account, he may desire, as he said to Cardwell, according to the latter's testimony, to "send her up." All these circumstances go to affect the credibility of this witness. What weight shall be given to his testimony you must judge, always remembering that a witness who is intentionally false in a material part of his testimony ought to be at least distrusted as to the rest of it.

The postal agent, Mr. Underwood, who acted as deputy marshal in pursuing and arresting Harmison and the defendant at Seguin, Texas, and bringing them here for trial, testifies to conversations and confessions of the defendant all along the route from there here. This kind of testimony should be received

with caution. The witness testified in a very indefinite manner as to the time and place of these conversations — giving them apparently in his own language and not always in the same words. After being on the stand one afternoon, and apparently going over the whole subject, he came back the next morning and testified to important conversations with the defendant in Texas, and between there and St. Louis, which he had not stated the day before, or apparently remembered. Besides, in stating a material part of a particular conversation, he first said she used the word “they,” and afterwards said she used “we” — a change which makes a material difference in the sense and effect of the admission. I make these suggestions not by way of calling in question or casting doubts upon the integrity of the witness, but that his testimony may be received with due caution. Apparently this prosecution was set on foot by him, and he has since been earnestly engaged in the arrest of Harmon and the defendant and the pursuit of evidence to secure their conviction, and he is liable to be unconsciously influenced by his zeal in the premises and the very natural desire of success in what he has undertaken.

§ 1117. *The law as to confessions as evidence.*

Upon the subject of verbal confessions, I read to you, as a part of my charge, from 1 Greenl. Ev., sections 214, 215, as follows: “The evidence of verbal confessions of guilt is to be received with great caution. For, besides the danger of mistake, from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of the situation, and that he is often influenced by motives of hope or fear to make an untrue confession. The zeal, too, which so generally prevails, to detect offenders, especially in cases of aggravated guilt, and the strong disposition, in the persons engaged in the pursuit of evidence, to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of the persons necessarily called as witnesses, in cases of secret and atrocious crime, all tend to impair the value of this kind of evidence, and sometimes lead to its rejection, when, in civil actions, it would have been received.” The weighty observation of Mr. Justice Foster is also to be kept in mind, that this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence by which the proof of plain facts may be, and often is, confronted.

Subject to these cautions in receiving them and weighing them, it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law. Their value depends on the supposition that they are deliberate and voluntary, and on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, so made by a prisoner, to any person, at any moment of time, and at any place subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are at common law received in evidence, as among proofs of guilt. The only direct evidence in the case which brings this defendant into what might be considered possession of this dust, in Oregon, is that of Montgomery, concerning the dust being left at the toll-house, near Canyonville, where he and she lived in the spring of 1875. According to his account, he came home one day and found his wife, the defendant, lying on the lounge in the front room, when she laughed and said: “Dan Smith (Harmison) has been here and left you a present.” He asked what it was, and she replied by rising up and leading him

into the back room, and pointing him to a sack in the potato-box. He put his hand into the sack, felt the cans of dust, and drew one of them in sight, when he said: "It is that d—d infernal dust! Give it back to him, and have nothing to do with it." The defendant urged him to keep the dust; but he declined, saying it would be the ruin of them, when she promised to return it, and Montgomery never saw it afterwards. Upon this evidence, assuming it to be true, I do not think, as a matter of law, that the defendant was then and there guilty of the crime charged in the indictment. A package is brought to the house and left with her for her husband, which she delivered to him, and he refuses to accept it, and directs her to return it to the person who brought it, which she does. This alone does not make her guilty of receiving, concealing, or aiding in the concealing, of stolen property, even if we assume, as is probable, that she knew these cans of dust had been stolen from the mails. And although it was wrong to advise her husband to take it (if she did), yet she did not hereby commit the crime with which she is charged.

Gentlemen of the jury, the case is now submitted to you to say upon your oaths, under the law and evidence given you in court, whether the defendant is guilty or not. Take the law so given you, and apply it to the facts, as you may find them from the evidence, and make up your verdict accordingly. (Verdict, not guilty.)

XVI. RESISTING AN OFFICER.

[See §§ 232, 612, 1218, 1468, 2644.]

SUMMARY—*Resistance after property is seized on attachment, § 1118.—Resisting a person in charge of property, § 1119.—When owner of property may not resist, though the writ does not run against him, § 1120.—What constitutes the offense, § 1121.*

§ 1118. Under a statute which punishes any person who shall resist or obstruct an officer in serving or executing the process of a court, a person who resists the officer after property is taken into his hands on a writ of attachment is guilty, for such holding of the property is executing the process within the meaning of the statute. *United States v. McDonald*, §§ 1122-1127.

§ 1119. Resistance to a person having custody of property seized by a marshal, and who acts under the direction of the marshal, is resisting the marshal, even though such person is not a regularly sworn deputy. *Ibid.*

§ 1120. Where an officer, under a writ of attachment in favor of one person, and acting in good faith, seizes the property of another person, having reasonable grounds for believing that the property belongs to the person against whom the writ runs, the owner has no right to resist the officer in serving or executing the process. But if the officer acts in bad faith and without such reasonable grounds, then taking forcible possession of the goods by the owner or agent is not resistance to an officer which the law punishes. *Ibid.*

§ 1121. Resistance to an officer is to oppose him by direct, active, and more or less forcible means. It means something more than to hinder, or interrupt, or prevent, or baffle, or circumvent. The gist of the offense of resisting is personal resistance of the officer; that is, personal opposition to the exercise of official authority or duty by direct, active, and in some degree forcible means. Where a statute punishing this offense uses the words "obstructs, resists or opposes," the offense is not limited to resistance alone, but it includes, also, wilful acts of obstruction or opposition, and does not necessarily imply the employment of direct force. It includes any passive, indirect or circuitous impediments to the service or execution of process. *Ibid.* See §§ 1130, 1137.

[NOTES.—See §§ 1128-1163.]

UNITED STATES v. McDONALD.

(Circuit Court for Wisconsin: 8 Bissell, 439-452. 1879.)

Charge by DYER, J.

STATEMENT OF FACTS.—This is an indictment which charges the defendants with the offense of obstructing and resisting an officer of the United States in

the service and execution of process issued from the United States circuit court. The allegations of the indictment in brief are, that on the 11th day of January, 1879, one Isaac Cook, a citizen of Missouri, commenced in the circuit court of the United States, for this district, an action against the defendant McDonald, to recover a certain demand, in which action a summons was issued and placed in the hands of the marshal for service; that a writ of attachment, commanding the marshal to attach the property of the defendant McDonald, was also issued in the same action, out of and under the seal of the court, the plaintiff in the action having made or procured to be made the affidavit and undertaking required by law in such cases; and that the writ of attachment, affidavit and undertaking were placed in the hands of the marshal in connection with the summons for service and execution.

That on or about the 16th day of January, the marshal caused and directed two of his deputies to proceed to the premises of the defendant McDonald to serve the summons and execute the writ of attachment, and that they did, on or about that day, serve the summons, and attach and take into custody a certain quantity of personal property, found by them upon the premises of the defendant McDonald, as his property, by virtue of the writ of attachment; that an inventory and appraisal of the attached property were made, and that thereafter copies of the writ of attachment, affidavit, undertaking and inventory were served upon McDonald; that at the time of such service one of the marshal's deputies, W. A. Nowell, made an arrangement with the defendant McDonald to leave the attached property on his premises in the charge and custody of one Jas. H. Hubbard, who was there present at the special request and by direction of Deputy Nowell, and that such arrangement was agreed to by the defendant McDonald and was acted upon by the deputy, and that the property was left upon the premises in the special care and custody of Hubbard.

It is then alleged that on or about the 22d day of January, Hubbard was specially authorized and directed by the marshal to keep possession of the attached property, and to protect the same, and his letter of authority and direction is set out in the indictment. It is further charged that on the 27th day of January, the attached property being in the care and custody of the marshal in the manner alleged, the defendants did forcibly, wilfully and unlawfully take and remove a large portion thereof from the possession of the marshal and of Hubbard, against and in defiance of the authority of the marshal, and so it is charged that they did knowingly and wilfully obstruct, resist and oppose an officer of the United States in serving and attempting to serve and execute a *mesne* process of the United States, namely, the writ of attachment before mentioned. This is the first count of the indictment. The second count, in more abbreviated form, charges the commission of a similar offense by the defendants on the 27th day of January, and is understood to be but a repetition of the charge contained in the first count.

§ 1122. *It is an offense to resist an officer attempting to execute process; and holding attached property after seizure is execution of process.*

The statute of the United States upon which this indictment is based is as follows: "Every person who *knowingly* and *wilfully* obstructs, resists or opposes any officer of the United States in *serving* or attempting to serve or *execute* any *mesne* process or warrant, or any rule or order of any court of the United States or any other legal or judicial writ or process" (R. S., sec. 5398), shall be punished in the manner prescribed by the statute. And the question is, Have the defendants committed this offense and so made themselves amen-

able to the penalties of this law? There has been put in evidence the judgment roll in the case of *Cook v. McDonald*, consisting of the summons, complaint, writ of attachment, affidavit, undertaking, inventory of attached property, returns of service, affidavit of no answer and judgment. The return of service on the summons shows that it was served on the defendant McDonald on the 14th of January, 1879, and the return upon the writ of attachment shows that the marshal on the same day attached the personal property described in the inventory, and that on the 16th day of January, the writ of attachment, affidavit, undertaking and copy of inventory were served on McDonald as the defendant in that action.

This writ of attachment was *mesne* process within the meaning of the statute referred to, and was such process as the statute makes it an offense for any person to knowingly and wilfully obstruct or resist an officer of the United States in serving or attempting to serve or execute. The point has been made that, if any levy by attachment upon the property in question was made, it was completed prior to the 27th of January, when the alleged resistance to the officer transpired, and that if such levy was so made and the writ was returned to the clerk of the court before the 27th of January, the acts complained of, if proven, did not constitute obstruction of or resistance to the officer in the service or execution of the writ, and consequently that there can be no conviction. My view of that question is this: The statute makes it an offense to knowingly and wilfully obstruct, resist or oppose any officer of the United States in serving or attempting to serve or execute any *mesne* process. Now, even though the attachment levy was made on the 14th day of January, and before the alleged acts of resistance, and even though the writ was returned to the clerk of the court before the 27th of January, if on that day the marshal was, through a special custodian, holding the property under a levy, so previously made, this was part of the process of executing the writ, and obstruction of or resistance to the officer at that time, if otherwise unlawful, would be as much an offense under the statute as if such obstruction or resistance had transpired while the attachment levy was actually in progress or before the writ was returned. The offense does not consist alone of obstructing or resisting an officer in *serving* or attempting to *serve* process. It includes as well obstruction of or resistance to an officer in attempting to *execute* the writ, and holding attached property after levy and seizure is part of the execution of the process.

* * * * *

§ 1123. *Resistance of a custodian of property appointed by and acting for the marshal is resistance of the marshal.*

It is claimed further that there was no resistance by the defendants to any officer of the United States; that the person resisted, one Hubbard, was not such officer, and that the alleged resistance to him was not a resistance to the marshal or to any of his regularly appointed deputies. The prosecution has given evidence tending to show that the first proceedings upon the writ of attachment were had under the immediate direction and supervision of the marshal's deputies; that after the alleged levy by attachment had been made, Hubbard was employed by one of these deputies to assume custody and care of the property; and that on the 22d day of January, 1879, the marshal wrote and sent to Hubbard a letter directing him to hold the property.

It is not claimed that Hubbard received directly from the marshal any other authority to act than this letter, nor that he was a regularly appointed sworn

deputy marshal under the statute. And as I have said, it is contended in behalf of the defendants, that resistance to him, if any be shown, was not resistance to the marshal nor to any officer of the United States. I do not concur in this view of the law. It is not and cannot be required or expected that the marshal shall be always personally present when process is served or is in course of execution, or that he can always exercise personal and immediate control over property that may have been seized upon such process. He has the right and power to designate and appoint a custodian of such property and to hold it by the hand of such custodian; and when it has been seized and is so held, it is, in law, in the charge and custody of the marshal, and in such case, the marshal, as an officer of the United States, by the hand of such custodian so appointed, executes the writ. I therefore instruct you that if the property in question had been previously attached by the marshal's deputies, and if subsequently Hubbard received from the marshal the letter of authority before referred to, and was on the 27th of January, 1879, acting thereunder, then any obstruction of or resistance to Hubbard as such custodian was obstruction of and resistance to the marshal, and proof to that end is competent under the allegations of the indictment.

§ 1124. *Rule stated as to resistance where the officer seizes the property of one person under process against another.*

The defendants have given evidence tending to show that on the 9th day of December, 1878, the defendant McDonald executed to the defendant Mrs. La Mothe his two promissory notes, one for \$1,961.84, and one for \$5,000, and that to secure the payment of such notes he, at the same time, executed to her a mortgage upon the property in question, which mortgage contains the usual provisions to be found in chattel mortgages, and was duly filed in the office of the town clerk. Testimony has also been offered tending to show that at some time subsequent, but prior to the service of the summons upon the defendant McDonald, in the case of Cook against him, Mrs. La Mothe took possession of all of this property under her mortgage, and that the defendant Thompson was her agent for the purpose of taking and maintaining such possession, and it is claimed upon the evidence that she was in actual personal possession of the property by virtue of provisions of the mortgage giving her such right, at the time of the alleged levy under the attachment. Upon such a state of facts, if proved, it is contended that the marshal and his deputies or agents had no right to take the property from her upon the writ of attachment, and that such facts, if established, constitute an absolute defense to the charge contained in this indictment. *Prima facie* the mortgage was valid, and the burden of showing it to be invalid falls upon the party attacking it; and there is no doubt, if the mortgage in question was executed in good faith, to secure a *bona fide* indebtedness, and if Mrs. La Mothe, by herself or her agent, did in like good faith take actual possession of the property under the mortgage, so that she had the absolute and exclusive dominion and control over it as against the mortgagor, that she thereby became vested with the legal title to the property. Touching the principal question involved, there is some apparent diversity of opinion in the authorities. Courts of equal respectability seem to differ somewhat upon it, and we must therefore adopt such rule as best commends itself to our own judgment as most consonant with right and with sound legal principles. And after reflection upon the question, I have come to the conclusion that the true rule to lay down in a case of this character is this: that if the marshal and his deputies in their proceedings under the writ of attachment acted in

good faith and on *reasonable grounds* for believing that the property in question was the property of the defendant McDonald, then the defendants had no right to resist the officers in serving or attempting to serve or *execute* the process. But if the mortgage in question was in good faith executed to secure a *bona fide* indebtedness, and if Mrs. La Mothe in good faith took actual possession of the property under the mortgage, so that she had the absolute and exclusive control and dominion over it, and if the marshal, or his deputies acting for him, did not act in their proceedings under the writ of attachment, in good faith, or acted without reasonable grounds for believing that the property was in fact owned by the defendant McDonald, then the forcible assertion of possession by Mrs. La Mothe and any duly authorized agent of hers acting in good faith for her, as against the officer, would not be such resistance to the officer as the statute was intended to make a punishable offense.

In considering and passing upon the alleged possession of the property in question by Mrs. La Mothe, you should determine whether such possession was taken in good faith under her mortgage, and whether it was or not an actual, exclusive possession, free from any right of the mortgagor to control it. It must have been a possession taken in good faith, and so taken as to give her the absolute, exclusive and unqualified dominion and control over it, to make it such possession as under the mortgage would carry the title. And in determining this question of possession, the jury should consider all the facts and circumstances attending and surrounding the transaction, such as the situation of the property, its character, its continuance upon the premises of the mortgagor, the occupation of the premises by both the mortgagor and mortgagee as their common home, the necessity for constant care of and attention to the property, the season of the year, and the facilities for or difficulties of removing the property. In short, all of the circumstances are to be looked into with a view of determining whether the property passed under the mortgagee's absolute and exclusive control and possession.

In considering whether the marshal and his deputies acted in good faith in their alleged attachment of the property, you will inquire whether, as the property was situated at the time, and in the light of all facts and circumstances then brought to their knowledge, the question of property right was so far doubtful that the officers acted without wantonness, recklessness or oppression and on reasonable grounds for believing the property to be that of the defendant McDonald. It is not disputed that they knew of the mortgage, and of Mrs. La Mothe's claim to possession and ownership. Reasonable grounds for believing the property to be that of the defendant McDonald would be such grounds as would influence the judgment of a careful and prudent man in his own affairs, and, in considering whether the officers acted in good faith and on reasonable grounds for believing that the property belonged to McDonald, you are again to consider the nature and situation of the property, the relation of the parties thereto, any information they had as to the mortgage and Mrs. La Mothe's claim to possession, the apparent character of such alleged possession,—in short, as before stated, all the facts and circumstances of the situation as they were then presented.

§ 1125. *What is wilful resistance and obstruction of an officer.*

To constitute the offense of resisting an officer, as is apparent from the language of the statute, the resistance or obstruction or opposition must be wilful. The term wilful, as here used, means something more than intentional. It is to be here considered as implying an evil intent without justifiable excuse.

An act wilfully done means that it is done wrongfully, in bad faith, with evil intent; that it is done with a bad purpose, and as an act which a person of reasonable knowledge and ability must know to be contrary to duty. This is its sense when used in a criminal statute like this. So, to establish the offense charged, it must be shown that the alleged acts of resistance, if any were committed, were done knowingly and wilfully, that is, with evil intent or purpose, and as acts known to be contrary to duty.

The words of the statute are, "obstructs, resists or opposes any officer of the United States." Resistance to an officer is to oppose him by direct, active, and more or less forcible means. It means something more than to hinder, or interrupt, or prevent, or baffle, or circumvent. The gist of the offense of *resisting* is personal resistance of the officer, that is, personal opposition to the exercise of official authority or duty by direct, active, and in some degree forcible means. *State v. Welch*, 37 Wis., 196. The statute, however, does not limit the offense to resistance alone, it includes also wilful acts of obstruction or opposition; and to obstruct is to interpose obstacles or impediments, to hinder, impede or in any manner interrupt or prevent, and this term does not necessarily imply the employment of direct force, or the exercise of direct means. It includes any passive, indirect or circuitous impediments to the service or execution of process; such as hindering or preventing an officer by not opening a door or removing an obstacle or concealing or removing property. *State v. Welch, supra*. So, that, although to establish a case of resistance it must appear that the party was personally present and personally resisting, liability to the charge of obstructing may be established by showing that the party has wilfully caused any impediment or hindrance to be interposed, though not personally present and actively co-operating in the direct act of obstructing. It should appear, however, that such party, in some manner and at some stage, aided or abetted the act of obstructing.

Thus understanding the meaning and significance of these terms as used in the statute, and what constitutes the statutory offense, you will be prepared to consider and determine in the light of the evidence whether the defendants are guilty of having knowingly and wilfully obstructed, resisted or opposed the service of or the attempt to serve or execute the writ of attachment in question.

* * * * *

Now, gentlemen, if you find from the evidence that there were no acts committed, by which the service or attempt to serve or execute the writ of attachment was obstructed, resisted or opposed, that of course would dispose of the case and your verdict in such case should be for the defendants. If you find that though certain acts were done by the defendants, they did not *knowingly* and *wilfully* obstruct, resist or oppose the service or the attempt to serve or execute the writ, *then* your verdict should be in their favor.

* * * * *

Again, if you find from the evidence that the mortgage in question was in good faith executed to secure a *bona fide* indebtedness, and that the defendant Mrs. La Mothe, by herself, or by an agent in good faith appointed for the purpose, in like good faith took, and was holding at the time alleged, the actual possession of the property — that is, the absolute and exclusive control and dominion over it — and if you further find that the marshal and his deputies, acting for him, did not in their proceedings under the writ of attachment act in good faith, or acted without reasonable grounds for believing that the property was in fact owned by the defendant McDonald, then your verdict as to

Mrs. La Mothe and as to the defendant Thompson, if he was her agent and acted only as such, should be in their favor. In this connection I should say that I do not think the mortgage or any possession of the property thereunder by Mrs. La Mothe would be a justification for resistance to or obstruction of the officer by the defendant McDonald, if he committed any acts of resistance or obstruction.

On the other hand, if you find from the evidence that the mortgage in question was not made in good faith, or that the defendant Mrs. La Mothe did not in good faith take and was not at the time alleged holding such possession of the property as I have defined, by virtue of the mortgage, and if you further find that the defendants did on the day stated, knowingly and wilfully obstruct or resist or oppose the service or the attempt to serve or execute the writ of attachment, then your verdict should be in favor of the United States. Further, if you find from the evidence that the mortgage in question was in good faith made as claimed by the defendants, and that the defendant Mrs. La Mothe did in good faith take and at the time alleged hold possession of the property under the mortgage, and if you further find that the marshal and his deputies acted in good faith in their proceedings under the writ of attachment, and with reasonable grounds for believing that the property was in fact owned by the defendant McDonald, and if you further find that the defendants did on the day stated, as charged, knowingly and wilfully obstruct, or resist or oppose, the service or attempt to serve or to execute the writ of attachment, then your verdict should be for the United States.

* * * * *

§ 1126. *Where two or more persons are jointly indicted for the same offense, to convict all it must appear that the offense wholly arose from the act of all.*

The indictment in this case is against three defendants and charges the commission by them of the *same offense*. They are indicted together for *one offense*. To convict all of them, it is therefore essential that it be shown that the offense committed, if any offense is proven, *wholly arose from the joint act of all*. All of the defendants cannot be convicted unless each and all of them were parties to the commission of one and the same offense. An indictment in the form of this, is not sustained by proof merely that each of the defendants has separately committed at different times a separate and distinct offense of the kind charged here, with which the other defendants were not connected and in which they did not participate, and which did not spring from the joint act of all. So, if you are satisfied from the evidence, applying to it the legal principles I have stated, that the offense charged was committed, and that it arose wholly from the joint act of all of the defendants, then your verdict may be guilty as to all, otherwise not. If you find that the offense charged was committed by any two of the defendants, and that it arose wholly from the joint act of such two defendants, and that the other defendant is not guilty, then your verdict may be guilty as to the two defendants, and not guilty as to the other. So, if you should find one of the defendants guilty of the offense charged and that two of the defendants are not guilty, you may convict the one and acquit the others.

§ 1127. — *rule as to proof of separate acts.*

If you should find that each of the defendants did commit the offense of obstructing or resisting the officer, but that the offense so committed by each defendant was complete in and of itself, and was entirely separate and distinct from that committed by any other defendant, neither defendant in the com-

mission of his or her offense having any connection with the offense of any other defendant, so that each complete offense was wholly independent of, and disconnected from, each other offense, then there could be no conviction of any of the defendants. So, if you should find that any two of the defendants committed the offense charged, such offense arising from the joint act of the two defendants, and if you should also find that the other defendant also committed the offense of obstructing or resisting the officer, but that the offense committed by the two defendants was wholly separate and distinct from that committed by the one defendant, the two defendants having no connection with the offense committed by the one defendant, and the one defendant having no connection with the offense committed jointly by the two defendants, then there could be no conviction. For, as before indicated, it is the law, that, when two or more persons are indicted together for an offense of this character and for one and the same offense, proof of entirely separate, distinct, unconnected offenses committed by each will not sustain a conviction. (Verdict for defendants.)

§ 1128. **Resistance justified.**—Where the defendant was indicted under the act of April, 1790 (ch. 9, § 22), for resisting the deputy marshal when serving two writs of *capias ad respondendum* upon him, the one for a duty due upon a still, and the other for a penalty recovered in an action of debt by the United States under the revenue laws; the marshal having demanded bail on both, and the defendant having resisted an attempt to imprison him by the marshal for refusal to give bail, it was held that the resistance was lawful and the defendant not guilty, the marshal having a right to require bail on the former *capias*, but not on the latter. *United States v. Mundell*,* 1 Hughes, 415; 6 Call (Va.), 245.

§ 1129. It seems that if an officer, having a distress warrant against the property of A., is resisted while attempting to seize the property of B. upon it, the person so resisting him is not liable for resisting an officer. *United States v. Myers*,* 14 Int. Rev. Rec., 14.

§ 1130. **Violence not necessary.**—On an indictment for resisting an officer, it is not necessary to show actual violence; threats and acts intended to terrify, or calculated in their nature to terrify, a prudent and reasonable officer, are sufficient, even though he be not prevented thereby from executing his process. *United States v. Smith*,* 1 Dill., 212. See § 1121.

§ 1131. **Persons accompanying a marshal** for the purpose of receiving possession of land for the possession of which he is proceeding to execute a writ, and persons present for the purpose of pointing out the land, are a part of the agencies employed for the purpose of executing the writ, and are as much under the protection of the writ as the marshal himself. Any obstruction to their receiving possession, which the marshal attempts to deliver, is an obstruction to the execution of the writ. *United States v. Doyle*,* 6 Saw., 612.

§ 1132. **Attorney and client.**—If a client and his attorney conspire to resist an officer in performing his duty, both are equally guilty. *United States v. Smith*,* 1 Dill., 212.

§ 1133. **State officers liable.**—Where a United States officer in charge of a prisoner is served with a *habeas corpus* from a state court, it is proper for him to obey the writ by producing the prisoner in court and showing the cause of his detention; and, when it is shown that the party is held under United States process, if the state judge, in combination with others, misuse his position and office by making use of the law and his power to accomplish an improper release, he is guilty of obstructing United States process. *United States v. Doss*,* 11 Am. L. Reg. (N. S.), 320.

§ 1134. But, if he acts in good faith, he is not guilty. *Ibid.*

§ 1135. And a person who merely takes charge of the prisoner under the order of the state judge is not guilty of obstructing process. *Ibid.*

§ 1136. **All are principals.**—Under the act of April 30, 1790, punishing any person who shall knowingly or wilfully obstruct any officer of the United States in serving any process, not only those actually obstructing are guilty, but also all those who are present, leagued in the common design, and ready to assist, if necessary, although they do not actually obstruct, resist or oppose. The offense being a misdemeanor, all are principals. And not only those present, but those absent who procure, counsel, abet or command others to commit the offense, are indictable as principals. Charge to Grand Jury, 2 Curt., 637.

§ 1137. **Opposing execution of writ.**—The offense, under the act of congress, of resisting and opposing the execution of a writ of *habere facias possessionem*, is complete, when the person in possession refuses, and by threats and violence, which it is in his power to enforce,

prevents the officer from dispossessing him. It is not material that neither the plaintiff in the ejectment suit, nor any one representing him, is in company with the marshal to receive possession. *United States v. Lowry*, * 2 Wash., 169. See § 1121.

§ 1138. A mere threat to resist the execution of a writ of *habere facias possessionem* is not an offense against the act of congress. But when the officer proceeds to the land with the writ, and is about to execute it, and such a threat is made by the one in possession, accompanied by force, or having the capacity to exercise it, in consequence of which the officer cannot do his duty, the execution of process has been opposed and obstructed. The officer need not risk his life or expose himself to violence. *Ibid.*

§ 1139. Under the act of April 30, 1790, punishing "any person who shall knowingly or wilfully obstruct, or resist, or oppose any officer of the United States in serving or attempting to serve or execute any *mesne* process," etc., any obstruction to the free action of the officer, or his lawful assistants, wilfully placed in his or their way, for the purpose of thus obstructing him, or them, is sufficient. Charge to Grand Jury, 2 Curt., 637.

§ 1140. The act of April 30, 1790, providing for the punishment of "any person who shall knowingly or wilfully obstruct, resist, or oppose any officer of the United States in serving or attempting to serve or execute any *mesne* process or warrant, or any rule or order of any of the courts of the United States, or other legal or judicial writ or process whatever," embraces every legal process whatsoever, whether issued by a court in session, or by a judge, or magistrate, or commissioner, acting in the due administration of any law of the United States. *Ibid.*

§ 1141. Persons who combine to oppose the execution of a warrant, without knowing the nature of it, and actually assault the constable, before any assault has been made by the constable or any of his party in attempting to execute the warrant, are criminally responsible. *United States v. O'Neale*, * 2 Cr. C. C., 183.

§ 1142. The twenty-second section of the act of congress of April 30, 1790, which punishes resistance to any judicial writ or process, includes and punishes resistance to writs issued by a judge as well as by a court. *United States v. Lukins*, * 3 Wash., 335.

§ 1143. It is resistance to an officer for a person for whom he has a warrant to say to him that he will not come, if he does not come as commanded by the warrant. *Ibid.*

§ 1144. If several persons assemble by concert to prevent a United States marshal from executing a writ of possession, and when he arrives for that purpose and enters into conversation with them concerning the matter, they surround him, and tell him that he cannot execute the writ, and with their pistols drawn and cocked and pointed at him within a few feet distant, they demand the surrender of his arms in a menacing manner, and tell him to consider himself a prisoner, this is not only a resistance within the meaning of the law, but it is also a conspiracy to resist the execution of the writ. *United States v. Doyle*, * 6 Saw., 612.

§ 1145. If a marshal of the United States, in attempting to execute a writ of possession, is met by a large number of men, the leader of whom hands him a paper directed to the United States marshal and orders him to take it and leave, and will not even give the marshal time to read the paper, and the paper contains the declaration that the settlers of the community will not permit the writ to be executed except by a force superior to their own, and the marshal is thereby prevented from executing the writ, this is a resistance within the meaning of the statute. *Ibid.*

§ 1146. Where a United States marshal, in proceeding to execute a writ of possession, is menacingly forbidden to execute the writ, and obstructed in its execution, the persons resisting, knowing that he was there for that purpose, and threatened and menaced him for the purpose of preventing him from executing the writ, such persons are guilty of resisting the marshal in the execution of process within the meaning of the law. The fact that the marshal was not, at the time, upon the land for the possession of which the writ was issued, and the fact that he was waiting a few moments near the land to see what would be the result of the conference being then held by the persons who resisted him, is not material. *Ibid.*

§ 1147. Resistance to an *alias* writ of *habere facias possessionem* is as much an offense against the law as if the resistance had been to the original writ, provided the original writ has not been returned executed. *United States v. Slaymaker*, * 4 Wash., 169.

§ 1148. Resistance to the execution of a writ of *habere facias possessionem*, after the return day of the writ, is not an offense; the writ cannot be executed after the return day. *Ibid.*

§ 1149. Collector of customs.—The inspectors being appointed under the act of March 2, 1799, by the collector annually in office, and ceasing to be such officers upon his death, removal or resignation, an inspector exercising the duties of such office after the death of the collector who appointed him, and before his reappointment by the new collector, is not such an officer of the customs for the resisting of whom an indictment will lie, under the act above recited. *United States v. Wood*, * 2 Gall., 360.

§ 1150. Casks of goods had been brought from Vermont and were deposited in the store of the defendant at a place near Boston, to which latter place they were destined. There was no apparent attempt at concealment or opposition to search. The casks were accompanied by an invoice, on which was written a certificate of passport from the collector of the district of Vermont. This invoice was shown to the inspector at the defendant's store, and the marks and numbers in it corresponded with those on the casks. The defendant offered that the inspector should accompany the merchandise and ascertain at the custom-house the genuineness of the signatures of the collector of Vermont. The inspector refused this, and insisted on removing the goods to the custom-house at Boston. Upon these facts, the court directed the jury that there was not probable cause of suspicion that the goods were illegally imported, to justify a seizure by the inspector, and the defendant was not liable for resisting such seizure. *United States v. Gay*, * 2 Gall., 359.

§ 1151. To support an indictment for forcibly resisting an officer of the customs in the exercise of his duties, based on the act of March 2, 1799, it need not be shown that the goods were liable to condemnation, but it must at all events be shown that there was probable cause for the seizure. *Ibid.*

§ 1152. The question whether the seizure was made upon probable cause of suspicion of illegal importation is a question on which the court ought to instruct the jury. It is not a mere question of fact for the jury. *Ibid.*

§ 1153. An inspector is "an officer of the customs," for obstructing whom an indictment lies under the seventy-first section of the act of March 2, 1799 (ch. 128). *United States v. Sears*, * 1 Gall., 215.

§ 1154. Upon an indictment for obstructing an inspector in the discharge of his duties, contrary to section 71 of the act of March 2, 1799, the commission of the inspector reciting his approval as such officer by the principal officer of the treasury department, and a copy, from the treasury department, of the oath taken by him, and an actual execution of the duties of the office, constitute sufficient proof that he is a lawful inspector. The commission of the collector who appointed the inspector need not, in such a case, be proved. *Ibid.*

§ 1155. Under the embargo laws, a licensed coasting vessel was not allowed, under penalty of forfeiture, to engage in foreign trade, nor to depart from port without giving bond that she would not proceed to a foreign port. It was unlawful to export from the United States any goods, etc., under a like forfeiture. No vessel could receive a clearance unless laden under the inspection of the proper revenue officers. The collectors were authorized to detain any vessel when there was reason to suspect an intended violation of the law. The lading of goods on ships was illegal unless made by permission of the collector and under inspection of the revenue officers. Vessels already laden were required to be unladen, and to give the bond required by law. The president was authorized to give instructions to the revenue officers for carrying the embargo into effect. These provisions are held to imply an authority on the part of the inspectors to enter on board any such ships to discover if any goods had been laden on board of said vessels for the purpose of being exported from the United States. And the obstruction of such an officer in the discharge of such duty is held to be indictable under the act of March 2, 1799, prohibiting the obstruction of the officers of the customs. *Ibid.*

§ 1156. If an officer of the customs has seized property as forfeited, and it is tortiously taken away from him, while under his personal and immediate superintendence and custody, the law implies that the taking is forcible; and if the rescue be for the purpose of impeding or preventing him from following up his seizure and conveying the property to a place of security to wait a legal adjudication, it is a "forcible impeding," and punishable by the act of March 2, 1799. *United States v. Bachelder*, * 2 Gall., 14.

§ 1157. It is not necessary to prove that the property seized was actually condemned. It is sufficient if the officer was acting within the line of his duty, and his conduct was founded on probable cause of suspicion of illegal importation. *Ibid.*

§ 1158. On an indictment for resisting an officer, the description in the indictment as to the character of the officer must be strictly proved; thus, where the accused was indicted for resisting an inspector of the customs, and it appeared that the officer was appointed by the surveyor, who had no authority to appoint an inspector, the prosecution failed. *United States v. Phelps*, * 4 Day (Conn.), 469.

§ 1159. Under the act of 1823, reciting that "if any person shall forcibly resist, prevent, or impede any officer of the customs, etc., such person so offending shall, for every such offense, be fined a sum not exceeding \$100," each individual who concurs in resisting or impeding an officer of the customs in the execution of his duty is liable for the entire penalty. *United States v. Babson*, 1 Ware, 450.

§ 1160. On an indictment for obstructing or impeding an officer of the customs in the discharge of his duties, it is no defense that the intent of the accused was merely to chastise the

officer, and not to obstruct him in his duties, if the officer was actually engaged in his duties and the accused knew it. *United States v. Keen*,* 5 Mason, 458.

§ 1161. *Arresting deserters.*—To render a person criminally liable for an assault upon an officer engaged in arresting deserters, it is not necessary that he should have made the assault personally. If, with the object of obstructing the officers in the performance of their duties, the defendant intentionally brought about, or assisted in bringing about, the assault, it is the same as if he had made it. *United States v. Gleason*,* Woolw., 128.

§ 1162. It was held that the officers were engaged in the discharge of their duties if they had come into the neighborhood with the intention of arresting the deserters, and, finding themselves unable to do so by reason of apprehended resistance, were, at the time of the assault, returning for a stronger force. *Ibid.*

§ 1163. It is not necessary to prove that the persons the officers were endeavoring to arrest were, in fact, deserters. *Ibid.*

§ 1164. It is not enough for the jury to find that the assault was a mere casual rencounter, which would have taken place if the persons assaulted had not been employed in such service. The assault, to be punishable, must be prompted by some motive which had relation to the service in which the person assaulted was engaged, and grew out of hostile feelings engendered thereby. *Ibid.*

§ 1165. *Enrolling officers.*—Under the act of February 24, 1864 (13 Stat. at L., 8), which punishes any person who resists or assaults an officer employed in making an enrollment prior to a draft of soldiers, if an officer engaged in the discharge of his official duties has occasion to deal with a man who, under the influence of a general feeling of hostility to the law, or of a violent temper which is roused by no fault of the officer, or a spirit of revenge, makes an assault upon such officer, a purpose in his mind to obstruct the execution of the law is not necessary to constitute a crime under the act. But if, while going through the country serving notices, he has an altercation with a man growing out of a personal matter, or a matter having no connection with his official duties, and is killed, the offender is not liable under the act. *United States v. Gleason*,* Woolw., 75.

§ 1166. Section 25 of the act of March 3, 1863, is limited to the prevention of resistance to the draft of soldiers; and section 12 of the act of February 24, 1864, to the preventing resistance to the enrollment. A person cannot, therefore, be punished under the former act for assaulting an officer while engaged in making an enrollment of men subject to military duty. *United States v. Murphy*,* 3 Wall., 649.

§ 1167. The services of an officer in notifying "enrolled and drafted men" to appear at the designated rendezvous "and report for military duty" do not constitute any employment "in the performance, or aiding in the performance, of any service in any way relating" to the enrollment mentioned in section 12 of the act of February 24, 1864. Resisting the officer giving such notice, which resistance results in the death of the officer, is not, therefore, punishable under this act. *United States v. Scott*,* 3 Wall., 642.

§ 1168. The sections of the act of March 3, 1863, which relate to enrollment, interpose no penalty for resisting the enrolling officer. One of the sections relating to drafting punishes any person who "shall resist any draft of men enrolled under this act into the service of the United States, or shall counsel or aid any person to resist any such draft, or shall assault or obstruct any person in making such draft, or the performance of any service in relation thereto, or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted man not to appear at the place of rendezvous, or wilfully dissuade them from the performance of military duty, as required by law." An indictment for assaulting the enrolling officer, and hindering, delaying and obstructing him in the performance of his duties, charges no offense punishable under this act. *United States v. Will*,* 5 Phil., 293.

XVII. TREASON.

[See § 2665, *infra*; CONSTITUTION AND LAWS, §§ 133-139.]

SUMMARY—*Defined by the constitution; power of congress, § 1169.—"Enemies" defined, § 1170.—Levying war, what constitutes, §§ 1171, 1179, 1180.—Parties aiding in rebellion were guilty of treason, § 1172.—No accessories, §§ 1173, 1181.—Object of the act of July 17, 1862, § 1174.—Fitting out a vessel to cruise in aid of the rebellion, §§ 1175, 1176.—Effect of conceding belligerent rights to Confederate States, § 1177.—Effect of letter of marque from president of Confederate States, § 1178.—Aiding and abetting, § 1182.*

§ 1169. The crime of treason is defined by the constitution. And congress can neither extend, nor restrict, nor define the crime. Its power over the subject is limited to prescribing the punishment. *United States v. Greathouse*, §§ 1183-94. See § 1202.

§ 1170. The term "enemies," as used in the constitutional provision defining treason, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. *Ibid.* See § 1225.

§ 1171. To constitute a levying of war against the United States, which is declared to be treason by the constitution, there must be an assemblage of persons in force to overthrow the government, or to coerce its conduct. The offense is complete, whether the force be directed to the entire overthrow of the government throughout the country, or only in certain portions of the country, or to defeat the execution and compel the repeal of one of its public laws. *Ibid.* See § 1213.

§ 1172. The rebellion was a war levied against the United States within the meaning of the constitutional definition of treason, and all who aided in its prosecution, whether by open hostilities in the field, or by performing any part in furtherance of the common object, however minute or however remote from the scene of action, were equally guilty of treason. *Ibid.* See § 1235.

§ 1173. In treason there are no accessories; all who engage in a rebellion, at any stage of its existence, or who designedly give to it any species of aid and comfort, in whatever part of the country they may be, are principals. *Ibid.* See § 1205.

§ 1174. By the act of July 17, 1862, prescribing the punishment for treason, it was the intention of congress, (1) to preserve the act of 1790, which prescribes the penalty of death, in force for the prosecution and punishment of offenses committed previous to July 17, 1862, unless the parties accused are convicted under the act of the latter date for subsequent offenses; (2) to punish treason thereafter committed with death, or fine and imprisonment, in the discretion of the court, unless the treason consist in engaging in or assisting a rebellion or insurrection against the authority of the United States, or the laws thereof, in which event the death penalty is to be abandoned and a less penalty inflicted. *Ibid.*

§ 1175. To procure, fit out and arm a vessel to cruise, in the service of an existing rebellion, upon the high seas, and commit hostilities against the citizens, property and vessels of the United States, is treason. *Ibid.*

§ 1176. If a vessel is fully equipped and armed for the service of the rebellion, it is not essential, to constitute the giving of aid and comfort, that the enterprise should be successful and render actual assistance. Where overt acts have been committed, which, in their natural consequence, if successful, would encourage and advance the interests of the rebellion, in judgment of law, aid and comfort is given. *Ibid.*

§ 1177. If full belligerent rights had been conceded to the Confederate States, such rights could not be invoked for the protection of persons entering within the limits of states which had never seceded, and secretly getting up hostile expeditions against our government and its authority and laws. *Ibid.*

§ 1178. A letter of marque from the president of the so-called Confederate States does not exempt from prosecution in the tribunals of the country persons setting on foot hostile expeditions against the United States. The courts cannot treat any new government as having authority to issue commissions or letters of marque which will afford protection to its citizens, until the legislative and executive departments have recognized its existence. *Ibid.*

§ 1179. Treason, in "levying war" against the United States, is not necessarily to be judged of alone by the number or array of troops. But there must be a conspiracy to resist by force, and an actual resistance by force of arms or intimidation by numbers. The conspiracy and the insurrection connected with it must be to effect something of a *public nature*, to overthrow the government or to nullify some law of the United States, and totally to hinder its execution or compel its repeal. *United States v. Hanway*, §§ 1195-1201. See § 1213.

§ 1180. The term "levying war" is used in the clause in the constitution defining treason in the sense which has been affixed to it by the laws from which we borrowed it. *Ibid.* See § 1213.

§ 1181. In treason all are principals, and a person may be guilty of aiding and abetting, though not present. *Ibid.* See § 1205.

§ 1182. If one countenances, encourages, aids or abets others in the commission of a treasonable offense, he is equally guilty with them. But if he comes to the place without any knowledge of what is about to take place, and does not interfere or lend his aid, or countenance, or assistance, he is not guilty of the offense. *Ibid.*

[NOTES.—See §§ 1202-1237.]

UNITED STATES v. GREATHOUSE.

(Circuit Court for California: 2 Abbott, 364-381; 4 Sawyer, 457-487. 1863.)

STATEMENT OF FACTS.—Schooner seized when about to sail from the port of San Francisco on a cruise in the service of the Confederate States. The parties

connected with the proposed expedition were indicted under the act of July 17, 1862.

§ 1183. *In criminal trials it is the duty of the jury to take the law from the court.*

Charge by FIELD, J.

Gentlemen of the jury: Before proceeding to give any instructions in this case, it may be proper to briefly call attention to your appropriate and only province in the determination of the issues presented. There prevails a very general, but an erroneous, opinion, that in all criminal cases the jury are the judges as well of the law as of the fact — that is, that they have a right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury. They have the power, it is true, to disregard the instructions of the court, and in case of acquittal their decision will be final — for new trials are not granted in criminal cases where a verdict has passed in favor of the defendant; but they have no right, legal or moral, to adopt their own views of the law. It is their duty to take the law from the court and apply it to the facts of the case. It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence and determine all contested questions of fact. The responsibility of deciding correctly as to the law rests solely with the court, and the responsibility of finding correctly the facts rests solely with the jury. The separation of the functions of the court from those of the jury in this respect is essential to the efficacy and safety of jury trials. Any other doctrine would lead only to confusion and uncertainty in the administration of justice. "I hold it," says Mr. Justice Story, "the most sacred constitutional right of every party accused of crime, that the jury should respond as to the facts, and the court as to the law. . . . This is the right of every citizen, and it is his only protection." You will, therefore, in this case, gentlemen, take the law from the court and follow it. If the court err, the responsibility will not be shared by you.

§ 1184. *Treason, by the constitution, consists only in levying war against the United States, or in adhering to their enemies; congress can neither extend, restrict, nor define the crime.*

The defendants are indicted for engaging in and giving aid and comfort to the existing rebellion against the government of the United States. The indictment is framed under section 2 of the act of congress of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes;" and it charges the commission of acts which, in the judgment of the court, amount to treason within the meaning of the constitution. Treason is the only crime defined by the constitution. That instrument declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." The clause was borrowed from an ancient English statute, enacted in the year 1352, in the reign of Edward the Third, commonly known as the statute of treasons. Previous to the passage of that statute, there was great uncertainty as to what constituted treason. Numerous offenses were raised to its grade by arbitrary constructions of the law. The statute was passed to remove this uncertainty, and to restrain the power of the crown to oppress the subject by constructions of this character. It comprehends all treason under seven distinct branches. The framers of our constitution selected one of these branches, and declared that

treason against the United States should be restricted to the acts which it designates. "Treason against the United States," is the language adopted, "shall consist *only* in levying war against them, or adhering to their enemies, giving them aid and comfort." No other acts can be declared to constitute the offense. Congress can neither extend, nor restrict, nor define the crime. Its power over the subject is limited to prescribing the punishment.

§ 1185. "*Levying war*" is used in the constitution in the sense in which it was used in the English statute.

At the time the constitution was framed, the language incorporated into it from the English statute had received judicial construction, and acquired a definite meaning; and that meaning has been generally adopted by the courts of the United States. Thus, Chief Justice Marshall, in commenting upon the term "levying war," says: "It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England and in this country to have been used in the statute of the 25th of Edward III., from which it is borrowed."

§ 1186. "*Enemies*," as used in the constitution, means foreign subjects in open hostility against us; it does not embrace rebels in insurrection against the government.

The constitutional provision, as you perceive, is divided into two clauses — "levying war against the United States," and "adhering to their enemies, giving them aid and comfort." The term "enemies," as used in the second clause, according to its settled meaning at the time the constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country. We may, therefore, omit all consideration of this second clause in the constitutional definition of treason. To convict the defendants, they must be brought within the first clause of the definition. They must be shown to have committed acts which amount to a levying of war against the United States.

§ 1187. *What will constitute a "levying of war."*

To constitute a levying of war, there must be an assemblage of persons in force, to overthrow the government, or to coerce its conduct. The words embrace not only those acts by which war is brought into existence, but also those acts by which war is prosecuted. They levy war who create or carry on war. The offense is complete, whether the force be directed to the entire overthrow of the government throughout the country, or only in certain portions of the country, or to defeat the execution and compel the repeal of one of its public laws.

§ 1188. *After war has been actually levied, all who aid or assist are guilty of treason; there are no accessories in treason.*

It is not, however, necessary that I should go into any close definition of the

words "levying war," for it is not sought to apply them to any doubtful case. War has been levied against the United States. War of gigantic proportions is now waged against them, and the government is struggling with it for its life. War being levied, all who aid in its prosecution, whether by open hostilities in the field, or by performing any part in the furtherance of the common object, "however minute or however remote from the scene of action," are equally guilty of treason within the constitutional provision. In treason there are no accessories; all who engage in the rebellion, at any stage of its existence, or who designedly give to it any species of aid and comfort, in whatever part of the country they may be, stand on the same footing—they are all principals in the commission of the crime; they are all levying war against the United States. In *Ex parte Bollman*, 4 Cranch, 127, Mr. Chief Justice Marshall, in delivering the opinion of the supreme court, said: "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." And in commenting upon this language on the trial of Burr, the same distinguished judge said: "According to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part; that part is the act of levying war. That part, it is true, may be minute; it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act of which alone the person who performs it can be convicted." 2 Burr's Trial, 438-9.

§ 1189. *An indictment for treason under the act of 1862 is sufficient if it follows the language of the statute; it need not use the term "levying war."*

The indictment in the present case, as I have already stated, is founded upon section 2 of the act of July 17, 1862. The constitution, although defining treason, leaves to congress the authority to prescribe its punishment. In 1790 congress passed an act affixing to the offense the penalty of death. By section 1 of the act of July, 1862, congress gave a discretionary power to the courts to inflict the penalty of death, or fine and imprisonment, providing that in either case the slaves of the party convicted, if any he have, shall be liberated. Section 2 of the act declares, "that if any person shall hereafter incite, set on foot, assist or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in, or give aid and comfort to, any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding \$10,000, and by the liberation of all his slaves, if any he have, or by both said punishments, at the discretion of the court." Section 4 provides that the act shall not be construed in any way to affect or alter the prosecution, conviction or punishment of any person guilty of treason before its passage, unless convicted under the act.

There would seem upon a first examination to be an inconsistency between sections 1 and 2 of this act—section 1 declaring a particular punishment for treason, and section 2 declaring, for acts which may constitute treason, a differ-

ent punishment. It appears from the debate in the senate of the United States, when section 2 was under consideration, that it was the opinion of several senators that the commission of the acts which it designates might, under some circumstances, constitute an offense less than treason. The constitution, as you have seen, declares that "treason against the United States shall consist *only* in levying war, or in adhering to their enemies, giving them aid and comfort." Rebels not being enemies within its meaning, an indictment alleging the giving of aid and comfort to them had been, as was stated, held defective. But if such ruling had been made, it was made, we may presume, not because the giving of aid and comfort to rebels was not treason, but because the parties giving such aid and comfort were equally involved in guilt with those in open hostilities, and should have been indicted for levying war; for every species of aid and comfort, which, if given to a foreign enemy, would constitute treason within the second clause of the constitutional provision — adhering to the enemies of the United States — would, if given to the rebels in insurrection against the government, constitute a levying of war under the first clause. Section 2 of the act, however, relieves the subject from any difficulty, so far as the form of the indictment is concerned. It is not necessary now to use specifically the term "levying war;" it will be sufficient if the indictment follows the language of the act, as the indictment does in the present case. But we are unable to conceive of any act designated in section 2 which would not constitute treason, except, perhaps, as suggested by my associate, that of inciting to a rebellion. If we lay aside the discussion in the senate, and read the several sections of the act together, the apparent inconsistency disappears. Looking at the act alone, we conclude that congress intended: 1st, to preserve the act of 1790, which prescribes the penalty of death, in force for the prosecution and punishment of offenses committed previous to July 17, 1862, unless the parties accused are convicted under the act of the latter date for subsequent offenses; 2d, to punish treason thereafter committed with death, or fine and imprisonment, in the discretion of the court, unless the treason consist in engaging in or assisting a rebellion or insurrection against the authorities of the United States or the laws thereof, in which event the death penalty is to be abandoned, and a less penalty inflicted. By this construction the apparent inconsistency in the provisions of the different sections is avoided, and effect given to each clause of the act. The defendants are therefore in fact on trial for treason, and they have had all the protection and privileges allowed to parties accused of treason, without being liable, in case of conviction, to the penalty which all other civilized nations have awarded to this, the highest of crimes known to the law.

The indictment charges that on March 16, 1863, and long before and since, an open and public rebellion by certain citizens of the United States, under a pretended government, called the Confederate States of America, has existed against the United States and their authority and laws; that the defendants, in disregard of their allegiance to the United States, did on that day and divers other times before and since, at the city of San Francisco, "maliciously and traitorously" engage in, and give aid and comfort to, the said rebellion; that in the prosecution and execution of their "treasonable and traitorous" purposes, they procured, prepared and fitted out and armed a schooner, called the J. M. Chapman, then lying within the port of San Francisco, with intent that the same should be employed in the service of the rebellion to cruise on the high seas, and commit hostilities upon the citizens, property and vessels of

the United States; and that they entered upon the said schooner and sailed from the port of San Francisco upon such cruise, in the service of said rebellion. In other words, the indictment alleges: 1st. The existence of a rebellion against the United States, their authority and laws; 2d, that the defendants traitorously engaged in, and gave aid and comfort to, the same; 3d, that in execution of their treasonable and traitorous purposes they procured, fitted out and armed a vessel to cruise in the service of the rebellion upon the high seas, and commit hostilities against the citizens, property and vessels of the United States; and 4th, that they sailed in their vessel from the port of San Francisco, upon such cruise, in the service of the rebellion.

§ 1190. *Public notoriety, proclamations by the president, and acts of congress, are sufficient proof of a state of war.*

The existence of the rebellion is a matter of public notoriety, and, like matters of general and public concern to the whole country, may be taken notice of by judges and juries without that particular proof which is required of the other matters charged. The public notoriety, the proclamations of the president, and the acts of congress are sufficient proof of the allegation of the indictment in this respect. The same notoriety and public documents are also sufficient proof that the rebellion is organized and carried on under a pretended government, called the Confederate States of America.

§ 1191. *There is no rule of evidence which excludes the testimony of an accomplice, or prevents the jury from giving credence to it, when it has been corroborated in material particulars.*

As to the treasonable purposes of the defendants, there is no conflict in the evidence. It is true, the principal witnesses of the government are, according to their own statement, co-conspirators with the defendants and equally involved in guilt with them, if guilt there be in any of them. But their testimony, as you have seen, has been corroborated in many of its essential details. You are, however, the exclusive judges of its credibility. The court will only say to you that there is no rule of law which excludes the testimony of an accomplice or prevents you from giving credence to it, when it has been corroborated in material particulars. Indeed, gentlemen, the court has not been able to perceive from the argument of counsel that the truth of the material portions of their testimony has been seriously controverted.

§ 1192. *The fitting out of a vessel under a letter of marque from the president of the Confederate States, with intent to cruise against the government of the United States, was aiding the rebellion.*

It is not necessary that I should state in detail the evidence produced. I do not propose to do so. It is sufficient to refer to its general purport. It is not denied, and it will not be denied, that the evidence tends to establish that Harpending obtained from the president of the so-called Confederate States a letter of marque — a commission to cruise in their service on the high seas, in a private armed vessel, and commit hostilities against the citizens, vessels and property of the United States; that his co-defendants and others entered into a conspiracy with him to purchase and fit out and arm a vessel, and cruise under the said letter of marque, in the service of the rebellion; that in pursuance of the conspiracy they purchased the schooner J. M. Chapman; that they purchased cannon, shells and ammunition and the means usually required in enterprises of that kind, and placed them on board the vessel; that they employed men for the management of the vessel; and that, when everything was in readiness, they started with the vessel from the wharf, with the intention to sail

from the port of San Francisco on the arrival on board of the captain, who was momentarily expected. Gentlemen, I do not propose to say anything to you upon the much disputed questions whether or not the vessel ever did, in fact, sail from the port of San Francisco, or whether, if she did sail, she started on the hostile expedition. In the judgment of the court they are immaterial, if you find the facts to be what I have said the evidence tends to establish.

When Harpending received the letter of marque with the intention of using it, if such be the case (and it is stated by one of the witnesses that he represented that he went on horseback over the plains expressly to obtain it), he became leagued with the insurgents—the conspiracy between him and the chiefs of the rebellion was complete; it was a conspiracy to commit hostilities on the high seas, against the United States, their authority and laws. If the other defendants united with him to carry out the hostile expedition, they, too, became leagued with him and the insurgent chiefs in Virginia, in the general conspiracy. The subsequent purchasing of the vessel and the guns and the ammunition, and the employment of the men to manage the vessel, if these acts were done in furtherance of the common design, were overt acts of treason. Together, these acts complete the essential charge of the indictment. In doing them, the defendants were performing a part in aid of the great rebellion. They were giving it aid and comfort.

§ 1193. *The enterprise to give aid and comfort need not be successful.*

It is not essential, to constitute the giving of aid and comfort, that the enterprise commenced should be successful, and actually render assistance. If, for example, a vessel fully equipped and armed in the service of the rebellion should fail in its attack upon one of our vessels, and be itself captured, no assistance would, in truth, be rendered to the rebellion; but yet, in judgment of law—in legal intent—the aid and comfort would be given. So if a letter containing important intelligence for the insurgents be forwarded, the aid and comfort are given, though the letter be intercepted on its way. Thus, Foster, in his Treatise on Crown Law, says: "And the bare sending money or provisions, or sending intelligence to rebels or enemies, which in most cases is the most effectual aid that can be given them, will make a man a traitor, though the money or intelligence should happen to be intercepted; for the party in sending it did all he could; the treason was complete on his part, though it had not the effect he intended."

Wherever overt acts have been committed, which in their natural consequence, if successful, would encourage and advance the interests of the rebellion, in judgment of law, aid and comfort are given. Whether aid and comfort are given—the overt acts of treason being established—is not left to the balancing of probabilities; it is a conclusion of law. If the defendants obtained a letter of marque from the president of the so-called Confederate States, the fact does not exempt them from prosecution in the tribunals of the country for the acts charged in the indictment. The existence of civil war, and the application of the rules of war to particular cases, under special circumstances, do not imply the renunciation or waiver by the federal government of any of its rights as sovereign towards the citizens of the seceded states.

§ 1194. *Because the government chooses to treat rebel citizens as prisoners of war, it does not follow that the courts have such dispensing power.*

As matter of policy and humanity, the government of the United States has treated the citizens of the so-called Confederate States taken in open hos-

ilities as prisoners of war, and has thus exempted them from trial for violation of its municipal laws. But the courts have no such dispensing power; they can only enforce the laws as they find them upon the statute-book. They cannot treat any new government as having authority to issue commissions or letters of marque which will afford protection to its citizens, until the legislative and executive departments have recognized its existence. The judiciary follows the political department of the government in these particulars. By that department, the rules of war have been applied only in special cases; and notwithstanding the application, congress has legislated, in numerous instances, for the punishment of all parties engaged in, or rendering assistance in any way to, the existing rebellion. The law under which the defendants are indicted was passed after captives in war had been treated and exchanged as prisoners of war, in numerous instances. But even if full belligerent rights had been conceded to the Confederate States, such rights could not be invoked for the protection of persons entering within the limits of states which have never seceded, and secretly getting up hostile expeditions against our government and its authority and laws. The local and temporary allegiance, which every one — citizen or alien — owes to the government under which he at the time lives, is sufficient to subject him to the penalties of treason.

These, gentlemen, constitute all the instructions I have to give. My associate, Judge Hoffman, will submit some further observations to you. The case is one of much interest — not because it is the only case for treason tried in the state, but because of the great importance of the principles involved. As you will weigh carefully the evidence, and be guided by the instructions of the court, you will have no difficulty in reaching an intelligent and just verdict. (Verdict, guilty.)

UNITED STATES v. HANWAY.

(Circuit Court for Pennsylvania: 2 Wallace, Jr., 139-203. 1851.)

Charge by GRIER, J.

STATEMENT OF FACTS.—Whether the allegations of this bill of indictment are supported by evidence is the matter which you are sworn to try. In assisting you to arrive at a correct conclusion on these points, it is not the intention of the court to intimate an opinion on any disputed fact. But there are certain facts in the case which have not been disputed by the learned counsel, and which, in speaking of this case, we may assume to have been satisfactorily proved, as they have not been denied. They are these:

That Mr. Edward Gorsuch, a citizen of Maryland, was the owner of certain slaves, or persons held to labor by the laws of that state. That these slaves had escaped and fled into Pennsylvania, and were known to be lurking in the neighborhood of the village of Christiana, Lancaster county. That Mr. Gorsuch came to Philadelphia in September last, and obtained warrants for the arrest of these fugitives from a commissioner of this court, having authority by law to issue such warrants. That these warrants were put into the hands of Kline, an officer duly authorized to execute them. That on the morning of the 11th of September, about daylight, Kline, accompanied by Gorsuch, his son, nephew and cousin, and two other persons, citizens of Maryland, proceeded to the house of one Parker. That a person who was recognized as one of the fugitives for whom the warrants had been issued was seen to come out of the house. That the fugitive, on seeing the officer and his company, immediately fled into the house and up stairs, leaving the door open behind him. That Mr.

Gorsuch pursued him, followed by the officer. That a number of negroes were collected up stairs, armed in various ways, and determined to resist the capture of the fugitives. That a gun was fired by one of them at Mr. Gorsuch, and others of his assistants were struck with missiles thrown from the upper windows. That a pistol was then fired by the officer, not aimed at the negroes, but rather to frighten them, and let them know their assailants were armed. That a parley was then held between the parties, and the negroes informed that the officer had legal process in his hands for their arrest. That the negroes demanded time for the purpose, as was supposed, of offering terms of surrender, but in reality, perhaps, to gain time for the arrival of assistance from the neighborhood. That after some lapse of time, the defendant arrived on the ground, and at the same time, or soon after, large numbers of negroes began to collect around with various weapons of offense, such as guns, clubs, scythes and corn-cutters. That on the arrival of these reinforcements, the persons in the house set up a yell of defiance. That the officer made known his character, and exhibited his writs to the defendant and another white man who had arrived on the ground, and demanded their assistance in executing the warrants, which was refused. That the officer, deeming the attempt to execute his writs in the face of a numerous armed and angry mob of negroes hopeless, made no further attempt to do so, being content to escape with his life. That the mob of armed negroes, now amounting to near or over one hundred persons, immediately made an attack upon the party who attended the officer. Mr. Gorsuch was then shot down, beaten with clubs, and murdered on the spot. His son, who came to his assistance, was shot and wounded, and with difficulty escaped with his life. That the nephew was surrounded and beaten, but escaped with his life; and that on the preceding evening notice had been given in the neighborhood, by a negro who had followed the officer from Philadelphia, that an arrest of the fugitives was intended, and that the concourse and riot of the morning was evidently by preconcert, and in consequence of such information.

Without at present further noticing the history of the transaction, or expressing any opinion of the conduct of the white people in the neighborhood, on the occasion, we may say that the evidence has clearly shown that the participants in this transaction are guilty of riot and murder at least. Whether the crime amounts to treason or not will be presently considered.

Two questions present themselves for your inquiry: 1st. Was the defendant Hanway a participant in the offenses proved to have been committed? Did he aid, abet or assist the negroes in this transaction, without regard to the grade or description of the offense committed? 2d. And secondly, if he did, was the offense treason against the United States, as alleged in this bill of indictment?

§ 1195. *Meaning of aid and abet. One who, being present, aids and abets in a case of treason or felony, is guilty as principal.*

The first of these questions is one wholly of fact, and for your decision alone. The last is a mixed question of law and fact. On the law, you have a right to look to the court for a correct definition of what constitutes treason, but whether the defendant has committed an offense which comes within that category is, of course, a matter of fact for your decision. When a murder is committed, all who are present, aiding, abetting and assailing, are equally guilty with him who gave the fatal stroke. An abettor of a murder, in order to be held liable as a principal in the felony, must be present at the transaction; if

he is absent, he may be an accessory. But in treason all are principals, and a man may be guilty of aiding and abetting, though not present. "If one man watch while another breaks into a house at night and robs it, both are guilty of burglary." "If A. comes and kills a man, and B. runs with an intent to assist him, if there should be occasion, though in fact he doth nothing, yet he is a principal, being present, as well as A." "If divers persons come with one assent to do mischief, as to kill, rob or beat, and one doth it, they are all principals in the felony." "If many be present, and one only gives the stroke, whereby the party dies, they are all principals." "Thus if two fight a duel, and one of them is killed, the seconds who are present are both guilty of murder." "If A. and B. be fighting, and C., a man of full age, comes by chance, and is a looker-on only, and assists neither, he is not guilty of murder or manslaughter, but it is a misprision for which he shall be fined, unless he uses means to apprehend the felon." Lastly, "if divers persons come in one company, to do any unlawful thing, as to kill, rob or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party, abetting him and consenting to the act, or ready to aid him, although they did but look on."

I have given you these examples from the books, in order that you may form some idea as to the nature of what the law treats as criminal; and what it regards as aiding, abetting and countenancing the perpetration of an offense. In the present case, Hanway was confessedly present. But did he come to aid, abet, countenance or encourage the rioters? If so, he was guilty of every act committed by any individual engaged in the riot — whether it amount to felony or treason. There is no evidence of any previous connection of the prisoner with this party, before the time the offense was committed — that he had counseled, advised or exhorted the negroes to come together with arms and resist the officer of the law or murder his assistants. There is no evidence, even, that the prisoner was a member of any of these associations or conventions, which occasionally or annually infest the neighboring village of West Chester, for the purpose of railing at and reviling the constitution and laws of the land, and denouncing those who execute them as no better than a Scroggs and a Jeffries — who stimulate and exhort poor negroes to the perpetration of offenses, which they know must bring them to the penitentiary or the gallows.

§ 1196. *Acts, declarations and conduct of a defendant, on the occasion of the commission of an offense, are to be considered as indicia of his guilt or innocence.*

The fact of his interference, whether active or passive, of his aiding, counseling or abetting the perpetrators of this offense, has been argued from his language and conduct during its perpetration in his presence. His acts, his declarations and his conduct are fair subjects for your careful examination, in order to judge of his intentions or his guilty complicity with those whose hands perpetrated the offense. If, as the counsel for the United States have argued, he countenanced or encouraged, aided or abetted the offenders in the commission of the offense, he is equally guilty with them. If, on the contrary, as is argued by his counsel, he came there without any knowledge of what was about to take place, and took no part by encouraging, countenancing or aiding the perpetrators of the offense — if he merely stood neutral through fear of bodily harm, or because he was conscientiously scrupulous about assisting to arrest a fugitive from labor, and therefore merely refused to interfere, while he did not aid or encourage the offenders, he may not have acted the part of a good citi-

zen; he may be liable to punishment for such neutrality by fine and imprisonment, but he cannot be said to be liable as a principal in the riot, murder and treason, committed by the others — and much more so if, as has been argued, his only interference was to preserve the lives of the officer and his attendants. A man may have such conscientious principles on the subject of non-resistance as to stand by with indifference and neutrality, when his father or friend is attacked by a madman, and in case of his death may not be liable as an aider or abettor in the murder or manslaughter. We may wonder at his philosophic indifference, though we cannot admire the man. So a man who is a mere spectator in a contest where a mob of rioters are resisting an officer of the law in the execution of his duty may refuse assistance, countenance or aid to either side. In so doing he is not acting the part of an honest, loyal citizen; he may be liable to be punished for a misdemeanor for his refusal to interfere, but such conduct will not necessarily make him liable as a principal in the riot or murder committed.

But such conduct is a fair subject for the consideration of a jury, in connection with other circumstances, to show preconcert and guilty complicity with the rioters, murderers or traitors. What inference the jury may draw from the evidence in this case of the conduct of this prisoner is for them to say, after carefully weighing the arguments which have been so ably urged by the learned, counsel. With these remarks we submit this point of the case to the jury, after reading to them, *if they desire it*, the testimony of the witnesses bearing more directly on this question. If you should find that the defendant Castner Hanway did *not* aid, assist or abet in the perpetration of the offense, you will return a verdict of not guilty, without regard to the grade of the offense; whether riot, murder or treason. But if you should find that he has so aided and abetted, so as thereby to become a principal in the transaction according to the rules of law which we have just stated, you will next have to inquire whether the offense as proved amounts to the crime of "treason against the United States."

The bill charges the defendant with "wickedly and traitorously intending to *levy war* against the United States;" and the jury must find the act or acts to have been committed with such intention. For although the prisoner may have been guilty of riot, robbery, murder, or any other felony, he cannot be found guilty under this bill of indictment, unless you find that he *intended to levy war against the United States*, or that the acts were committed by himself and others in pursuance of some conspiracy or preconcert for that purpose; and this is a question of fact for the decision of the jury. But in the decision of it, the jury should regard the construction of the constitution as given them by the court as to what is the true meaning of the words "*levying war*."

§ 1197. *Treason defined.*

Treason against the United States is defined by the constitution itself. Congress has no power to enlarge, restrain, construe or define the offense. Its construction is intrusted to the court alone. By this instrument it is declared that "Treason against the United States shall consist *only* in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." What constitutes "*levying war* against the government" is a question which has been the subject of much discussion, whenever an indictment has been tried under this article of

the constitution. The offense is described in very few words, and in their application to particular cases much difference of opinion may be expected. We derive our laws as well as our language from England. As we would apply to English dictionaries and classical writers to ascertain the proper meaning of a particular word, so when we would inquire after the true definition of certain legal phraseology we would naturally look to the text writers and judicial decisions which we know that the framers of our constitutions would regard as the standard authorities in questions of legal definition. Otherwise the language of the constitution on this subject might be subject to any construction which the passion or caprice of a court and jury might choose to give it in times of public excitement. At one time the constitution might be nullified by a narrow construction, and at another time the life and liberty of the citizen be sacrificed by a latitudinous one.

§ 1198. "*Levying war*" defined.

The term "levying war," says Chief Justice Marshall (Burr's Trial, vol. 2, p. 402), "is not for the first time applied to treason by the constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which has been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in their ascertained meaning, unless the contrary is proved by the context."

§ 1199. — *English rules on the subject. "Constructive treason;" changes of judicial opinion.*

Since the adoption of the constitution but few cases of indictment for treason have occurred, and most of them not many years afterwards. Many of the English cases, then considered good law and quoted by the best text writers as authorities, have since been discredited, if not overruled, in that country. The better opinion there at present seems to be, that the term "levying war" should be confined to insurrections and rebellions for the purpose of overturning the government by force and arms. Many of the cases of constructive treason quoted by Foster, Hale, and other writers, would perhaps now be treated merely as aggravated riots or felonies. But for the purposes of the present case, it is not necessary to pursue this subject further, or to look beyond the cases decided in our own country. The subject is one of too serious importance to allow this court to indulge in speculations, or wander from the safe path of precedent.

In England, all insurrections to imprison the king, or to force him to change his measures, or to remove evil counselors; to attack his troops in opposition to his authority; to carry off or destroy his stores provided for defense of the realm, if done conjointly with and in aid of rebels or enemies, and not only for lucre or some private and malicious motive; to hold a fort or castle against the king or his troops, if actual force be used in order to keep possession; to join with rebels freely and voluntarily; to rise for the purpose of throwing down, by force, all inclosures; alter the law or religion, etc.; to effect innovations of a public and general concern by an armed force, or for any other purpose which usurps the government in matters of a public and general nature. All these acts have been deemed "a levying of war." So also have insurrec-

tions to redress, by force, national grievances; or to reform real or imaginary evils of a public nature, and in which the insurgents had no private or special interest, or by intimidation to force the repeal of a law.

But when the object of an insurrection is of a local or private nature, not having a direct tendency to destroy all property and all government, by numbers and armed force, it will not amount to treason. In the case of Bollman and Swartwout, in the supreme court of the United States (*Ex parte Bollman*, 4 Cranch, 75, 126-128), it is declared "that it is more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended, by construction, to doubtful cases;" "that to constitute the specific offense, war must be actually levied against the United States;" that "to conspire to levy war, and actually to levy war, are distinct offenses;" and that "to complete the crime of levying war, there must be an actual assemblage of men for the purpose."

This case also recognized the doctrine which had been previously laid down by Judge Chase in *Fries' Case* (Whart. St. Tr., 634, 635), that "if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, they are guilty only of a high misdemeanor; but if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war, and the quantum of the force employed neither lessens nor increases the crime; whether by one hundred or one thousand persons is wholly immaterial;" and that "a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but it is altogether immaterial whether the force used is sufficient to effectuate the object; any force connected with the intention will constitute the crime of 'levying war.'" In *Mitchell's Case* (United States v. Mitchell, Whart. St. Tr., 176), it was decided that to resist or prevent by armed force the execution of a particular statute of the United States is a levying war against the United States, and consequently treason, within the true meaning of the constitution.

§ 1200. *Levying war must be for a purpose of a general, or public, and not of a private, nature or for private ends.*

And in *Fries' Case*, already mentioned, "that an insurrection or rising of any body of people within the United States, to attain by force or violence any object of a great public nature, or of public (or national) and general concern, is a levying of war against the United States." "That any such insurrection or rising to resist or prevent by force or violence the execution of any statute of the United States," "under any pretense, as that the statute was unjust, burthensome, oppressive or unconstitutional, is a levying of war against the United States within the constitution." And in a case in the circuit court of New York (*United States v. Hoxie*, 1 Paine, 265), it was declared that, "if the intention be to prevent, by force of arms, the execution of any act of congress altogether, any forcible opposition calculated to carry that intention into effect is levying war against the United States. But the resistance of the execution of a law of the United States, accompanied with any degree of force, if for a private purpose, is not treason. To constitute that offense the object of the resistance must be of a public and general nature. I do not think it necessary to quote further from the decisions of my predecessors. It will suffice to say that the late charge of my brother Kane to the grand jury in the

circuit court contains what I believe to be a correct statement of the decisions on this subject, and that I fully concur in the doctrines stated and the sentiments expressed in it. 2 Wall. Jr., 135.

§ 1201. *It is not essential to levying war that there should be large numbers of persons engaged.*

In the application of these principles of construction to the case before us the jury will observe that the "levying of war" against the United States is not necessarily to be judged of alone by the number or array of troops. But there must be a conspiracy to resist by force, and an actual resistance by force of arms or intimidation by numbers. The conspiracy and the insurrection connected with it must be to effect something of a *public nature*, to overthrow the government or to nullify some law of the United States, and totally to hinder its execution or compel its repeal. A band of smugglers may be said to set the laws at defiance and to have conspired together for that purpose, and to resist by armed force the execution of the revenue laws; they may have battles with the officers of the revenue, in which numbers may be slain on both sides, and yet they will not be guilty of treason, because it is not an insurrection of a public nature, but merely for private lucre or advantage. A whole neighborhood of debtors may conspire together to resist the sheriff and his officers in executing process on their property — they may perpetrate their resistance by force of arms — may kill the officer and his assistants — and yet they will be liable only as felons, and not as traitors. Their insurrection is of a private, not of a public, nature; their object is to hinder or remedy a private, not a public, grievance. A number of fugitive slaves may infest a neighborhood, and may be encouraged by the neighbors in combining to resist the capture of any of their number; they may resist with force and arms their master or the public officer, who may come to arrest them; they may murder and rob them; they are guilty of felony and liable to punishment, but not as traitors. Their insurrection is for a private object and connected with no public purpose.

It is true that constructively they may be said to resist the execution of the fugitive slave law, but in no other sense than the smugglers resist the revenue laws, and the anti-renters the execution laws. Their insurrection, their violence, however great their numbers may be, so long as it is merely to attain some personal or private end of their own, cannot be called *levying war*. Alexander the Great may be classed with robbers by moralists, but still the political distinction will remain between war and robbery. One is public and national, the other private and personal.

Without desiring to invade the prerogatives of the jury in judging the facts of this case, the court feel bound to say that they do not think the transaction with which the prisoner is charged with being connected rises to the dignity of treason or a levying of war. Not because the number or force was insufficient. But first, for want of any proof of previous conspiracy to make a *general and public resistance to any law* of the United States. Secondly. Because there is no evidence that any person concerned in the transaction knew there were such acts of congress as those with which they are charged with conspiring to resist by force and arms, or had any other intention than to protect one another from what they termed kidnappers (by which slang term they probably included not only actual kidnappers, but all masters and owners seeking to recapture their slaves, and the officers and agents assisting therein).

The testimony of the prosecution shows that notice had been given that certain fugitives were pursued; the riot, insurrection, tumult, or whatever you

may call it, was but a sudden "*conclamatio*" or running together, to prevent the capture of certain of their friends or companions, or to rescue them if arrested. Previous to this transaction, so far as we are informed, no attempt had been made to arrest fugitives in the neighborhood under the new act of congress by a public officer. Heretofore arrests had been made not by the owner in person, or his agent properly authorized, or by an officer of the law. Individuals without any authority, but incited by cupidity, and the hope of obtaining the reward offered for the return of a fugitive, had heretofore undertaken to seize them by force and violence, to invade the sanctity of private dwellings at night, and insult the feelings and prejudices of the people. It is not to be wondered at that a people subject to such inroads should consider odious the perpetrators of such deeds and denominate them kidnappers — and that the subjects of this treatment should have been encouraged in resisting such aggressions, where the rightful claimant could not be distinguished from the odious kidnapper, or the fact be ascertained whether the person seized, deported or stolen in this manner, was a free man or a slave. But the existence of such feelings is no evidence of a determination or conspiracy by the people to publicly resist any legislation of congress, or levy war against the United States. That in consequence of such excitement, such an outrage should have been committed, is deeply to be deplored. That the persons engaged in it are guilty of aggravated riot and murder cannot be denied. But riot and murder are offenses against the state government. It would be dangerous precedent for the court and jury in this case to extend the crime of treason by construction to doubtful cases, and our decision would probably operate in the end to defeat the purposes of the law, which the government seeks to enforce.

I cannot conclude this charge to the jury, without availing myself of the occasion which it offers, to express the satisfaction which the court has in seeing here the attorney-general of the state of Maryland and the private counsel associated with him; for although the ordinary officers of the United States are deserving of all praise for the vigilance, ability and learning they have shown in bringing offenders to justice, the indignation felt by the people of Maryland at the calamitous and disgraceful murder of Mr. Gorsuch are most natural indeed; and we receive their representatives here, in defense of the law with cordial respect and readiness, in the hope that it may efface all angry feeling between the people of these two states, and foster those of respect and friendship. (Verdict, not guilty.)

§ 1202. In general.—The highest of all crimes under the laws of the United States is treason. It is defined by the constitution as consisting in levying war against the United States, or adhering to their enemies, giving them aid and comfort. When this language, borrowed from an ancient English statute enacted in 25 Ed. III., was adopted into the constitution, it had acquired a settled meaning, and this meaning has been adopted by the courts. By this settled interpretation, the words "levying war" include not only the act of levying war for the purpose of overturning the government, but also any combination forcibly to oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law in pursuance of such combination. It is not enough, however, that the purpose of the combination is to oppose the execution of the law in some particular case, but the purpose must be to oppose the execution of the law in all cases. It is immaterial whether the purpose embraces opposition to one law or many. Charge to Grand Jury, 2 Curt., 630. See § 1169.

§ 1203. In order to constitute the crime of treason against the United States under the constitution, war must actually have been levied. But if war has been actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered trait-

ors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war. *Ex parte Bollman*, 4 Cr., 126; 1 Burr's Trial, 14.

§ 1204. The definition of treason in the constitution having been borrowed from the ancient English law, its terms must be understood in the sense they bore in that law, and which obtained here when the constitution was adopted. The expression "levying war," so regarded, embraces not only the act of formal or declared war, but any combination forcibly to prevent or oppose the execution or enforcement of a provision of the constitution or of a public statute, if accompanied or followed by an act of forcible opposition in pursuance of such combination. Charge to Grand Jury,* 2 Wall. Jr., 134.

§ 1205. All are principals.—With regard to the act of violence, as the result or consequence of the combining to resist the law, which is an element of the offense of treason, it is not necessary to prove that the individual accused was a direct perpetrator in the violence. If he was present, directing, aiding, abetting, counseling or countenancing it, he is in law guilty of the forcible act. Charge to Grand Jury,* 5 Penn. L. J. Rep., 55; 2 Wall. Jr., 134. See §§ 1173, 1181.

§ 1206. Nor is his personal presence indispensable. For though he be absent at the time of the actual perpetration, yet if he directed the act, devised or knowingly furnished the means of carrying it into effect, or instigated others to perform it, he shares their guilt. *Ibid.*

§ 1207. Treason may be committed by those not personally present at the immediate scene of violence. If a body of men be actually assembled to effect by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are guilty of treason. Charge to Grand Jury, 1 Curt., 650.

§ 1208. Proof.—In a case of treason by levying war against the United States, the offense need not be proved to have been committed on the day nor the number of the insurgent party be so great as the indictment states. *United States v. Vigol*, 2 Dal., 346.

§ 1209. Executive communications, not on oath or affirmation, cannot, under the constitution, be received in a court of justice as sufficient to charge a man with treason, much less to commit him to trial. (Per CRANCH, C. J., dissenting.) *United States v. Bollman*,* 1 Cr. C. C., 373.

§ 1210. The constitutional provision that no person shall be convicted of treason unless upon the testimony of two witnesses to the same overt act, or on confession in open court, and the language of the first section of the act of April 30, 1790, upon the same subject, do not apply to proceedings before grand juries, or to preliminary investigations. *United States v. Greiner*,* 4 Phil., 396; Charge to Grand Jury,* 2 Wall. Jr., 134; 5 Penn. L. J. Rep., 55.

§ 1211. The highest, or at least the direct, proof of conspiring to resist law may be found in the declared purposes of the individual before the actual outbreak; or it may be derived from the proceedings of meetings, in which he took part openly, or which he either prompted or made effective by his countenance or sanction. Charge to Grand Jury,* 5 Penn. L. J. Rep., 55; 2 Wall. Jr., 134.

§ 1212. But such direct proof of this element of treason is not legally necessary to establish its existence. The concert of purpose may be deduced from the concerted action itself, or may be inferred from facts occurring at the time, or afterwards, as well as before. *Ibid.*

§ 1213. Levying war.—A conspiracy to levy war is not treason within the constitutional definition. To constitute treason by levying war, there must be an assembly of persons, met for the treasonable purpose, and some overt act done, or some attempt made by them with force to execute, or towards executing, that purpose. There must be a present intention to proceed in the execution of the treasonable design by force. The assembly must be in a condition to use force. Charge to Grand Jury,* 1 Story, 614. See §§ 1171, 1179, 1180.

§ 1214. If such an assembly is arrayed in a military manner,—if they are armed and march in a military form, for the express purpose of overawing or intimidating the public,—and thus attempt to carry into effect the treasonable design,—that will of itself amount to a levy of war, although no actual blow has been struck, or engagement has taken place. *Ibid.*

§ 1215. The act of "levying war" against the United States, which the constitution declares to be treason, embraces not merely the act of formal or declared war, but any combination forcibly to prevent or oppose the execution or enforcement of a provision of the constitution or of a public statute, if accompanied or followed by an act of forcible opposition in pursuance of such combination. Charge to Grand Jury,* 5 Penn. L. J. Rep., 55.

§ 1216. Levying war requires an assemblage of men, ready to act, and with an intent to do some treasonable act, and armed in a warlike manner, or else assembled in such numbers as to supersede the necessity of arms. (Per CRANCH, C. J., dissenting.) *United States v. Bollman*,* 1 Cr. C. C., 373.

§ 1217. The levying of war which is necessary to constitute treason under the constitution of United States must be brought into open action by the assemblage of men for a purpose trea-

sonable in itself. Conspiracy to accomplish a treasonable object is not sufficient; and it seems that the actual enlistment of men to serve against the government does not amount to levying war. *Ex parte Bollman*, 4 Cr., 126; 1 Burr's Trial, 14.

§ 1218. **Resisting the execution of the law.**—The members of an armed party formed for the purpose of resisting the excise law, who commit such acts of violence in pursuance of that intention, as attacking the house of an excise officer and extorting from him an oath that he would no longer act as excise officer, and burning the house of another excise officer, are guilty of treason. *United States v. Vigol*, 2 Dal., 346.

§ 1219. The conspiracy to oppose the execution of the law, which is an element of treason, may be formed before the individuals assemble to act, or it may be formed when they have assembled. Time is not essential. Actual force must be used. It is not necessary that there should be any military array, or weapons, nor that any personal injury be inflicted on the officers of the law. What amounts to actual force must depend on the circumstances of the case. Charge to Grand Jury, 2 Curt., 630.

§ 1220. It is not necessary to a treasonable design that it should be a direct and positive intention to entirely overthrow the government. It is equally treason if the intention is by force to prevent the execution of any one or more of the general public laws of the United States, or to resist the exercise of any legitimate authority of the government in its sovereign capacity. Charge to Grand Jury,* 1 Story, 614.

§ 1221. An insurrection whose object is to prevent the execution of the excise law, and suppress the excise officers by force and intimidation, is high treason. It is treason by levying war against the United States. *United States v. Mitchell*, 2 Dal., 348.

§ 1222. An alien cannot be guilty of the crime of high treason. *United States v. Villato*, 2 Dal., 370.

§ 1223. Aliens residing in the United States who manufactured saltpetre and sold it to the Confederates, knowing that it was to be used for the manufacture of gunpowder for the prosecution of the war of the rebellion, and in order to aid the Confederates in accomplishing their treasonable purposes, were themselves guilty of treason or misprision thereof. *Carlisle v. United States*, 16 Wall., 147.

§ 1224. Treason against the United States may be committed by any one resident or sojourning within its territory and under the protection of its laws, whether he be citizen or alien. Charge to Grand Jury,* 2 Wall. Jr., 134; 5 Penn. L. J. Rep., 55.

§ 1225. **Aiding enemies.**—If a prize taken during the existence of a maritime war between France and the United States be found to be regularly commissioned and authorized by France as a public or private ship of war, all officers and members of the crew, who are citizens of the United States or some one of the states, may be tried for treason, in adhering to and aiding the enemies of the United States. *Prize Ship and Crew*,* 1 Op. Att'y Gen'l, 85. See § 1170.

§ 1226. When the act itself amounts to treason, it involves the intention. No threat of destruction of property will excuse or justify such an act. It is treason, therefore, to deliver up prisoners and deserters to the enemy, for such is adhering to the enemy, giving them aid and comfort; and it is no excuse that the prisoners were delivered up upon a threat of the enemy that they would destroy the town. *United States v. Hodgson*,* 2 Wheeler, 477.

§ 1227. **The taking of a fort** belonging to and in possession of the United States by an artillery company of a state, and the holding it against the United States, is treason on the part of every one concerned, notwithstanding the fort was taken without resistance. It is also unimportant that those taking the fort did so under the orders of the governor of the state. *United States v. Greiner*,* 4 Phil., 396.

§ 1228. **A judgment of forfeiture** for treason, rendered by the inferior court of common pleas of a county in New Jersey, which had, by statute, general jurisdiction in cases of treason, is conclusive until reversed, though perhaps erroneous. *Kempe v. Kennedy*, 5 Cr., 185.

§ 1229. **Going ashore to obtain food.**—It is not an overt act of treason for a prisoner, on board a hostile ship, to go ashore with an armed boat's crew with the intention of procuring food for the vessel, especially as the accused was captured before the purpose of the expedition was accomplished. *United States v. Pryor*,* 3 Wash., 234.

§ 1230. **Conspiracy—Proof of overt act.**—Of the overt act of treason there must be proof by two witnesses. The intention and the act, the will and the deed, must concur. A bare conspiracy is not treason. But where it was proved by a number of witnesses that the prisoner was at the place where the conspiracy was formed to attack the house of the excise officer, and also that he was on the march thither; and one witness swore that the prisoner was at the house, and another said "it ran in his head that he saw him there," the jury were told that they might consider how far the act of marching aided the doubtful language of the second witness as to the prisoner's being at the house. *United States v. Mitchell*, 2 Dal., 348.

§ 1231. *Seizure of property.*—The forcible rescuing of a raft from the custody of a military guard placed over it by a collector, who had seized it for a violation of the embargo laws, accomplished by a number of persons for private gain, is not such a levying of war against the United States as constitutes treason. *United States v. Hoxie*,* 1 Paine, 265.

§ 1232. *Object of a local nature.*—When the object of an insurrection is of a local or private nature, not having a direct tendency to destroy all property and all government by numbers and armed force, it will not amount to treason; and in these and other cases that occur the true criterion is the intention with which the parties assembled. *Ibid.*

§ 1233. *Against a state.*—Levying war exclusively against the sovereignty of a particular state is not treason against the United States. But treason may be begun against a state, and may be mixed up with or merged in treason against the United States. A treasonable purpose to overthrow the government of a state and forcibly to withdraw it from the Union, and thereby prevent the exercise of the national authority within its limits, is treason against the United States. *Charge to Grand Jury*,* 1 Story, 614.

§ 1234. *Aiding another nation.*—It is treason for a citizen, or any other person within the United States not commissioned under France, to aid and abet and assist that nation during a maritime war between her and the United States. *Treason*,* 1 Op. Att'y Gen'l, 84.

§ 1235. *The rebellion.*—War levied against the United States by the citizens of the republic, under the pretended authority of the new state government of North Carolina, or of the so-called Confederate government which assumed the title of Confederate States, was treason against the United States. *Shortridge v. Macon*, Chase's Dec., 133. See § 1172.

§ 1236. All persons who made war upon the United States in aid of secession, and all giving aid to the rebellion, were traitors, and subject to punishment as such by act of congress. *United States v. Cathcart*, 1 Bond, 558 (CONST., §§ 133-139).

§ 1237. *Trial of Jefferson Davis.*—Upon the trial of Jefferson Davis for treason, in engaging in insurrection and rebellion against the United States, it having appeared that prior to the rebellion the defendant was a member of the congress of the United States, and as such member had taken the oath to support the constitution of the United States, the court was divided in opinion whether the penalties and disabilities denounced against and inflicted on the defendant, for his alleged offense, by the third section of the fourteenth amendment to the constitution, which declares in effect that no person shall hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath as a member of congress, etc., to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof, were not a bar to any proceedings against him on the indictments. *United States v. Davis*, Chase's Dec., 1.

XVIII. MISCELLANEOUS OFFENSES.

SUMMARY — *Introducing spirits into Alaska*, § 1238. — *Attempt to commit a crime*, § 1239. — *Assault with a dangerous weapon*, § 1240. — *What is a dangerous weapon*, § 1241; *a question of law and fact*, § 1242.

§ 1238. The introduction or the attempt to introduce spirituous liquors into Alaska is a crime under the laws of the United States. *United States v. Stephens*, §§ 1243, 1244.

§ 1239. In order to constitute an attempt to commit a crime there must be a combination of intent and act—an intent to commit a crime, and an act done in pursuance of such intent, which falls short of the thing intended. To make the act an indictable attempt it must be a cause, as distinguished from a condition, and it must go so far that it would result in the crime unless frustrated by extraneous circumstances. So the act of a person in Alaska in writing a letter to a dealer in San Francisco, ordering a quantity of spirituous liquors sent to him in Alaska, is not an attempt to introduce such liquors into Alaska within the meaning of the statute punishing such an attempt. *Ibid.* See §§ 1247, 1737.

§ 1240. There is no punishment provided, by act of congress, for an assault with a dangerous weapon committed within the exclusive jurisdiction of the United States, if committed on land, even if such assault should involve an attempt to commit murder. *United States v. Williams*, §§ 1245, 1246.

§ 1241. A dangerous weapon is one likely to produce death or great bodily harm. A loaded pistol is not only a dangerous but a deadly weapon. *Ibid.* See §§ 148, 714, 1354, 1461.

§ 1242. Whether a particular weapon is a dangerous or deadly one is generally a question of law. Sometimes it becomes one of law and fact, to be determined by the jury under the direction of the court. But when it is practicable for the court to declare a particular weapon dangerous, it is its duty to do so. *Ibid.*

[NOTES.— See §§ 1247-1474.]

UNITED STATES v. STEPHENS.

(Circuit Court for Oregon: 12 Federal Reporter, 52-57. 1832.)

Opinion by DEADY, D. J.

STATEMENT OF FACTS.— On March 30, 1882, an information was filed by the district attorney, accusing the defendant, by the first count, of the crime of introducing spirituous liquors into the district of Alaska contrary to law; and by the second count, of the crime of "attempting" to so introduce such liquors into said district. The defendant demurs to the information because it does not state facts sufficient to constitute a crime. Upon the argument of the demurrer it was abandoned as to the first count, and insisted upon as to the second. This count alleges that on July 14, 1879, the defendant, being in the district of Alaska, wrote and transmitted a letter to a certain firm in San Francisco, California, wherein and whereby he requested said firm to ship and send to him at Fort Wrangle, in said district, one hundred gallons of whisky; the defendant then well knowing that said firm were then wholesale dealers in spirituous liquors, and owned and possessed said one hundred gallons of whisky; "and he thereby contriving and intending to introduce the said one hundred gallons of whisky into the said district of Alaska."

§ 1243. *The introduction of wine and spirits into the Indian country and Alaska is indictable, as is also an attempt to do so.*

In *United States v. Seveloff*, 2 Saw., 311, the district court for this district having decided that the district of Alaska was not "Indian country," and that the act of June 30, 1834 (4 St., 729), regulating the trade and intercourse with the Indian tribes, was not in force therein, congress, in the general appropriation act of March 3, 1873 (17 St., 530), amended section 1 of the Alaska act of June 27, 1868 (15 St., 240; sec. 1954, R. S.), so as to extend over that country sections 20 and 21 of said act of June 30, 1834, as well as the acts relating "to customs, commerce and navigation." The first of these sections provides, among other things, that "if any person shall introduce or attempt to introduce any spirituous liquors or wine into the Indian country," except supplies for the army under the direction of the war department, he "shall forfeit and pay a sum not exceeding \$300." By the act of March 3, 1847 (9 St., 203), said section 20 was amended so that upon a conviction before the proper district court of such act or attempt, the party should be punished by imprisonment not exceeding one year. The section was again amended by the acts of February 13, 1862 (12 St., 339), and March 15, 1864 (13 St., 29; sec. 2139, R. S.). By these latter amendments the maximum punishment for a violation of the section was fixed at two years' imprisonment and \$300 fine; and jurisdiction was given to the circuit court as well as the district.

By section 2 of the Alaska act, *supra* (sec. 1955, R. S.), the president was given "power to restrict and regulate, or to prohibit the importation and use of fire-arms, ammunition and *distilled spirits* into and within the territory of Alaska." It is a question whether this provision, so far as distilled spirits are concerned, was not superseded and repealed by the extension of said section 20 over Alaska by the act of March 3, 1873, *supra*. This section, as has been stated, absolutely prohibits the introduction of spirituous liquors, which of course includes distilled spirits, into Alaska, except for the use of the army, by permission of the war department. Without doubt, as to the executive power to restrict or prohibit, the later act supersedes the earlier one. A statute power in the president to restrict or prohibit is certainly rendered nugatory by a sub-

sequent act which absolutely prohibits. But as to the power "to regulate," which naturally implies the power to permit, the case is not so clear. Probably the better conclusion is that the acts should be construed as *in pari materia*, and both have effect so far as possible. Upon this construction of the statutes the law concerning the introduction of spirituous liquors and wine into Alaska is that such introduction is absolutely prohibited, subject to the power of the war department to permit the same for the use of the army, and the power of the president to permit the introduction of distilled spirits, but not wine, for any purpose. It is doubtful if any attempt to commit an offense of this character is indictable at common law, and this is probably the reason why it was made so specially by the act defining the crime. 1 Whart. Cr. L., § 177; 1 Bish. Cr. L., §§ 684, 687.

§ 1244. *What constitutes an "attempt" to commit a crime.*

It is said that the subject of attempt to commit crime is "less understood by the courts" and "more obscure in the text-books" than any other branch of the criminal law. Bish. Crim. Law, § 657. And certainly there is none in some respects more intricate and difficult of comprehension. It is almost impossible to comprehend all cases of attempt in a definition that does not necessarily run into a mere enumeration of instances. It is easy to say that there must be a combination of intent and act — an intent to commit a crime and an act done in pursuance of such intent, which falls short of the thing intended. There are a class of acts which may be fairly said to be done in pursuance of or in combination with an intent to commit a crime, but are not in a legal sense a part of it, and therefore do not with such intent constitute an indictable attempt; for instance, the purchase of a gun with a design to commit murder, or the purchase of poison with the same intent. These are considered in the nature of preliminary preparations — conditions, not causes — and, although co-existent with a guilty intent, are indifferent in their character, and do not advance the conduct of the party beyond the sphere of mere intent. They are, it is true, the necessary conditions, without which the shooting or poisoning could not take place, but they are not, in the eye of the law, the cause of either. 1 Whart. Cr. L., §§ 178, 181; 1 Bish. Cr. L., § 668 *et seq.*; *People v. Murray*, 14 Cal., 160. Dr. Wharton says (*supra*, § 181): "To make the act an indictable attempt it must be a *cause*, as distinguished from a *condition*; and it must go so far that it would result in the crime unless frustrated by extraneous circumstances."

Bishop says (*supra*, § 669): "It is plain that if a man who has a wicked purpose in his heart does something entirely foreign in its nature from that purpose, he does not commit a criminal attempt to do the thing proposed. On the other hand, if he does what is exactly adapted to accomplish the evil meant, yet proceeds not far enough in the doing for the cognizance of the law, he still escapes punishment. Again, if he does a thing not completely, as the result discloses, adapted to accomplish the wrong, he may, under some circumstances, be punishable, while under other circumstances he may escape. And the difficulty is not a small one to lay down rules, readily applied, which shall guide the practitioner in respect to the circumstances in which the criminal attempt is sufficient."

In *People v. Murray*, *supra*, the defendant was indicted for an attempt to contract an incestuous marriage, and was found guilty. From the evidence it appeared that he intended to contract such marriage; that he eloped with his niece for that purpose, and requested a third person to get a magistrate to per-

form the ceremony. Upon an appeal the judgment was reversed. Chief Justice Field, delivering the opinion of the court, said: "It [the evidence] shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made; . . . but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, that the attempt was made. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense but for the intervention of circumstances independent of the will of the party."

In the case under consideration, to constitute the attempt charged in the information, there must have been an intent to commit the crime of introducing spirituous liquors into Alaska, combined with an act done in pursuance of such intention that, apparently, in the usual course of events, would have resulted in such introduction, unless interrupted by extraneous circumstances, but which actually fell short of such result. But it does not appear that anything was done by the defendant towards the commission of the intended crime of introducing spirituous liquors into Alaska but to offer or attempt to purchase the same in San Francisco. The written order sent there by the defendant was, in effect, nothing more or less than an offer by him to purchase the one hundred gallons of whisky; and it will simplify the case to regard him as being present at the house of the San Francisco firm at the time his order reached them seeking to purchase the liquor with the intent of committing the crime of introducing the same into Alaska. But the case made by the information stops here. It does not show that he bought any liquor. Whether he changed his mind and countermanded the order before the delivery of the goods, or whether the firm refused to deal with him, does not appear. Now, an offer to purchase whisky with the intent to ship it to Alaska is, in any view of the matter, a mere act of preparation, of which the law takes no cognizance. As the matter then stood, it was impossible for the defendant to attempt to introduce this liquor into Alaska, because he did not own or control it. It was simply an attempt to purchase — an act harmless and indifferent in itself, whatever the purpose with which it was done. But suppose the defendant had gone further and actually succeeded in purchasing the liquor, wherein would the case differ from that of the person who bought the gun or poison with intent to commit murder, but did no subsequent act in execution of such purpose? In all essentials they are the same. A purchase of spirituous liquor at San Francisco or Portland, either in person or by written order or application, with intent to commit a crime with the same — as to dispose of it at retail without a license, or to a minor, or to introduce it into Alaska — is merely a preparatory act, indifferent in its character, of which the law, lacking the omniscience of Deity, cannot take cognizance. At what period of the transaction the shipper of liquor to Alaska is guilty of an attempt to introduce the same there is not very easily determined. Certainly the liquor must first be purchased, obtained in some way, and started for its illegal destination. But it is doubtful whether the attempt or the act necessary to constitute it can be committed until the liquor is taken so near to some point or place of "the mainland, islands or waters" of Alaska as to render it convenient to introduce it from there, or to

make it manifest that such was the present purpose of the parties concerned. But this is a mere suggestion, and each case must be determined upon its own circumstances.

The demurrer is sustained to the second count, and overruled as to the first.

UNITED STATES *v.* WILLIAMS.

(Circuit Court for Oregon: 6 Sawyer, 244-247. 1880.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—On January 7, 1879, the grand jury for this district found an indictment against the defendant, containing two counts. The first one charges him with “an attempt to commit the crime of murder by means not constituting an assault with a dangerous weapon,” by wilfully and maliciously “shooting one Edward Robert Roy,” on October 8, 1879, with a loaded pistol, with intent him to murder, at Sitka, in the territory of Alaska. The second one charges him with an assault upon said Roy, at the time and place aforesaid with a loaded pistol, with intent him to kill, and alleges that said territory of Alaska was then and there Indian territory. The defendant demurred to the indictment, upon the ground that the facts stated did not constitute a crime. The court sustained the demurrer to the second count, holding that Alaska was not “the Indian country,” within the purview of section 21 of the act of March 27, 1854 (10 Stat., 270; R. S., sec. 2142), defining the crime of an assault by a white person within such country with a deadly weapon, with intent to kill, and citing *United States v. Seveloff*, 2 Saw., 311; *United States v. Carr*, 3 id., 302; *Waters v. Campbell*, 4 id., 121. The demurrer to the second count was overruled *pro forma*, whereupon the defendant pleaded guilty thereto, and then moved in arrest of judgment for the cause stated in the demurrer.

§ 1245. *The attempt to commit murder by assault with a dangerous weapon is not punishable by any law of the United States, where the assault was made upon land in places within the exclusive jurisdiction thereof.*

This count is based upon section 2 of the act of March 3, 1857 (11 Stat., 250; R. S., sec. 5342), which provides, in effect, that every person who, within any place or district of country under the exclusive jurisdiction of the United States, or upon the high seas, or other water within the admiralty jurisdiction thereof, and out of the jurisdiction of any particular state, attempts to commit murder “by any means not constituting the offense of assault with a dangerous weapon,” shall be punished, etc. Without doubt, Sitka, in Alaska, is a place under the exclusive jurisdiction of the United States, and not within the jurisdiction of any state. Therefore, it appearing from the indictment that the defendant was first brought within this district for trial, it follows that if the alleged assault is a violation of any law of the United States, the motion must be denied. R. S., sec. 730; *United States v. Carr*, *supra*, 304.

The only provision in the statutes of the United States for punishing an attempt to commit murder or manslaughter on land is found in section 5342, *supra*, but for some reason this is confined to cases where the means used do not constitute “the offense of assault with a dangerous weapon.” The punishment of an assault with a dangerous weapon, or with intent to perpetrate a felony, committed on the waters within the jurisdiction of the United States, and out of the jurisdiction of any particular state, was provided for in section 4 of the act of March 3, 1825 (4 Stat., 115; R. S., sec. 5346), but not the attempt to commit murder or manslaughter, unless it was coincident with such assault. But an

attempt to commit murder or manslaughter on land, or an assault there, by whatever means committed, was not punishable by any law of the United States until 1837, when, as has been stated, by section 2 of the act of March 3 of that year, it was declared that an attempt to commit murder or manslaughter, whether on land or water, should be punished as therein prescribed; provided, such attempt was not made by means of the assault mentioned in the act of 1825, *supra*, thus limiting the operation of the statute to attempts made by drowning, poisoning, or the like. And probably this was so provided upon the erroneous impression that the act of 1825 was applicable to assaults committed on land as well as water. But however this may be, as a result of this patch-work legislation, it appears that there is no punishment provided for an assault with a dangerous weapon committed within the exclusive jurisdiction of the United States, if committed on land, even if such assault should involve, as it may, and did in this case, an attempt to commit murder.

§ 1246. *A dangerous weapon is one likely to produce death or great bodily harm; and the question of its character is generally one of mixed law and fact.*

In the drawing of the indictment, an effort had been made to bring this case within the terms of section 5342, R. S., by an averment therein that the attempt to murder was made "by means not constituting an assault with a dangerous weapon." But this is necessarily avoided, and in effect rendered null, by the very statement of the alleged commission of the alleged offense — that the defendant attempted to commit murder by shooting Roy with a loaded pistol. Whether a particular weapon is a deadly or dangerous one is generally a question of law. Sometimes, owing to the equivocal character of the instrument — as a belaying-pin — or the manner and circumstances of its use, the question becomes one of law and fact, to be determined by the jury under the direction of the court. But where it is practicable for the court to declare a particular weapon dangerous or not, it is its duty to do so. A dangerous weapon is one likely to produce death or great bodily harm. A loaded pistol is not only a dangerous, but a deadly weapon. The prime purpose of its construction and use is to endanger and destroy life. This is a fact of such general notoriety that the court must take notice of it. *United States v. Small*, 2 Curt., 242; *United States v. Wilson*, 1 Bald., 99. It appears, then, from the indictment, notwithstanding the averment therein to the contrary, that the act alleged to be an attempt to commit murder was an assault with a dangerous weapon, and, therefore, not punishable by the statute.

The motion in arrest of judgment must be allowed, and the defendant discharged. By this ruling the defendant will escape punishment for what appears to have been an atrocious crime, but the court cannot inflict punishment where the law does not so provide. It is the duty of the legislature to correct the omission or defect in the law, and it is to be hoped that the result in this case will attract the attention of congress to the matter at an early day.

§ 1247. *Attempt.*— Every attempt or offer to commit any crime or misdemeanor at common law, or by statute, is not an indictable offense. Only those attempts or offers to violate laws are indictable, which, if the attempt were carried into effect, would invade the very safeguards of social order, or lead to the utter subversion or corruption of our political institutions; as, for example, an attempt to commit a breach of the peace, or to bribe an officer of the government. An attempt to sell a free negro as a slave is not, therefore, indictable as an offense, nor is such an attempt indictable as a fraud at common law. *United States v. Henning*, * 4 Cr. C. C., 608. See §§ 1239, 1737.

§ 1248. Under the Maryland law of 1751, declaring that "slaves, convicted of attempting to murder any person, shall suffer death without benefit of clergy," a slave who takes an axe,

and enters with it into his mistress' room, with intent to murder her, and is prevented by the awakening of his mistress and her servant, and by their noise, and his being seized and forced out of the room, from executing his intention, is guilty. *United States v. Bowen*, 4 Cr. C. C., 604.

§ 1249. **National banks.**—Where a president of a national bank, charged as trustee with the administration of the funds of the bank in his hands, converts them to his own use, he embezzles and abstracts them within the statute relating to embezzlements by officers of such banks, unless he shows authority to do so. *In re Van Campen*,* 2 Ben., 419. See §§ 251, 2628.

§ 1250. In a prosecution under the first clause of section 5209, Revised Statutes, for embezzling, abstracting and wilfully misapplying the property of a national bank, it seems that testimony showing other violations of law mentioned in the latter part of said section are admissible in evidence, and are important as bearing on the question of intent. Evidence of previous good character is admissible. *United States v. Lee*,* 13 Fed. R., 816.

§ 1251. It is not necessary to show that the person who misapplies the funds derived any benefit from the transaction, directly or indirectly. The word "defraud," as used in the law (see sec. 5209, R. S.), implies that the accused received some benefit, but the word "injure," used with it, applies where the party receives no such benefit. *Ibid.*

§ 1252. The crime of "abstraction," created by the statute, applies to cases where one for his own benefit takes the property of another; but it is not necessary that any position of trust should exist between the parties, nor is it necessary that the property should lawfully come into the possession of the person abstracting it. *Ibid.*

§ 1253. On an indictment against the cashier of a national bank for embezzling its funds, where it is shown that the defendant used such money in stock operations as margins, evidence that such transactions were known to the president of the bank and "some of the directors," no resolution of the directors authorizing it, and that such transactions were for the benefit of the bank, is inadmissible. *United States v. Taintor*,* 11 Blatch., 374.

§ 1254. **Homicide in Indian country.**—A trial for homicide committed in an Indian reservation must be had on the federal side of a territorial court, and is governed by the United States statutes and the rules of the common law. *McCall v. United States*,* 1 Dak. T'y, 320.

§ 1255. **Offenses by Indians.**—Congress has power to provide for the punishment of Indians for offenses committed against the United States, especially when the offenses consist in attacks for purposes of robbery and plunder, and not open acts of war and hostility. *United States v. Cha-to-kah-na-pe-sha*, Hemp., 27.

§ 1256. **Trade and intercourse with Indians.**—The act of congress of June 30, 1834, regulating trade and intercourse between Indian tribes, provided that the provision of the clause relating to crimes "shall not extend to crimes committed by one Indian against the person or property of another Indian." *Held*, that a white citizen who at mature age went to reside within the Cherokee reservation, and was adopted into the tribe, did not thereby become an Indian within the exception above referred to. *United States v. Rogers*, 4 How., 572.

§ 1257. **Selling liquor to Indians.**—Under the act of June 30, 1834, declaring that if any person sold spirituous liquor to an Indian in the Indian country, he should forfeit \$500, as amended by the act of February 13, 1862, punishing any person who shall sell to an Indian under charge of an Indian agent or superintendent appointed by the United States, it is a crime to sell liquor in the territorial limits of Minnesota and without any Indian reservation, to an Indian of the Winnebago tribe, under the charge of the Indian agent for that tribe. *United States v. Holliday*, 3 Wall., 407.

§ 1258. Under the act of congress of March 15, 1864, punishing any person who "shall sell . . . or dispose of any spirituous liquors to any Indian, under the charge of an Indian superintendent or Indian agent appointed by the United States," it is not essential, in order to maintain the indictment, that there should be an immediate personal superintendence by the agent over the Indian. The selling of liquor to an Indian at the time off the reservation and living away from the tribe is within the act, provided the tribe is under an agent or superintendent, and the Indian still maintains his tribal relation. *United States v. Flynn*, 1 Dill., 451.

§ 1259. The exception, "an Indian in the Indian country," in section 2130, Revised Statutes, punishing "every person except an Indian in the Indian country, who sells, exchanges, gives, barter or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent," extends only to the offender and not the offense. *United States v. Winslow*,* 3 Saw., 337.

§ 1260. The fifth section of the act of June 5, 1850, making Oregon "Indian country," so far as the offense of disposing of spirituous liquors to Indians is concerned, is not repealed by section 5596 of the Revised Statutes. *Ibid.*

§ 1261. "The Indian country," within the meaning of the statute making it a crime to in-

to introduce spirituous liquors therein, is only that portion of the United States or its territories which has been declared to be such by an act of congress. *United States v. Seveloff*, * 2 Saw., 311.

§ 1262. The territory of Alaska is not a part of "the Indian country," and it is therefore not a violation of section 20 of the act of 1834 to introduce spirituous liquors therein. *Ibid.*

§ 1263. The twentieth section of the act of 1834, as amended by the acts of February 13, 1862, and March 15, 1864, making the disposing of spirituous liquors to any Indian under the charge of any Indian agent a crime, without reference to the locality in which the act is done, does not apply to the territory of Alaska, since that territory was not acquired until afterwards, and if congress had intended that these provisions should be in force there it would have so declared by the act of July 27, 1868. *Ibid.*

§ 1264. Common law offenses.—It is held to be an indictable offense at common law to incite and encourage a fierce and dangerous dog to bite a cow. *United States v. McDuell*, 5 Cr. C. C., 391.

§ 1265. A contempt of court is a crime at common law. *United States v. Jacobi*, * 14 Int. Rev. Rec., 45.

§ 1266. What is known in the technical vocabulary of politicians as "log-rolling" is a misdemeanor at common law, punishable by indictment. *Marshall v. Baltimore & Ohio R'y Co.*, 16 How., 336.

§ 1267. Public cruelty to a cow, by cruelly beating her in the public streets, to the common nuisance of the citizens, is indictable as an offense at common law. It is not necessary to prove that the cow died of the beating. *United States v. Jackson*, * 4 Cr. C. C., 483.

§ 1268. Instigating and inciting another to commit an assault and battery is a misdemeanor at common law. *United States v. Lyles*, * 4 Cr. C. C., 469.

§ 1269. An indictment for conspiracy to cheat, by selling a free negro as a slave, will not be quashed on the ground that cheating by a simple false assertion is not indictable at common law. *United States v. Spalding*, 4 Cr. C. C., 616.

§ 1270. A simple assault and battery upon a slave is not an indictable offense at common law. *United States v. Lloyd*, 4 Cr. C. C., 468.

§ 1271. It is an indictable offense at common law to cruelly, inhumanly, and maliciously, beat, cut, slash and ill-treat one's own slave. *United States v. Brockett*, 2 Cr. C. C., 441.

§ 1272. The beating of one's own slave or the slave of another cruelly, and exposing him, so beaten, to public view, is indictable as a misdemeanor at common law. *United States v. Lloyd*, 4 Cr. C. C., 470; *United States v. Cross*, 4 Cr. C. C., 603.

§ 1273. At common law a coroner is not required to put down in writing the evidence given on an inquisition; but if he chooses to write it down, and states it falsely or unfairly, it is not an indictable offense. *United States v. Faw*, * 1 Cr. C. C., 458.

§ 1274. Transporting military stores to Canada.—Under the act of July 6, 1812, declaring it to be a misdemeanor for any citizen or inhabitant of the United States to "transport, or attempt to transport, over land or otherwise, in any waggon, cart, sleigh, boat, or otherwise, naval or military stores, arms or munitions of war, or any articles of provision from the United States to Canada," it is no offense to drive fat oxen on foot from the United States into Canada. *United States v. Sheldon*, 2 Wheat., 119.

§ 1275. Military expedition against foreign power.—Some definite act or acts of which the mind can take cognizance must be proved to sustain a charge under the sixth section of the act of April 20, 1818, punishing any person who "shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace." Mere words, written or spoken, will not constitute the offense. *United States v. Lumsden*, * 1 Bond, 5.

§ 1276. Where the means are procured, to be used on the occurrence of a future contingent event, no liability is incurred under this statute. The test of the criminality of the act is the intention; but if the intention is that the means provided or procured shall only be used at a time and under circumstances in which they could be used, without a violation of any law, no criminality attaches to the act. *Ibid.*

§ 1277. Under the third section of the act of April 20, 1818, providing a penalty against any person who shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming, of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, . . . to cruise or commit hostilities against the subjects . . . of any foreign prince or state, . . . with whom the United States are at peace," it is not necessary that the vessel should be armed, or in a condition to commit hostilities, on leaving the United States, in order to convict one in-

dicted for being concerned in fitting out or arming such a vessel. *United States v. Quincy*,* 6 Pet., 445.

§ 1278. But if the defendant, under the above act and indictment, had no present intention at the time the vessel sailed, of using the vessel as a privateer, but only wished to so employ her if he could raise the necessary funds in a foreign port to prepare her for the cruise, then he is not guilty. *Ibid.*

§ 1279. But if the defendant in this indictment has formed the intention that the vessel shall be used as set forth, the fact that such intention is afterwards defeated by failure to raise funds in a foreign port will not purge the offense already consummated. *Ibid.*

§ 1280. No offense is committed under the act of congress declaring it to be a misdemeanor for any person within the limits of the United States to "fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed," or to "knowingly be concerned in the furnishing, fitting out or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state," to cruise or commit hostilities against people with whom the United States are at peace, etc., unless the vessel is armed as well as fitted out. *United States v. Skinner*,* 2 Wheeler, 232.

§ 1281. Under section 6 of the act of April 20, 1818, declaring "that if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, every person so offending shall be deemed guilty of a high misdemeanor," it is sufficient to charge the offense in the language of the statute. It is not necessary to state what acts were done to begin or set on foot a military expedition, nor what acts rendered the expedition military. It is not necessary to allege any criminal intent, since the definition of the offense imports a criminal knowledge and intent in those committing it. The indictment need not state from what particular place in the United States or at what time the expedition or enterprise was to be carried on. *United States v. O'Sullivan*,* 9 N. Y. Leg. Obs., 257.

§ 1282. Said sixth section comprehends all the acts denounced, when committed within the United States, against a friendly power, whether that power be engaged in war with another power or at peace with all the world. *Ibid.*

§ 1283. The word "soldier," as used in the neutrality act of 1818, declaring it to be a misdemeanor "if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself . . . in the service of any foreign prince, state, colony, district or people, as a soldier, or marine, or seaman, on board of any vessel of war, letter of marque or privateer," must be taken in its ordinary sense, as one enlisted to serve on land in a land army. *United States v. Kazinski*,* 2 Spr., 7.

§ 1284. An expedition carried on from the United States, with intent to commit hostilities against a power at peace with the United States, is a violation of the act of 1794, whether the association to carry out the expedition originated in the United States or beyond the seas. If a regiment of foreign soldiers, armed and equipped, should land in the United States and hire a vessel to transport them to another country with intent to make war on a power at peace with us, it would constitute the offense, and it would be immaterial whether the company departed as passengers or hired a ship. *Ex parte Needham*,* Pet. C. C., 487.

§ 1285. Under the neutrality act of 1818, it is not a crime to leave this country with intent to enlist in foreign military service. *United States v. Kazinski*,* 2 Spr., 11.

§ 1286. A minister from the government of Buenos Ayres to that of the United States, not being accredited by the president, and the independence of Buenos Ayres not being acknowledged by the United States, is liable to be proceeded against for any offense he may commit against our laws, in the same way as any other individual. *United States v. Skinner*,* 2 Wheeler, 232. See § 2661.

§ 1287. Arresting a public minister.—On an indictment under the law of 1790, for arresting and imprisoning a public minister, it is not necessary to show that the defendant knew the person arrested to be a public minister. The statute does not make knowledge of that fact an element of the offense. *United States v. Benner*,* Bald., 234. See § 2661.

§ 1288. On an indictment for arresting a public minister, it is immaterial that the minister submitted to arrest. The privilege is not personal with the minister and cannot be waived. *Ibid.*

§ 1289. Offenses against public ministers.—The law of nations, with respect to offenses committed against ambassadors and public ministers, identifies the property of the minister, attached to his person, or in his use, with his person. Any insult upon it is considered an insult upon the person of the minister and his sovereign. It is therefore an offense against the law of nations, and punishable by the act of congress, to shoot at a picture exhibited in the window of a public minister. But the defendant must have known that the house upon

which the violence was committed was the domicile of the minister. *United States v. Hand*,* 2 Wash., 435. See CONSULS AND MINISTERS, II.

§ 1290. In an indictment for an assault upon a foreign minister, it is immaterial whether or not the defendant knew at the time that the person assaulted was a foreign minister. *United States v. Ortega*,* 4 Wash., 531.

§ 1291. On an indictment for an assault upon a foreign minister, proof that the person assaulted has been received by the government as such minister is conclusive of his character, without strict proof of his authority emanating from his sovereign. *Ibid*.

§ 1292. A person is not liable as for assaulting a public minister if such minister first assaulted him, and he defended himself against such assault. *Ibid*.

§ 1293. An assault and battery committed by a citizen upon a public minister is excused by a previous assault by the minister upon the citizen in the same manner as if both had been citizens. *United States v. Liddle*,* 2 Wash., 205.

§ 1294. Though an assault by a public minister may be repelled by force, yet it will not justify an arrest on legal process. *United States v. Benner*,* Bald., 234.

§ 1295. A battery committed upon the person of a public minister, though his character be unknown to the aggressor, is a trespass for which the latter may be criminally responsible. It is also an offense within the meaning of the act of congress declaring that "if any person shall assault, strike, wound or imprison the person of an ambassador or other public minister," he shall be punished, etc., for the purpose of giving jurisdiction of the offense to federal courts. *United States v. Liddle*,* 2 Wash., 205.

§ 1296. Regulating passenger traffic.—Under the laws of congress forbidding the taking on board of vessels more than a certain number of passengers with intent to bring them to the United States, a person is taken on board within the meaning of the act when he comes on board in the usual way, and not clandestinely. If a passenger is found on board he is presumed to be there with the master's consent until the contrary appears. *United States v. Thomson*,* 12 Fed. R., 245.

§ 1297. The defendant was appointed master of a vessel, and was indicted under section 1 of the act of March 3, 1835, for bringing to the port of Boston certain passengers in excess of the number allowed by law. Motion was made for a new trial, on the ground that an oral contract had been made with the passengers by a former master; that the passengers were on board when the defendant was appointed; and that the defendant did not take the passengers on board within the meaning of the law. Motion denied. *United States v. Morton*,* 1 Lw., 179.

§ 1298. Shipment of gunpowder, etc.—Under section 8 of the act of August 30, 1852, by which it is provided that gunpowder and other materials which ignite by friction shall be packed in a particular manner and distinctly marked on the outside with a description of the articles; and that any one who shall pack or put up for shipment any of the above articles, or shall ship the same, except as above provided, shall be guilty of a misdemeanor, an individual who has not packed the articles is not liable, unless they are actually shipped on board the vessel. The articles are not shipped, within the meaning of the act, where they are brought to the wharf for that purpose, but the discovery of their contents prevents their shipment. *United States v. Chenoweth*,* 6 McL., 139.

§ 1299. Augmenting force of belligerent.—The offense created by the fourth section of the act of June 5, 1794, consists in increasing, or augmenting, or procuring, or being knowingly concerned in increasing or augmenting, the force of any belligerent vessel, which was armed at the time of her arrival within the United States, by adding to the number or size of her guns, prepared for use; or by the addition thereto of any equipment, solely applicable to war. It is held that the raising or lowering of the gun carriages of a vessel, or replacing the decayed wood on the carriages by sound wood, if the guns were thereby prepared for use so as to augment the force of the vessel beyond what it was at her arrival, is an offense within the statute. *United States v. Grassin*,* 3 Wash., 65.

§ 1300. Employment of seamen.—Where a statute was entitled "An act for the regulation of seamen on board the public and private vessels of the United States" (Act of March 3, 1813), making it unlawful to employ any persons other than citizens, and one section of the act makes it unlawful for "any person" to "falsely make, forge," etc., any certificate of citizenship, etc., held, that said latter provision referred to any person who should forge, etc., any naturalization paper. *United States v. Randolph*,* 1 Pittsb. R., 24.

§ 1301. Defrauding underwriters.—It is held that the felonious destruction of a ship to defraud the underwriters, committed in Mango Bay, in the Island of Bermuda, which bay is entirely land-locked, and inclosed by a reef and island from the sea, is not committed on the high seas, and therefore not punishable by the act of March 26, 1804. *United States v. Robinson*,* 4 Mason, 307.

§ 1302. To make out the offense of destroying a vessel, by the owner, with intent to preju-

dice the underwriters thereon, a valid insurance must be shown, and the legal authority of the insurance corporation to act must also be established. *United States v. Johns*,* 1 Wash., 368.

§ 1808. The act of congress declaring that "if any owner of a ship or vessel shall wilfully cast away, burn, or otherwise destroy said ship or vessel with intent to prejudice any person who hath underwrote or shall underwrite any policy thereon; or of any owner or owners of goods laden therein; or of any other owner or owners of the said vessel, he shall suffer death," etc., does not make it an offense for the owner to destroy his vessel to the prejudice of the underwriters on the cargo. *Ibid.*

§ 1804. Under the act of congress of March 26, 1804, it is an offense for the owner to wilfully cast away a vessel, where there are insurers on the vessel and cargo, and a cargo on board belonging in part to others. Any one, not the owner, concerned in the casting away, is also guilty. *United States v. Vanranst*,* 3 Wash., 146.

§ 1805. On an indictment for destroying a vessel, with intent to defraud an insurance company, it is sufficient to show that the company existed *de facto*, and did business, and strict proof of its incorporation is unnecessary. *United States v. Amedy*,* 11 Wheat., 392.

§ 1806. It is sufficient to show that the policy of insurance was executed by the known officers of the company *de facto*, and strict proof of their authority is unnecessary. It is immaterial whether or not the policy of insurance was valid; the law punishes the act done with the intention to defraud, whether successful or otherwise. *Ibid.*

§ 1807. Liability of persons in charge of steamboats.—The twelfth section of the act of July 7, 1838, punishing "any captain, engineer or pilot, or other person employed on board of any steamboat, . . . by whose misconduct or negligence, or inattention to his or their respective duties, the lives of any person or persons on board of said vessel may be destroyed," makes the persons named responsible, whether the act is done through ignorance or negligence, without reference to fitness for such duties. One incompetent to discharge the duties of engineer is guilty, though the act which destroys life was done through ignorance. *United States v. Taylor*,* 5 McL., 242. See §§ 618-624.

§ 1808. The act of July 7, 1837, declaring that officers and others employed on any steamboat, by whose "misconduct, negligence or inattention" to their duties, "the life or lives of any person or persons on board" shall be destroyed, shall be deemed guilty of manslaughter, does not make the intention of the person an ingredient of the offense. The essence of the crime consists in "misconduct, negligence or inattention" in such degree and of such character as to have resulted in the loss of human life. There need be no malicious intent alleged or proved. *United States v. Warner*,* 4 McL., 463.

§ 1809. If it appear, under an indictment under the above section alleging the misconduct, negligence or inattention of the defendant from which the boat of which he was captain collided with a schooner and lives were lost thereby, that the collision happened from the improper and unskillful navigation of the schooner, or any other cause, rendering it an unavoidable occurrence, the defendant is entitled to an acquittal. *Ibid.*

§ 1810. Where the indictment, based on the above act, charges misconduct, negligence or inattention, through which a collision happened, it must be shown that the lives of the individuals named were lost as the result of the collision. Where it is proved that the captain and other officers of the vessel after the collision notified the passengers that they would be safe in getting on the hurricane deck, and also that all who sought this place of safety were preserved, the drowning of persons who, being apprised of this information or could have acquired it by reasonable diligence, resorted to other means of safety, and through the influence of excessive alarm unnecessarily and indiscreetly left the boat, preferring to launch into the lake on floats and rafts, and were drowned in consequence, is not such a necessary result of the disaster as to make the defendant liable. But if these persons, under the pressure of the circumstances under which they were placed, acted with ordinary prudence and discretion, the loss of their lives must be attributed to the collision. *Ibid.*

§ 1811. It was the duty of the captain after the collision to make an examination of the extent of the injury, and, as soon as there was danger that the boat was going down, to run her ashore with as little delay as the circumstances would allow; and if from gross negligence or indecision he omitted to give the proper order in time, and as a consequence the lives of passengers were lost, he is responsible for that result. *Ibid.*

§ 1812. Going aboard vessel about to arrive.—Section 62 of the shipping act of June 7, 1872, declaring it to be an indictable offense to go on board of a vessel about to arrive at the place of her destination, before her actual arrival, and before she is completely moored, without permission of the master, is a valid enactment. *United States v. Anderson*,* 10 Blatch., 226.

§ 1813. Proof that the master of the ship was not on board of the vessel at the time the defendant boarded her, but that the mate then in command gave no permission to the de-

fendant to come on board, and caused his arrest on the spot, is sufficient to support a conviction, in the absence of any evidence showing a permission by the master. *Ibid.*

§ 1314. Section 62 of the above act being intended to protect foreign vessels as well as those of the United States, that the vessel was a foreign one affords the prisoner no defense. *Ibid.*

§ 1315. A person, by climbing from a boat upon the rail of the ship, in the act of entering upon the ship, without permission given, renders himself liable to punishment as provided in the sixty-second section of the shipping act of June 7, 1872. The offense is committed by boarding, in the bay of New York, without permission, an inward-bound vessel, laden with a cargo to be landed at a pier in New York city, before the arrival of the vessel at such pier, although it appear that, at the time of the boarding, the vessel was temporarily at anchor in the bay. *Ibid.*

§ 1316. In a prosecution under said act, the government is not bound to prove that the prisoner was not in the United States service, or was not duly authorized by law to go on board the vessel. *Ibid.*

§ 1317. That the prisoner was a runner employed by a person who held a license to keep a sailors' boarding house, under the statutes of the state, does not show that he was exempt from the prohibition of said section 62. *Ibid.*

§ 1318. Use of military property.—An indictment, under section 5439 of the Revised Statutes, prohibiting any person from knowingly applying to his own use any clothing or other property of the United States furnished or to be used in the military service, upon which it appears that the clothing in question had been issued to an inmate of the National Military Home at Dayton, Ohio, is demurrable. The inmates of this institution are not in the military service, and clothing issued to them is not used in the military service. *United States v. Murphy*,* 9 Fed. R., 26.

§ 1319. Purchasing soldier's arms.—Indictment for purchasing a soldier's arms, under the act of March 16, 1802. *Held*, to bring the case within the statute, it is not necessary that the arms should be strictly the absolute property of the soldier; it is sufficient if the soldier have a special property therein by bailment in the course of the service, or have a lawful possession, using them as his own in the duties of the service. But if his possession be unlawful, or obtained by larceny, the arms are not, in the sense of the act, "his arms." *United States v. Brown*,* 1 Mason, 151.

§ 1320. Enticing seaman to desert.—Under the act of congress of March 2, 1855, section 11, punishing "any person who shall entice any seaman, . . . who may have enlisted into the naval service of the United States, to desert therefrom," it is no offense to entice away a seaman who has passed the necessary examination, signed the necessary paper, and received the necessary document, at the naval rendezvous, but who has not gone through with the requisite ordeal at the receiving ship to complete the contract of service and entitle him to his pay. Such a seaman is not enlisted. *United States v. Thompson*,* 2 Spr., 103.

§ 1321. Enticing soldier to desert.—Where one was indicted under the statute of 1812, ch. 14, § 17, for enticing and procuring one A., a soldier, to desert, the jury were told that if the prisoner, in order to induce A. to enlist to accomplish his own purposes of gain, made representations and gave assurances to A. as to the means and facilities of deserting, and, after A. had enlisted, received from him his bounty money, and the prisoner at the time believed that such representations and assurances would be likely to cause A. to desert, and they did cause him to desert, the prisoner was guilty of the offense; and that it was not necessary that the prisoner should have misled or actually intended that A. should desert. *United States v. Clark*,* 2 Spr., 55.

§ 1322. Selling liquor without license.—Under an indictment for selling spirituous liquor without a license, the selling by the wife of the defendant with his assent was held to be the selling of the husband. *United States v. Birch*, 1 Cr. C. C., 571.

§ 1323. Under an indictment for selling spirituous liquors without a license, the court instructed the jury that if they should be of the opinion that the defendant sold the liquor as clerk, agent, or servant, or bar-keeper of another, he was not guilty. *United States v. Paxton*,* 1 Cr. C. C., 44; *United States v. Shuck*, 1 Cr. C. C., 56.

§ 1324. Under an act of Virginia prohibiting the sale of liquor without a license, it is held that all acts of selling before conviction constitute but one offense, and one cannot be indicted for a second offense before he is convicted of the first. *United States v. Gordon*, 1 Cr. C. C., 81.

§ 1325. On an information for selling liquor without a license on a certain day, the jury were instructed that the day was immaterial if proved to be within twelve months before the filing of the information; the court being of the opinion that every act of selling before the filing of the information was a part of the same general offense of selling. *Virginia v. Zimmerman*,* 1 Cr. C. C., 47.

§ 1326. **Disorderly house.**—In a prosecution for keeping a disorderly house, the general character of the house is in issue, and may be given in evidence. *United States v. Gray*, 2 Cr. C. C., 675. See § 2659.

§ 1327. An indictment for keeping a disorderly house is sustained by proof that the house in question was kept for the meeting of men and women for illegal and obscene purposes, and for the purpose of enticing young girls there for the purpose of debauchery. *Ibid.*

§ 1328. Upon an indictment for keeping a common disorderly house, the jury were instructed that if the defendant kept an open house for selling spirituous liquors, and such liquors were sold to and drunk in the said house by other persons than boarders and lodgers, and the said house was kept open on Sundays, and such liquors were there sold and drunk by such persons on Sundays, and also at late hours of the nights both of Sundays and other days, and persons intoxicated were seen in said house and coming out of said house, at late hours of the night, drunk and disorderly, the indictment would be supported. *United States v. Columbus*,* 5 Cr. C. C., 304.

§ 1329. The selling of spirituous liquors in a public manner to negroes assembled in considerable numbers, and suffering them to drink the same in and about the house on the Sabbath, was held to constitute the offense of keeping a disorderly house at common law. *United States v. Prout*, 1 Cr. C. C., 203; *United States v. Coulter*, 1 Cr. C. C., 203; *United States v. Lindsay*, 1 Cr. C. C., 245.

§ 1330. Gaming for money is not an offense at common law. *United States v. Willis*,* 1 Cr. C. C., 511. A public gaming house is a common nuisance at common law. *United States v. Ismenard*,* 1 Cr. C. C., 150; *People v. Sponster*,* 1 Dak. T'y, 289.

§ 1331. It is indictable at common law to keep a common gaming house for lucre and gain, at which idle and dissolute persons are permitted to assemble and game for large and excessive sums of money. *United States v. Dixon*,* 4 Cr. C. C., 107.

§ 1332. Under an indictment for keeping a common gaming house, at which idle and dissolute persons assembled and gamed for large and excessive sums of money, evidence that the defendant kept a faro bank will be held to have been sufficient on motion in arrest. The jury may be presumed to know the nature of a faro table, and that large sums are usually won and lost at that game. It is not necessary to prove that the house was a common nuisance. It is sufficient to prove that it was a common gaming house, kept for lucre and gain. It is not necessary to prove more than one act of gaming. It may be proved to be kept as for a common gaming house by other evidence than that of its having been often used as such. *Ibid.*

§ 1333. An indictment, alleging that money was won at gaming, is not supported by proof that bank-notes were won. *United States v. Wells*,* 2 Cr. C. C., 43.

§ 1334. When a person is charged with keeping a house to be used or occupied for gambling, it is not necessary to show that gambling actually took place. The intention is a matter of proof, and if that can be established it is immaterial whether the prohibited establishment shall find customers or not. *Chase v. People*,* 2 Colo. T'y, 509.

§ 1335. Upon an indictment for keeping a gaming table, at a booth on a race field, contrary to a statute, the court instructed the jury that it was not necessary for the United States to prove that the traverser was the owner of the table, if he played at it as owner, and appeared to be the person who set it up. Also, that it was of no importance whether the traverser acted as principal, or as agent or as servant for the owner of the table. *United States v. Conner*, 1 Cr. C. C., 102.

§ 1336. One having been indicted under an act of Maryland for keeping a gambling device called "equality," the court held that, though the particular device was not mentioned in the statute, yet, being within its meaning, it was included in the words "or other device" used in the act. *United States v. Speeden*, 1 Cr. C. C., 535.

§ 1337. The penitentiary act for the District of Columbia, of the 2d of March, 1831, "prohibiting the keeping of a faro bank or other common gaming table," does not authorize an indictment for keeping a common gaming table called a sweat-cloth, for a single day, on the race ground, during the races. The word "keeping" implies a repetition or succession of similar acts. *United States v. Smith*,* 4 Cr. C. C., 659.

§ 1338. Upon an indictment for a nuisance in keeping a public gaming house, the court instructed the jury that dealing the cards as keeper of the faro table was *prima facie* evidence that the party was the keeper of the house and gaming table. *United States v. Miller*, 4 Cr. C. C., 104.

§ 1339. The day laid in an indictment for a nuisance in keeping a public gaming house is not material; and evidence may be given of acts done before that date, so that it is within the time of limitation and not within the time of a previous conviction or acquittal. All the acts of gambling and keeping a gaming house, previous to the indictment, constitute but one offense. *United States v. McCormick*, 4 Cr. C. C., 104.

§ 1340. Upon an information for the keeping of a house to be used or occupied for gambling, which charges the offense to have been committed on a certain day, evidence may be offered to show that gambling had been carried on in the house prior to that date, in order to explain the character of the house and the purpose for which it was kept. *Chase v. People*,* 2 Colo. T'y, 509.

§ 1341. Evidence that the defendant was the keeper of a room in which gaming was carried on does not support an indictment for keeping a common disorderly house. *United States v. Milburn*, 4 Cr. C. C., 719.

§ 1342. Under a statute which forbids the keeping of a faro table in a place occupied as a tavern, "on pain of forfeiting for every offense the sum of £50 upon conviction thereof by indictment or confession in the county court," and declaring that "one moiety of the forfeiture accruing or becoming due under this act shall be applied to the use of the county, and the other moiety to the person or persons who shall sue for the same," the court will give judgment for the penalty upon conviction. *United States v. Evans*, 4 Cr. C. C., 105.

§ 1343. The first section of the penitentiary act of the District of Columbia, declaring that every person who shall be convicted in any court of the District of Columbia of any of the offenses therein enumerated, and, among others, "of keeping a faro bank or other common gaming table," "shall be sentenced to suffer punishment by imprisonment and labor for the time and times hereinafter prescribed, in the penitentiary for the District of Columbia," and the twelfth section of the same act, providing that every person duly convicted "of keeping a faro bank or gaming table" shall be sentenced to suffer imprisonment and labor for a period not less than one year, nor more than five years, when construed together, as they ought to be, leave no doubt as to the designation of the offense, the place and tribunal in which the conviction is to be had, and the sentence passed, and the nature, extent and place of punishment. Under these two sections, so construed, the keeping of any kind of common gaming table may be punished. *United States v. Smith*,* 4 Cr. C. C., 620.

§ 1344. The power given by congress to the corporation of Washington "to prevent and remove nuisances;" "to restrain and prohibit" "all kinds of gaming;" "to cause" "all such as keep public gaming tables or gaming houses to give security for their good behavior," "and to indemnify the city against any charge of their support;" "to pass all laws which shall be deemed necessary and proper for carrying into execution the powers vested by that act, in said corporation or its officers;" and "to impose and appropriate fines, penalties and forfeitures for the breach of their laws or ordinances," does not vest the corporation with exclusive cognizance of the whole common law offense of nuisance arising from the keeping of a public gaming house, since such is not in the power of congress. If congress had such a power, the above legislation would not have that effect until the powers granted should be fully exercised by the corporation. Conviction and punishment under a by-law of the corporation punishing only the setting up or keeping a faro table, etc., or permitting it to be set up, kept or played, is therefore no bar to an indictment for common law nuisance in keeping a public gaming house, although the punishment already inflicted covers the whole time covered by the indictment. *United States v. Hally*,* 3 Cr. C. C., 656.

§ 1345. Assault.—If a person comes into the house where a woman is sitting, and, without any provocation on her part, raises a club over her head in an attitude to strike her, and threatens to strike her if she opens her mouth, it is an assault, for his language shows an intent to strike her upon her violation of a condition which he had no right to impose. *United States v. Richardson*,* 5 Cr. C. C., 348. See §§ 503, 1731, 2557.

§ 1346. To double the fist and run at another, saying, "If you say so again I will knock you down," is an assault. *United States v. Myers*, 1 Cr. C. C., 310.

§ 1347. Where a party enters a building which is under process of construction, the carpenter in charge may remove him, not using unnecessary force, if he refuses to depart on request; it is not material that he was not interrupting the business. *United States v. Bartle*,* 1 Cr. C. C., 236.

§ 1348. The laying of a hand upon another, or seizing his clothing, if done in friendship, or for a benevolent purpose, is not an assault; but if the act is done in anger, or in a rude or insolent manner, or with a view to hostility, it amounts not only to an assault, but to a battery. Even striking at a person, though no blow be inflicted, or raising the arm to strike, or holding up one's fist at him, if done in anger or in a menacing manner, are considered by law as assaults. *United States v. Ortega*,* 4 Wash., 531.

§ 1349. Upon the trial of an indictment for assault by cocking a gun and threatening to shoot a certain person, the court held that if, under all the circumstances, the act indicated an intention to shoot or injure the person, it was an assault, although the attempt was not actually made. *United States v. Kierman*,* 3 Cr. C. C., 435.

§ 1350. To constitute an assault it is essential that an intent to do some injury should be coupled with the act; and that the intent should be to do a *corporal* hurt to another. Where

one shoots at a picture in the window of another with intent to destroy the picture, because he is offended by it, but without intent to do a personal injury to any one, it is not an assault upon the owner of the house. *United States v. Hand*,* 2 Wash., 435.

§ 1351. The legal signification of the word "assault" includes the idea of malice or criminal intent, and an indictment averring an assault must be considered as alleging a criminal intent. The government must prove the intent. *United States v. McClare*,*17 Law Rep., 439.

§ 1352. In an indictment against one of several who made a joint assault, the conduct of every person joining in the assault is admissible in evidence. *United States v. Johnston*, 1 Cr. C. C., 237.

§ 1353. Upon an indictment against B. for assault and battery upon H., who entered B.'s house with an officer, who had an execution against the goods of B., at the suit of a third person, it was held that H., acting as agent for the plaintiff, had a right to enter the house with the officer to show the property. *United States v. Baker*, 1 Cr. C. C., 268.

§ 1354. — *with a dangerous weapon.*—In case of an indictment for an assault with a dangerous weapon, if it is possible for the court to declare whether, under the particular circumstances, the instrument used was a dangerous weapon as a matter of law, it is the duty of the court to do so. But where the weapon is dangerous to life or not, according to the manner in which it is used, or according to the part of the body attempted to be struck, the question whether the assault was with a dangerous weapon must be left to the jury under general instruction. If the blow as struck, or as intended to be struck, could put the life of the person assailed in danger, it was an assault with a dangerous weapon. The danger in question is danger to life. *United States v. Small*,* 2 Curt., 241. See §§ 148, 714, 1241.

§ 1355. — *with intent to kill.*—To sustain an indictment under the act of March 3, 1825, for assault with intent to kill, it must be proved that the assault was made with the intention to take the life of the person assaulted; an intent to torture merely, or to give pain, is not enough. *United States v. Riddle*,* 4 Wash., 644.

§ 1356. Upon an indictment at common law for assault with intent to murder, the jury may, if justified by the evidence, find the defendant guilty of the assault only, without the intent charged. *United States v. Cropley*,* 4 Cr. C. C., 517.

§ 1357. The act of congress of March 3, 1825, entitled "An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," is held to have provided for the punishment of an assault with intent to kill, committed in the Brooklyn navy yard. *United States v. Donlan*,* 5 Blatch., 284.

§ 1358. Upon an indictment under a statute punishing assault and battery with intent to kill, it is not necessary that the offense would have been murder if the act had caused death. *United States v. Tharp*, 5 Cr. C. C., 390.

§ 1359. *Riot.*—All concerned in a riotous assembly are equally guilty of the subsequent acts done by any of them in furtherance of the common objects of the assembly; and all who join them after the original meeting, and are present at any subsequent act, and either active in doing, countenancing or supporting, or ready to support the unlawful act, thereby become parties to the riot, and are equally guilty of all subsequent acts. *United States v. Fenwick*,* 4 Cr. C. C., 675. See §§ 2653, 3082.

§ 1360. Persons who assemble to the number of three or more, with intent forcibly and violently to disturb the public peace in a tumultuous manner, and with intent mutually to assist one another against any one who should oppose them in the execution of their purpose, and engage in turbulent gestures, threatening speeches and show of armor, are guilty of riot, whether they do the contemplated act of violence or not. *Ibid.*

§ 1361. The assembling of a large number of persons for the purpose of seizing a certain one, on account of insulting expressions which they had heard he had used, and the surrounding of his house for the purpose of executing such intention, and entering the house with intent to seize him, without legal authority therefor, constitute a riot. In such a case the jury may infer the intent from the acts done. *Ibid.*

§ 1362. Persons are guilty of riot if they assemble together to perpetrate one unlawful act, and do another unlawful act instead. *Ibid.*

§ 1363. The marshal has a right to call on all citizens to aid him in arresting rioters, and the citizens have a right to arm themselves. *Ibid.*

§ 1364. The excitement, whatever the cause of it, is no justification of the intended force and violence used by rioters. *Ibid.*

§ 1365. To constitute a riot, it is immaterial how suddenly the intent to do the unlawful acts, and to assist each other in doing the same, was formed, nor is it material that it was produced by a former quarrel. *United States v. Peaco*,* 4 Cr. C. C., 301.

§ 1366. Upon an indictment for a riot, it is not necessary to a conviction that those who were assembled with intent to commit the acts charged should have been actually engaged therein, if they were present and ready to support if necessary. *Ibid.*

§ 1367. If persons to the number of three or more assemble, and, at the time of assembling, or afterwards while assembled, form an intent, with force and violence, to do any unlawful act, and mutually to assist each other against any who shall oppose them in doing such acts, and actually do the same in a violent and turbulent manner, to the terror of the people, they are guilty of a riot. *Ibid.*

§ 1368. To constitute a riot it is not necessary that the persons engaged therein should have actually made formal promises to each other of mutual assistance, if in fact they had such a mutual intent. *Ibid.*

§ 1369. On an indictment for riot, the unlawful intent and agreement may be inferred from the act. *United States v. Stockwell*,* 4 Cr. C. C., 671.

§ 1370. It is not necessary to sustain an indictment for riot to prove that the unlawful intention existed at the time of meeting. It is sufficient, if, having met for a lawful purpose, the defendants afterwards formed the intention or agreement to commit the riotous act, and the jury may find such agreement and intention from the unlawful act itself. *United States v. McFarland*,* 1 Cr. C. C., 140.

§ 1371. Riots are punishable at common law notwithstanding a statute prescribing a mode of prosecution therefor. *United States v. McFarlane*,* 1 Cr. C. C., 163.

§ 1372. Solemnizing marriage.—On an indictment of a minister for solemnizing a marriage of a female under sixteen without the consent of her parents, it is not necessary to show that he knew the girl was under sixteen. It was his duty to know it. *United States v. McCormick*,* 1 Cr. C. C., 107.

§ 1373. Killing "horse."—Evidence of the killing of a "gelding" is sufficient to support an indictment for the killing of a "horse." *Fein v. Territory of Wyoming*,* 1 Wyom. T'y, 376.

§ 1374. Under bankrupt law.—The federal courts have no authority under the bankrupt law to punish frauds against a particular creditor, but only frauds against the creditors in general. *United States v. Clark*,* 1 Low., 402.

§ 1375. The offense of furnishing false schedules under the bankrupt law is complete when the false schedule is filed. *Ibid.*

§ 1376. Common scold.—To constitute the offense of being a common scold, the scolding need not be uttered in anger and with turbulence. Insulting and provoking language uttered in an insulting and provoking manner may be sufficient to constitute the offense. *United States v. Royall*,* 3 Cr. C. C., 620.

§ 1377. Upon the trial of an indictment of the defendant as being a common scold, particular instances of scolding may be given in evidence. *Ibid.*

§ 1378. Upon a motion in arrest of judgment, after the conviction of the defendant as a common scold, she was required to enter into a recognizance to appear in court from day to day to hear the judgment of the court, and to be of good behavior in the mean time. *Ibid.*

§ 1379. Although punishment by ducking is obsolete, yet the offense of being a common scold still remains a common nuisance, and, as such, is punishable by fine and imprisonment, like any other misdemeanor at common law. Ducking was not the only punishment that could be inflicted for this offense at common law. *Ibid.*

§ 1380. Uttering forged order.—The following order was held to be such an order for the payment of money and delivery of goods as was intended by the second section of the act of Maryland of 1799, ch. 75, for the punishment of the uttering, as true, forged orders: "Mr. E. M. Linthicum will please let the bearer, John Brown, have such articles as he may choose, on my account, to the value of \$30; also \$20 in cash, and oblige his friend, Henry Tayloe. For Col. John Tayloe, Washington City, 24th December, 1827." *United States v. Brown*,* 3 Cr. C. C., 263.

§ 1381. Presenting a forged letter to one who is supposed to be authorized to open and pay it, by one who knows the contents of the letter, is evidence of uttering it, if done with intent to obtain money thereon. *United States v. Carter*,* 2 Cr. C. C., 243.

§ 1382. And such an act is an offense at common law. *Ibid.*

§ 1383. Issuing small notes.—Section 3583, Revised Statutes, prohibits the issue of any note, check, etc., for a less sum than \$1, intended to circulate as money. Held, that it is not an offense to issue an obligation for a less sum than \$1, payable in goods. Such an obligation is not intended to circulate as money. *United States v. Van Auken*,* 6 Otto, 366.

§ 1384. An indictment charging the defendant with passing and offering to pass to a certain person "a certain note and bank-bill for the payment of \$1, being of less denomination than \$5," does not charge any offense under the act of July 7, 1838, "to restrain the circulation of small notes as currency," forbidding the issuing or passing of "any note, check, draft, bank-bill or any other paper currency of a less denomination than \$5;" and "any note, check, bank-bill or other paper medium of the denomination aforesaid, evidently intended for common circulation, as for and in lieu of small change in gold or silver, or for any other pre-

ten or whatever." The gist of the offense is the issuing of paper currency of less denomination than \$5; and the instruments named in the indictment do not import a paper currency. *Stettinius v. United States*, 5 Cr. C. C., 573 (§§ 1927-31).

§ 1385. Under this act a special verdict which finds the defendant guilty of passing notes of less denomination than \$5, but not guilty of circulating them in the District of Columbia, is not in effect a verdict of acquittal, since the offense is not made to consist in circulating paper as currency, but in passing paper currency. A denial that the defendant passed the paper as currency is not a denial that he passed paper currency. *Ibid.*

§ 1386. According to the above construction of the act, the offense is not committed unless the note alleged to have been passed was paper currency, or paper medium evidently intended for common circulation; and where this fact was not stated in the evidence and not found by the jury, it was error for the court to instruct the jury "that if they believed the evidence, as above stated in support of that indictment, to be true, the passing of the note as therein stated was a violation of the act." *Ibid.*

§ 1387. It is no defense under this act that the note was passed in payment of a *bona fide* debt. *Ibid.*

§ 1388. The passing of the note with the intent that it should be carried into the state of Maryland, and not be circulated in the District of Columbia, does not entitle the defendant to acquittal. The offense is the *passing* of paper currency of less denomination than \$5. *Ibid.*

§ 1389. It is no ground for arrest of the judgment that the defendant, in passing the notes, was acting as agent for a certain railroad company, when the jury in their special verdict have not found that the passing of the notes was the act of the company, nor that they were passed by order of the company, but have only found a fact from which it might be inferred that the notes were passed by the company. In such a case the court cannot infer the fact and make it the foundation of a judgment of acquittal. *Ibid.*

§ 1390. It is no objection to the constitutionality of the act of congress of July 7, 1838, entitled "An act to restrain the circulation of small notes as currency in the District of Columbia and for other purposes," and making it an offense to issue or pass paper currency of less denomination than \$5, within the District, that congress cannot regulate the currency except by a uniform rule operating equally throughout the states and territories. In legislating for this District, congress has the same power which a state has in legislating for the state. *Ibid.*

§ 1391. **Carrying challenge to fight a duel.**—Upon an indictment for unlawfully carrying a challenge to fight a duel, the court held that it was necessary to prove that the defendant knew that it was a challenge. *United States v. Shackelford*, 3 Cr. C. C., 178.

§ 1392. **Obstructing road.**—There can be no indictment for the obstruction of a road, laid out or reserved by the owner of a tract of land, in selling out the lots of his land, as a road for the accommodation of the lot-holders under his sales, and not as a public highway, although the public might pass over it. *United States v. Schwarz*, 4 Cr. C. C., 160.

§ 1393. **Italian children.**—In the act of June 23, 1874, providing that "whosoever shall knowingly and wilfully bring into the United States . . . any person inveigled or forcibly kidnapped in any other country, with intent to hold such person so inveigled or kidnapped in confinement, or to any involuntary service, . . . shall be deemed guilty of a felony," the word "inveigle" necessarily implies that the person is persuaded and enticed and yields assent as the result of the persuading or enticing. The person so inveigled may, within the view of the statute, be brought here by one who knows the circumstances of the case, with intent to hold such person to involuntary service, although the service be the one to which the inveigling related. *United States v. Aucarola*,* 17 Blatch., 423.

§ 1394. An arrangement made in Italy by which children were transferred to the service of the defendant, to earn money for him as street musicians in Chicago, their consent being obtained by the influence of their parents and uncles, and by statements of the defendant, is held, in view of their condition in life, and their ages and their experience, to be an inveiglement within the above statute. *Ibid.*

§ 1395. An intention on the part of the accused, in bringing such a child to this country, to employ the child as a beggar, or as a street musician, for his own profit, such intended employment being injurious to its morals, and inconsistent with its proper care and education, according to its condition, is an intention to hold the child to such involuntary service as is contemplated in the above statute, although the child consented to such employment before coming to this country, and no evidence of his subsequent dissent, while under the control of the accused, has been given. *Ibid.*

§ 1396. **Nuisance — Bar-room.**—If a person hires a bar-room and fixtures, and occupies a part of the house, and keeps the bar-room open at all days and hours and on Sundays as other days, for the sale of spirituous liquors to other persons than boarders and lodgers, and allows such liquors to be drank in the bar-room at such days and times, then such keeping

of such bar-room and house is a nuisance, and such person is subject to indictment. *United States v. Benner*, 5 Cr. C. C., 347.

§ 1397. **Offenses under census law.**—The act of March 3, 1839, made it an offense for any marshal to demand or receive from any assistant in taking the census any fee or reward for the appointment of such assistant. *Held*, that it was an offense under the act for the marshal to sell the treasury notes transmitted to him and pay his assistants in depreciated currency. *United States v. Patterson*,* 3 McL., 53.

§ 1398. **Mayhem.**—Under a statute in Virginia, which enacts that if any person "shall unlawfully cut out or disable the tongue, put out an eye, slit a nose, bite or cut off a nose or lip, or cut off or disable any limb or member of any person whatsoever, within the commonwealth, with intent in so doing to maim or disfigure, in any of the manners before mentioned, such person," he shall be declared a felon and suffer as in case of felony, biting off an ear is not a felony. *United States v. Askins*, 4 Cr. C. C., 98.

§ 1399. To constitute maiming under section 13 of the act of 1790, the means used are not material; the offense may be committed by shooting as well as by the use of a sharp instrument or edged tool. *United States v. Scroggins*,* *Hemp*, 478.

§ 1400. **Threatening letters.**—Sending anonymous and threatening letters, with a view to extort money, is indictable at common law; and a consul is not privileged from prosecution for such an offense by reason of his consular appointment. *United States v. Ravara*, 2 Dal., 297.

§ 1401. **Political assessments.**—The law of congress prohibiting the requesting or receiving of a voluntary contribution from a subordinate government official for political purposes is constitutional. It comes within the power of congress to prescribe all needful rules for the discipline of government officials. The power to prohibit acts of officers or employees which are incompatible with the proper discharge of their duties, or which impair the efficacy or tend to demoralize the public service, is essential to promote the end and object of government, and this power resides in the legislative department of the government, and it is left to congress to say what acts are pernicious. *United States v. Curtis*,* 12 Fed. R., 824; *Ex parte Curtis*, 16 Otto, 871 (CONST., § 472).

§ 1402. **Slave trade.**—Under the slave trade act of April 20, 1818, the owner of a vessel who commanded, authorized and superintended the fitting of it out for the slave trade through his agents, without his personal presence, is liable. *United States v. Gooding*, 12 Wheat., 460.

§ 1403. Under the slave trade act of April 20, 1818, preparations for a slave voyage which clearly manifest or accompany the illegal intent, even though incomplete and imperfect, and before the departure of the vessel from port, constitute a fitting out within the purview of the act. *Ibid*.

§ 1404. **Embargo laws.**—It is held that the proviso made by the act of June 28, 1809, to the act of March 1, 1809, repealing the embargo act of January 9, 1809, which proviso declares "that all penalties and forfeitures which may have been incurred or which may hereafter be incurred on account of any infraction of the act laying an embargo, etc., or of any of the acts supplementary thereto, or of the act to enforce, etc., the act laying an embargo, etc., shall, after the expiration of any of the said acts, or of any provision thereof, be recovered and distributed in like manner as if said acts and every provision thereof had continued in full force and virtue," does not save offenses which could be punished only in criminal form. *United States v. Mann*,* 1 Gall., 177.

§ 1405. **The disturbance of public worship** is an act tending to destroy public morals, and to excite a breach of the peace; it is a common injury to an indefinite number of persons, neither of whom could sue alone, unless he should have received some special and peculiar injury over and above the common injury sustained by others. It is therefore indictable at common law. *United States v. Brooks*,* 4 Cr. C. C., 427.

§ 1406. **Corrupting witnesses.**—Under the statute against influencing or corrupting witnesses (R. S. U. S., § 5399), a person cannot be said to have endeavored to corruptly influence a witness unless he knows that the person has been designated as a witness. *United States v. Bittinger*,* 15 Am. L. Reg. (N. S.), 49.

§ 1407. The designation may be by subpoena, or by the indorsement of the name of the witness on a complaint; it is not material that the subpoena has not been served. *Ibid*.

§ 1408. A case may be said to be pending in a court of the United States when a complaint is lodged with a United States commissioner charging a violation of the laws of the United States. *Ibid*.

§ 1409. **Importing women for prostitution.**—Under section 3 of the act of 1875, it is a criminal offense to import women from any country for purposes of prostitution. That section does not apply simply to importations from China, Japan and other Oriental countries. *United States v. Johnson*,* 19 Blatch., 257.

§ 1410. It is sufficient under said section to allege an importation, without setting out the act constituting the importation. *Ibid.*

§ 1411. On an indictment for importing women for purposes of prostitution, it is admissible to prove the character of a house of assignation at which the women were kept. *Ibid.*

§ 1412. **Fraudulent bond.**—It is no defense to an indictment against a person for furnishing a false and fraudulent bond that the defendant did not know that the sureties procured for him by a broker were entirely insufficient. *United States v. O'Brien*,* 7 Int. Rev. Rec., 62.

§ 1413. **The president of a manufacturing corporation**, who passes the notes of the company in the form of bank-notes, for the purpose of putting them into circulation as a current circulating medium, and not in payment for goods, materials, services, or expenses for the use of the company, in the ordinary course of their business as a manufacturing corporation, with a view to defraud or injure any person, is guilty of an indictable offense. But he is not guilty if he gave the notes in *bona fide* payment for materials or articles purchased by him as the agent and for the use of the company, or for services for the use of the company, or in payment of his expenses as agent of the company, he being the agent of the company and authorized by vote of the directors to use the notes in this manner, and the notes being the notes of the company. *United States v. Ray*,* 2 Cr. C. C., 141.

§ 1414. **False pretenses.**—An indictment for obtaining goods by false pretenses, charging that the defendant falsely pretended that he was master of a vessel and a man of property and substance, and in order to gain credit with the owner of the goods, and induce him to sell them to him, exhibited two letters written to himself by strangers, in which he was addressed as Captain Edward Hale, and from which it might be inferred that he was master of, and interested in, some vessel, whereby the complainant was induced to sell him the goods upon the defendant's giving a note for the purchase money, was held not to set forth an indictable offense at common law, for want of such false tokens as the common law recognizes. *United States v. Hale*,* 4 Cr. C. C., 88. See § 2655.

§ 1415. Obtaining and taking the account books of a merchant from his counting house, by means of false and fraudulent pretenses, is not indictable at common law. *United States v. Carico*,* 2 Cr. C. C., 446.

§ 1416. No person is guilty under the penitentiary act for the District of Columbia for obtaining money under false pretenses, unless he has "obtained" something by his false pretense. *Jones v. United States*,* 5 Cr. C. C., 647.

§ 1417. Under the penitentiary act for the District of Columbia, punishing the obtaining of money under false pretenses, a person who participates in the fraud, and who obtains the benefit of the money, may be said to obtain the money within the mischief of the act. It is not error, therefore, upon an indictment against three for this offense, to refuse to instruct the jury that the two defendants (the other not having been taken) must have received the money and check charged to have been obtained by false pretense, and that in order to receive the same they must have been present when it was given. *Ibid.*

§ 1418. At common law the obtaining of money by a mere lie, which common prudence could guard against, is not an indictable offense. But under the penitentiary act for the District of Columbia, declaring "that every person duly convicted of obtaining, by false pretenses, any goods or chattels, money, bank-note," etc., shall be sentenced, etc., it is an offense to obtain money by a mere false assertion. *Ibid.*

§ 1419. **Frands** not of a public nature, and not perpetrated by means of false tokens or pretenses, are not indictable. *United States v. Porter*,* 2 Cr. C. C., 64.

§ 1420. **False entries in books of bank.**—On a charge against the president of a bank of making false entries in the books of the bank, it is sufficient to show that the entries were made by a clerk under his directions, to hold him as principal. *In re Van Campen*,* 2 Ben., 419.

§ 1421. An intent to defraud a bank and deceive its officers will be inferred from embezzlement of its funds and false entries in its books. *Ibid.*

§ 1422. **Burglary.**—Upon an indictment for breaking into a storehouse and taking therefrom goods of certain value, contrary to a statute, the jury may find the defendant guilty of simple larceny. *United States v. Read*, 2 Cr. C. C., 198.

§ 1423. Where one was indicted for burglary, the court instructed the jury that if they were not satisfied as to the breaking and entering they might find him guilty of larceny only. *United States v. Dixon*,* 1 Cr. C. C., 414.

§ 1424. Upon an indictment at common law for burglary, if the jury find the prisoner guilty of larceny, the court may render judgment according to the statute. *Ibid.*

§ 1425. The unlatching of a person's door in the night-time, and with an axe entering the room with intent to murder him, is burglary. *United States v. Bowen*, 4 Cr. C. C., 604.

§ 1426. An indictment for burglary by breaking and entering the dwelling-house of A. is held to be supported by evidence that the house which the prisoner entered was a storehouse

of A., in which his storekeeper slept, and on a lot contiguous to the house in which A. lived, but not in the curtilage. The sleeping in the house fixes its character, whether a dwelling or not. *United States v. Johnson*,* 2 Cr. C. C., 21.

§ 1427. Extortion is the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due him, or in excess of what is due him, or before it is due him. *United States v. Waitz*,* 3 Saw., 473.

§ 1428. It is said to be extortion at common law to demand and receive illegal fees as an officer, or under color of office. *Ming v. Truett*,* 1 Mont. T'y, 322.

§ 1429. Laboring to exact fees from one party to a suit, after receiving them from the other party, is not extortion. The court refused to instruct the jury that the offense was not indictable. *United States v. Chenault*, 2 Cr. C. C., 70.

§ 1430. The register of a land office cannot lawfully act as attorney for any applicant for a patent for mineral lands, whose application was filed, and the proceedings on which were to be conducted, before him and in his office. He cannot lawfully engage himself to an applicant to do all that may be necessary to get a patent, and charge a gross sum for his services, covering his legal fees and those he is not entitled to as register. If the sum taken in such a transaction is in excess of his legal fees, then the taking of the excess is extortion. *United States v. Waitz*,* 3 Saw., 473.

§ 1431. Section 12 of the act of March 3, 1825, defining extortion, having been re-enacted on June 22, 1874, as section 5481 of the Revised Statutes, after the cession of Alaska to the United States, is in force in that country *proprio vigore*. *United States v. Carr*,* 3 Saw., 302.

§ 1432. Section 12 of the act of March 3, 1825, defining the crime of extortion under color of office, so far as a deputy collector of customs is concerned, is a law relating to customs, and therefore extended over Alaska by section 1 of the act of July 27, 1838, which extended over this territory the laws of the United States relating to customs, commerce and navigation. *Ibid*.

§ 1433. Embezzlement.—Under the sixteenth section of the act of March 3, 1825, declaring it to be a felony “if any person who shall be employed as president, cashier, clerk or servant in the Bank of the United States, . . . or in any office of discount or deposit, shall feloniously steal, take and carry away any money, goods, bond, bill, bank-note, or other note, check, draft, treasury note or other valuable security or effects belonging to the said bank, or deposited in said bank; or if any person so employed as president, cashier, clerk or servant shall fraudulently embezzle, secrete or make way with any money, goods, bond, bill, bank-note, or other note, draft, treasury note or other valuable security or effects, which he shall have received, or which shall come into his possession or custody by virtue of such employment,” an indictment which does not allege the defendant to have been employed as president, cashier, clerk or servant in the Bank of the United States, or in any of its offices of discount and deposit, except by alluding to the defendant as “being then a book-keeper in the said office of discount and deposit,” is not sufficient. The indictment must also allege that the things secreted or embezzled came into the hands or possession of the defendant by virtue of his employment. The things must have come into his possession by virtue of his authority from the bank. To say that they came into his hands while he acted as book-keeper, or in virtue of his office as book-keeper, or as book-keeper, without showing that he was authorized by the bank to act as book-keeper, is not a sufficient averment; it is not a sufficient allegation that they came “into his possession or custody by virtue of his employment.” Under the second branch of this section, it need not be alleged that the things embezzled were the property of the Bank of the United States, nor need it be alleged that they were the property of any person. The crime of embezzlement under this section must be alleged to have been done fraudulently. Where the act charged is the embezzlement of a check, it must be alleged that the check was a valuable security or a draft. *United States v. Forrest*,* 3 Cr. C. C., 56.

§ 1434. The crime of embezzlement is a species of larceny, and is applicable to the stealing of property by agents, clerks, servants, and, in general, by a person acting in a fiduciary capacity. In order to constitute this crime, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes. In this respect it differs from the crime of larceny, in which the property is unlawfully taken and retained. *United States v. Lee*,* 12 Fed. R., 816.

§ 1435. On an indictment for embezzlement of public funds by a collector of the customs, items in a treasury transcript, which are not established by the ordinary official action of the department, but are made up from estimates and hearsay, are not evidence. *United States v. Forsythe*,* 6 McL., 584.

§ 1436. The provision respecting embezzlement in the act of congress of August 13, 1841,

includes, among those subject to its penalties, only "officers charged with the safe-keeping, transfer or disbursement of the public moneys, or connected with the postoffice department." The act of 1846 includes "all officers and other persons charged by this act or any other act with the safe-keeping, transfer and disbursement of the public moneys." The latter act also punishes any officer who transmits to the treasury a false voucher, or a voucher which does not truly represent a payment actually made. But the provisions of this act all have reference to officers intrusted with the legal possession of public moneys, and not to subordinates. Under these acts, therefore, a clerk of the treasurer of the mint, appointed by the director, and who is not included among the officers of the mint as enumerated in the act under which he is appointed, is not liable for the embezzlement of the public moneys in the custody of the treasurer. *United States v. Hutchison*,* 4 Penn. L. J. Rep., 211.

§ 1437. Under section 5504 of the Revised Statutes, declaring guilty of embezzlement every officer of a court who fails forthwith to deposit such moneys as are required to be deposited "with the treasurer, assistant treasurer or a designated depository of the United States," an assignee in bankruptcy is not included. He is an officer of the court, but the moneys he receives as assignee are not to be deposited in the places designated in this section, and are required by another section to be deposited in some bank to his credit. There seems to be no statute covering the offense by an assignee in bankruptcy. *United States v. Bixby*,* 6 Fed. R., 375.

§ 1438. A justice of the peace cannot discharge a prisoner committed for trial for felony, nor can he take money in lieu of bail. If such acts are done contemptuously, wilfully, and with evil intent, the justice is liable for misdemeanor in office. But if he acted through ignorance or mistake of law, and without any sinister or corrupt motive, he is not punishable. *United States v. Faw*, 1 Cr. C. C., 487.

§ 1439. Acting in office without giving bond.—It is held that an indictment lies for acting as constable without giving bond agreeably to the act of May 3, 1804. *United States v. Evans*, 1 Cr. C. C., 149.

§ 1440. Persons confederating with a public officer and procuring of him loans of public money intrusted to him for safe-keeping are guilty of a felony. *United States v. Hartwell*, 3 Cliff., 227.

§ 1441. Bribery.—In the sixty-second section of the internal revenue act of July 16, 1866, enacting "that if any person or persons shall, directly or indirectly, promise, offer to give, or cause or procure to be promised, offered or given, any money, goods, right in action, bribe, present or reward, . . . to any officer of the United States, . . . with intent to influence any such officer or person to commit, or aid and abet in committing, any fraud on the revenue of the United States, or to connive at, or collude in, or to allow or permit, or make opportunity for the commission of any such fraud, and shall be thereof convicted, such person or persons so offering . . . shall be liable to indictment in any court of the United States having jurisdiction, and shall upon conviction thereof be fined," etc., the words "and shall be thereof convicted" are to be treated as surplusage. The act is complete without them; and if any meaning at all is given to them, they render the act nugatory by making a previous conviction necessary to an indictment. *United States v. Stern*,* 5 Blatch., 512.

§ 1442. Where one was indicted for attempting to bribe a commissioner of the internal revenue, who was invested with authority to receive proposals for the building of a light-house, and there was no statute of congress punishing the offense, the court were divided in opinion whether the indictment could be supported at common law, and without such an act. *United States v. Worrall*, 2 Dal., 384.

§ 1443. Civil rights.—The right to be secure in one's house is not a right derived from the constitution, and cannot be said to come within the meaning of the act of May 31, 1870, punishing a conspiracy to injure and oppress a citizen in the exercise of "any right, privilege or immunity granted or secured by the constitution of the United States." *United States v. Crosby*, 1 Hughes, 448 (§§ 2235-89). See §§ 235, 1750, 2567.

§ 1444. An ordinary offense against a colored person is not punishable by the laws of the United States unless committed because of his race, color or previous condition of servitude. *United States v. Cruikshank*, 1 Woods, 319.

§ 1445. A person indicted for excluding from the public school taught by him a boy, on account of his race and color, is not excused by the fact that he was advised by counsel that he had a right to exclude the child. *United States v. Buntin*,* 10 Fed. R., 730.

§ 1446. The recovery of damages for the deprivation of rights secured by the constitution and laws of the United States, in excluding a child from a public school on account of race or color, is no bar to an indictment for the same act, under section 5510 of the Revised Statutes, punishing any one who, by virtue of any law, ordinance, etc., deprives any inhabitant of any privileges, immunities, etc., secured or protected by the constitution and laws of the United States. *Ibid.*

§ 1447. Under section 5510, Revised Statutes, declaring that "every one who, under color of any law, statute, ordinance, regulation or custom, subjects, or causes to be subjected, any inhabitant of any state or territory to the deprivation of any rights, privileges or immunities secured or protected by the constitution and laws of the United States, . . . on account of such inhabitant being an alien, or by reason of his color or race, . . . shall be punished," etc., a school teacher who excludes a colored boy from the public school taught by him, after being requested by the board of trustees to permit him to enter, claiming a right to do so under authority of a statute providing for the separate education of colored children, is liable, if he does so on account of the color of the boy. But if another school of equal merit has been provided by law for colored children, and reasonably accessible to the boy excluded, offering the same educational facilities and advantage, he is not liable. He is liable if the school for colored children was not reasonably accessible to the boy excluded. *Ibid.*

§ 1448. While a colored defendant, in a trial involving his life, liberty or property, cannot claim, as a matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not, within the meaning of the constitution, always or absolutely necessary to the equal protection of the laws, yet it is a right to which he is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them because of color. So where it appears that colored persons are excluded from juries because of their color, a colored defendant has a right to have an indictment found by such a grand jury, and the panel of such a petit jury, quashed. *Virginia v. Rives*, 10 Otto, 323 (CONST., §§ 929-910); *Neal v. Delaware*, 13 Otto, 394.

§ 1449. It seems that a colored defendant in Delaware is entitled to show, on a motion to quash an indictment and panel of jurors for that reason, that the officers in selecting the grand and petit jurors purposely excluded colored persons therefrom on account of their race and color. *Neal v. Delaware*, 13 Otto, 394.

§ 1450. An affidavit of a colored defendant, that the officers charged with selecting the grand and petit juries had purposely excluded colored persons therefrom on account of race and color, which is uncontradicted and undenied, is sufficient to sustain a motion to quash the indictment and the panel. *Ibid.*

§ 1451. Cutting timber — "Timber" defined.— The word "timber," in the act of March 2, 1831, prohibiting the being "employed in removing any live-oak or red cedar trees, or other timber from the lands of the United States," is employed to signify the felled trees, prepared for use and transportation, and embraces the various uses to which timber can be appropriated, either in ship or house building. The act does not punish the removal of any articles manufactured from such timber. *United States v. Schuler*, * 6 McL., 28.

§ 1452. By the act of March 2, 1831, the cutting and using, for any other than naval purposes, of white-oak and hickory, or timber trees of any other description, from the lands belonging to the United States, is an indictable offense, and punishable by fine and imprisonment. This mode of protection is not limited to live-oak or red cedar, nor to timber specially reserved for naval purposes. *United States v. Briggs*, * 9 How., 351.

§ 1453. — lands not reserved for use of navy.— An indictment will lie, under the act of congress, for cutting timber on public lands, whether such lands have been reserved for naval purposes or not. *United States v. Redy*, * 5 McL., 353.

§ 1454. — one who employs another to cut timber on public lands is answerable under the act of congress. *Ibid.*

§ 1455. — making compensation.— Where one convicted of cutting trees on the public lands, contrary to the act of congress, had made full reparation for the trespass by entering a part of the land on which the trees were cut, and compensating the person who entered the other part for the trees cut on that part, and the land was sold at the price fixed by law, and there seemed to be no intention on the part of the trespasser to defraud the public, a nominal fine was imposed by the court. *United States v. Murray*, * 5 McL., 207.

§ 1456. — civil and criminal proceedings.— Section 2161 of the Revised Statutes having made the cutting of timber on the public lands a crime which may be proceeded against by indictment, the government may proceed against trespassers upon its land civilly or criminally, or both; and a judgment in one form of remedy is no bar to the prosecution of the other remedy. *Bly v. United States*, 4 Dill., 464.

§ 1457. — intent.— Under the act of March 2, 1831, punishing the offense of cutting or removing, etc., other timber than naval timber on other lands than naval lands, with intent to export, dispose of, use or employ the same in any manner whatever, other than for the use of the navy of the United States, if the specific act of cutting or removing be proved, the guilty intent will be presumed. But such inference of guilty intention may be removed by the defendant by proving that he was the agent of the owner of lands in the vicinage of those described in the indictment, and cut the timber described, by mistake, supposing it to belong

to his principal, the monuments of the public survey being such that the mistake might be committed. *United States v. Darton*,* 6 McL., 46.

§ 1458. **Robbery.**—The felonious taking of goods from the person of another, or in his presence, by violence or by putting him in fear, and against his will, is robbery. *United States v. Jones*,* 3 Wash., 200. See §§ 513, 529, 531, 577, 1739, 2343.

§ 1459. The word "rob," used in a statute, means stealing or taking from the person of another, or in the presence of another, property of any amount, with such a degree of force or terror as to induce the party to part with his property unwillingly. It is the felonious taking from the person of another money or goods of any value by putting him in fear. *United States v. Wilson*,* Bald., 78.

§ 1460. The snatching of a watch from the pocket of another, it being fastened to his neck by a ribbon, which was broken by the first snatch, the owner not having been put in fear, is not robbery, but larceny. *United States v. Simms*, 4 Cr. C. C., 618.

§ 1461. — **dangerous weapon.**—A sword or a dirk or a pistol in the hands of a robber, by means and under terror of which a person is robbed, is a dangerous weapon, although not drawn or pointed against the person robbed at the time. It is presumed that a pistol was loaded, and conclusively so presumed when the robbers threaten to use it in a manner impossible if it was not loaded. *United States v. Wood*,* 3 Wash., 440. See §§ 148, 714, 1241, 1354.

§ 1462. **Under revenue laws—Payment of money into treasury.**—The act of June 30, 1849, requiring collectors of the customs to pay into the treasury certain moneys without any abatement for fees, salary, etc., does not, it seems, apply to a criminal prosecution where the law did not take effect until after the default for which the officer is prosecuted. *United States v. Forsythe*,* 6 McL., 584.

§ 1463. — **fraudulent entry.**—A fraudulent entry of goods at a custom-house by means of a false invoice and a false classification is an offense against the revenue laws and is not barred in less than five years. *United States v. Hirsch*, 10 Otto, 34.

§ 1464. — **forgery of oath.**—On an indictment for a forgery of an owner's oath with intent to defraud the United States, it is not necessary that an entry of the goods be actually made or any act done towards the completion of the fraud. *United States v. Lawrence*,* 13 Blatch., 211.

§ 1465. — **unlading without a permit.**—The act of March 2, 1799, punishes with a penalty of \$400, and disability for seven years to hold any office of trust or profit under the United States, the unlading or delivery of any goods from any foreign port, "at any time, without a permit from the collector or naval officer, if any, for such unlading or delivery." It punishes in like manner, "if any goods, etc., shall be unladed or delivered from any such ship or vessel, contrary to the direction aforesaid," "any person who shall knowingly be concerned or aiding therein, or in removing, storing, or otherwise securing the said goods." It is held that upon an information for aiding "in removing, storing, or otherwise securing" such goods with knowledge that they had been landed without license, it is not necessary to show that the defendant aided or did anything in connection with the landing of the goods. An information will lie for the penalty of this act, although the act itself provides that the penalty shall be "sued for" in the name of the United States. *Walsh v. United States*, 3 Woodb. & M., 341.

§ 1466. — **smuggling.**—As a general rule, unless there is some law forbidding it, it is not a crime to import goods into the United States without payment of duty. The crime of smuggling is not complete until the goods are not only brought into the country, but fraud or concealment has been practiced with intent to defraud the revenue. *United States v. Thomas*,* 2 Abb., 116.

§ 1467. The nineteenth section of the act of August 30, 1842, does not apply to the case of goods imported from any adjacent foreign territory. An indictment charging the defendant with smuggling goods from Canada into this country, without an invoice or the payment of duties, cannot be supported by that section. *United States v. Nolton*,* 5 Blatch., 427.

§ 1468. — **resisting officers.**—Where rags in the bale were picked up on the shore, to which they had floated from a wrecked vessel, and those gathering them were indicted under the act of March 2, 1799, for "forcibly resisting, preventing and impeding" the custom-house officers in seizing the rags for non-payment of duties, the jury were instructed that there must have existed a probable ground of seizure; that if the rags were worthless on the beach, and the custom-house officer knew it, there was no ground for seizure; that the government must show an actual seizure, and that the defendants knew of it; that they must also prove that the actual possession of the rags by the officer was forcibly ousted by the defendants; that, if the seizure was abandoned by the officer, the defendants had a right to take the rags; and that if the defendants did believe that no seizure had been made, and acted in good faith in removing the goods, they were not guilty; but if the goods had been rightfully seized, and

the defendants, knowing the facts, forcibly and wilfully deprived the officers of the possession of the goods, they were guilty. *United States v. Cook*,* 1 Spr., 213.

§ 1469. In District of Columbia.—The act of congress of February 16, 1819, entitled "An act to incorporate the Medical Society of the District of Columbia," providing for the appointment of a medical board of examiners, and declaring "that, after the appointment of the aforesaid medical board, no person, not heretofore a practitioner of medicine or surgery within the District of Columbia, shall be allowed to practice within said District in either of the said branches, and receive payment for his services, without having first obtained a license, testified as by this law directed, or without the production of a diploma as aforesaid, under the penalty of \$50 for each offense," etc., is applicable to every branch of medicine and surgery, and includes one practicing a specialty, such as an oculist. *United States v. Williams*,* 5 Cr. C. C., 62.

§ 1470. A physician cannot be held liable unless there was a board of examiners *de jure* at the time of the violation of the statute charged. It is therefore incumbent on the United States to allege and prove the existence of such a board at the time of the alleged violation of the statute. *Ibid*.

§ 1471. Under the charters and by-laws of the corporation of Washington, authorizing justices of the peace to require of disorderly persons security for their good behavior, and on failure to give security to commit them to labor until such security shall be given, not exceeding one year at a time, a warrant of commitment which states that the accused had failed to give security for her good behavior, but does not state that such security was required of her, nor in what sum, nor for what time, and which requires her to be kept at *hard* labor, instead of labor, as required by the by-law and charter, is defective, and is not sufficient to detain the accused. *Ex parte Reed*,* 4 Cr. C. C., 582.

§ 1472. The charter of 1820, of the city of Washington, gives that corporation power and authority to cause "vagrants, idle or disorderly persons," and all "who shall be guilty of open profanity, or grossly indecent language or behavior publicly in the streets," to give security for their good behavior, for a reasonable time, and to indemnify the city against any charge for their support; and in case of their refusal or inability to give such security, to cause them to be confined to labor until such security shall be given. The corporation has exercised this authority by enacting by-laws and ordinances. The English statute of 34 Ed. 3, authorizing justices of the peace "to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behavior," was in force in Maryland on the 27th of February, 1801, and constitutes a part of the authority and jurisdiction of the justices of the peace of Washington county who have been appointed under the act of congress of that date. Justices of the peace have authority to require of disorderly persons security for good behavior, and to commit for failure to give security, under the by-laws passed under the authority of the charter of 1820. *Ibid*.

§ 1473. The act of congress creating the police court of the District of Columbia, and vesting it with "original and exclusive jurisdiction of all offenses against the United States committed in the District of Columbia, not deemed capital or otherwise infamous crimes; that is to say, of all simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary," vests exclusively in the police court jurisdiction of the offense of stealing any money or other goods and chattels of any kind whatever, or any bank-bill or promissory note of less value than \$35, punished by the act of congress of February 22, 1867, by fine not exceeding a certain sum, and imprisonment in the jail of the District. *United States v. Cross*,* 1 MacArth., 149.

§ 1474. The penitentiary act for the District of Columbia, of March 2, 1831, enacting "that if any free person shall, in said District, unlawfully, by force and violence, take and carry away, or cause to be carried away; or shall, by fraud, unlawfully seduce, or cause to be seduced, any free negro or mulatto from any part of said District, to any other part of said District, with design or intention to sell or dispose of such free negro or mulatto," etc., such person shall be punished by fine, does not apply to such negroes kidnapped out of the District and brought within it. *United States v. Henning*, 4 Cr. C. C., 645.

XIX. ARREST.

§ 1475. Affidavit — Probable cause.— Under the fourth amendment to the constitution of the United States an affidavit to justify the issuing of a criminal warrant must show probable cause. So an affidavit for the arrest of a person under section 5423, Revised Statutes, for using a fraudulent certificate of citizenship for the purpose of obtaining registration as a voter, which alleged that a person did, for the purpose of procuring himself to be unlawfully registered as a voter, make use of a certain unlawful certificate, knowing that such certi-

cate was unlawfully made and issued, but which did not state how such use was unlawful, or how the certificate was fraudulently issued and made, does not show probable cause, and is therefore insufficient to sustain a warrant. Characterizing the use as unlawful does not give any information as to the nature of the offense, and states a conclusion of law instead of fact. *In re Coleman*, 15 Blatch., 415.

§ 1476. When the military authority of the United States, under authority of section 23 of the intercourse act, makes an arrest in the "Indian country," for a violation of sections 20 and 21 of the said act, the military officer acts merely as a police officer, and it must appear upon oath or affirmation that there is probable cause as provided in the constitution of the United States. *In re Carr*,* 3 Saw., 316.

§ 1477. In order that there shall be probable cause to arrest an offender the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts upon which the charge is based and on which the belief or suspicion of guilt is founded. In the Matter of a Rule of Court,* 3 Woods, 503.

§ 1478. A circuit court of the United States will not, on motion, award process to arrest the offender in the first instance, there being no precedent establishing such a practice. *United States v. Burr*,* 2 Wheeler, 573.

§ 1479. Evidence which consists in the oath of a person that he has been informed by one not upon oath, and that the deponent believes the fact to be true, is not legal evidence to support a warrant of arrest. *Ibid*.

§ 1480. Under the constitution of the United States no warrant can issue except on probable cause supported by oath or affirmation. So, an order of arrest made in another district upon information filed, without any evidence by way of affidavit to support it, is void, and all proceedings under it must fail. *United States v. Shepard*, 1 Abb., 433 (§§ 3195-99).

§ 1481. The cause of issuing a warrant of arrest is a crime committed by the person charged. The probable cause required by the constitution is a probability that the crime has been committed by that person. Of this probability the court or magistrate issuing the warrant must be satisfied by facts supported by oath or affirmation. The facts, therefore, which are stated upon oath must induce a reasonable probability that all the acts have been done which constitute the offense charged. The question whether a crime has been committed is a question partly of law and partly of fact. What acts constitute the crime is a question of law. Whether those acts have been done is a question of fact. (Per CRANCH, C. J., dissenting.) *United States v. Bollman*,* 1 Cr. C. C., 373.

§ 1482. **Breaking doors.**—A constable or a magistrate, having a warrant to arrest a man for assault and battery, has a right to break open the door of the house inhabited by the offender, in order to arrest him. *United States v. Faw*, 1 Cr. C. C., 487.

§ 1483. **Who may make complaint.**—Any individual may complain of the infraction of a law of the United States, and on such complaint, under oath, the circuit court may award a warrant, whether such a warrant is applied for by the district attorney or not. *United States v. Skinner*,* 2 Wheeler, 232.

§ 1484. **Duty of officer.**—An officer who makes the arrest of a prisoner is not bound to disclose the name of the person from whom he received the information which led to the detection and apprehension of the prisoner. *United States v. Moses*,* 4 Wash., 726.

§ 1485. Where an officer has a party in custody, and also has a warrant for his arrest, he may hold him under such warrant without informing him that he arrests him upon it. *United States v. Omeara*,* 1 Cr. C. C., 165.

§ 1486. It is the duty of a person seeking to arrest another to make his purpose known, unless circumstances render his purpose obvious. If the officer is not known to be such he should produce his authority; but this is not necessary when the party knows, or has good reason to know, the authority of the officer. If the party is not in the actual physical presence of the officer, the latter should proceed with secrecy and actually make the arrest. If the party to be arrested does not recognize the party arresting him to be an officer, he has a right to demand the warrant. The party to be arrested has no right to assault the officer without demanding the warrant or asking explanations. *United States v. Jailer of Fayette County*, 2 Abb., 273.

§ 1487. **Discharge and subsequent arrest.**—A discharge of a person, under a writ of *habeas corpus*, from the process under which he is imprisoned, discharges him from any further confinement under the process; but it is no bar to subsequent arrest under any other process which may be issued against him under the same indictment. *Ex parte Milburn*,* 9 Pet., 704.

§ 1488. **Warrant signed with a pencil.**—A warrant signed by a justice of the peace with a black lead pencil is void, because so easily obliterated. *United States v. Thompson*, 2 Cr. C. C., 409.

§ 1489. **Jurisdiction — Resistance.**— If a warrant contains on its face a cause of arrest within the jurisdiction of the magistrate, and purports to have been issued within his local jurisdiction, and is in other respects formal, the officer is bound to execute it, and resistance is unlawful, although in fact the offense was not committed within the local jurisdiction of the magistrate. *Ibid.*

§ 1490. **Arrest on a warrant issued in another district.**— An arrest by a marshal in a district other than that in which the warrant was issued is invalid and does not justify an imprisonment within the proper district. When the original arrest is unlawful, the detention is improper, although the warrant upon which it was made is lawful. *In re Allen*, 13 Blatch., 275.

§ 1491. **Either judge of a federal circuit court has authority to issue a warrant for the arrest of a criminal, and under such a warrant he may be arrested in any part of the United States.** *In re Oaksmith*,* 11 Op. Att'y Gen'l, 127.

§ 1492. **Arrest without a warrant.**— A peace officer may take a man in an affray without a warrant. *United States v. Pignel*, 1 Cr. C. C., 310.

§ 1493. **Military custody.**— A bench warrant may issue for the arrest of persons confined by military authorities on a charge of treason on *ex parte* affidavits read in court. *United States v. Bollman*,* 1 Cr. C. C., 373.

§ 1494. **If a treaty provides for the arrest and commitment of persons charged with crime, it thereby confers jurisdiction upon the courts of the land to arrest and commit such persons, according to the law of the land.** *In re Metzger*,* 5 N. Y. Leg. Obs., 84.

§ 1495. **Quære:** Whether, when an indictment has been found in one judicial district against a defendant not then within the jurisdiction, the court in that district can issue its warrant to arrest the defendant wherever he may be found within the United States? *In re Alexander*, 1 Low., 530 (§ 3194).

XX. PRELIMINARY EXAMINATION.

§ 1496. **Evidence — Probable cause.**— On a preliminary examination preceding a prosecution, evidence of probable cause to believe the accused guilty is sufficient to justify his being held for trial, unless such probable cause is done away with by showing that no such crime has been committed, or that the suspicions entertained of the prisoner were wholly groundless. *In re Van Campen*,* 2 Ben., 419; 1 Burr's Trial, 11.

§ 1497. **On a preliminary examination on a charge of embezzlement against the president of a bank, it is sufficient to prove that the bank was actually in existence and that the accused was acting as its president.** *Ibid.*

§ 1498. **A confession of embezzlement, written and signed by the clerk himself, is sufficient evidence of the crime to warrant a commissioner to hold the clerk to trial, although proof of the *corpus delicti* has not been proved.** *United States v. Bloomgart*,* 2 Ben., 353.

§ 1499. **An examining court or judge will not require clear and indubitable proof of the guilt of the accused to justify an order that he shall answer further to the charge made against him. Whether the accused is held or discharged, the order is not conclusive.** *United States v. Lumsden*,* 1 Bond, 5.

§ 1500. **The powers of a commissioner of a federal circuit court as to the examination of offenders and the taking of bail are the same as those of justices of the peace in the respective states; and where a state law provides that justices shall not adjourn examinations before them for longer than ten days at any one time, an adjournment by a United States court commissioner for a longer time than ten days is improper, and a recognizance for the appearance of the defendant at such adjourned day is invalid.** *United States v. Horton*,* 1 Dill., 94.

§ 1501. **United States commissioners act ministerially and not judicially in the examination of offenders before trial.** *United States v. Berry*,* 2 McC., 58.

§ 1502. **A court has the authority to assume control of proceedings before a commissioner in a criminal case, and proceed therein.** *Ibid.*

§ 1503. **In preliminary examinations for offenses against the laws of the United States, a commissioner has only the power and authority of a committing magistrate, and he must proceed agreeably to the usual mode of process against offenders in the state in which he acts.** *United States v. Walker*,* 1 Pittsb. R., 437.

§ 1504. **Defendant's witnesses.**— Upon an application to bind a person over to answer upon a criminal charge, the defendant's witnesses are not generally examined. Nor are his witnesses ever sent to the grand jury, except where the attorney for the prosecution consents. But on the application to bind over, the judge may examine witnesses who were present at the time when the offense is said to have been committed, to explain what is said by the wit-

nesses for the prosecution. But the cross-examination of the witnesses for the prosecution is improper. *United States v. White*,* 2 Wash., 29.

§ 1505. The commitment of a prisoner for preliminary examination should be for a short definite period of time. It should not, except for special cause, exceed twenty-four hours, and where cause is shown for delay, great diligence should be required of the government in the procurement of testimony. *United States v. Worma*,* 4 Blatch., 332.

§ 1506. Persons accused of treason have a right to be heard by counsel on preliminary examination before the court. *United States v. Bollman*,* 1 Cr. C. C., 373.

§ 1507. The magistrate.—Under the twenty-third section of the twentieth chapter of the act of congress of 1789, declaring that an offender against the United States is, agreeably to the usual mode of process against offenders in such state where he is found, to be arrested and imprisoned, or bailed, as the case may be, for trial before the court of the United States having cognizance of the offense, the examination preparatory to the trial is to be had before a magistrate, who is to send to the clerk's office of the court copies of the process and recognizances of the witnesses. A state law requiring preliminary hearings to be before a county or corporation court does not apply to offenses against the United States. *Prize Ship and Crew*,* 1 Op. Att'y Gen'l, 85.

§ 1508. Information without.—Where an indictment for a misdemeanor is found, it may be quashed, and an information may be filed setting up the same offense, without a preliminary examination. *United States v. Ronzone*,* 14 Blatch., 60.

XXI. BAIL.

SUMMARY—*Powers of United States commissioners*, §§ 1509, 1510.—*Bond good as a voluntary bond*, § 1511.—*Bond presumed to have been taken by the clerk under the direction of the court*, § 1512.—*Responsibility incurred by a recognizance, how determined*, § 1513.—*Forfeiture; what necessary to sustain an action on a bond*, § 1514; *principal must be called*, §§ 1514, 1517.—*Principal not bound by an adjournment, when*, § 1515.—*Principal not in default until expiration of hour at which he was to appear*, § 1516.—*Sufficiency of indictment cannot be set up in answer to a sci. fa.*, § 1518.—*Power to reduce bail*, § 1519.—*Discretion of magistrate in taking bail*, § 1520.—*Record conclusive as to forfeiture*, § 1521.—*Principal prevented from appearing by being arrested in another state*, § 1522.—*Provision for appearance at successive terms of court has reference to regular terms*, § 1523.—*Discharge of sureties by departure of principal from United States with consent of government*, § 1524.

§ 1509. A United States circuit court commissioner has the power to compel a person charged with an offense to recognize to appear before him and have the proceedings completed, in those states in which such power is conferred by state laws upon justices of the peace. *United States v. Rundlett*, §§ 1525-28. See § 1567.

§ 1510. Under the thirty-third section of the judiciary act of 1789, declaring that the accused may, "agreeably to the usual mode of process against offenders" in the state "where he may be found," "be arrested, and imprisoned or bailed," a commissioner has power to take a recognize to appear from day to day pending the examination of an accused, where a justice of the peace in the same state has such power. But no other act of congress having given to commissioners such a power, they cannot exercise it where justices of the peace in the same state cannot. This power did not exist at common law, nor can it be inferred from general authority given to take bail. Justices of the peace possessing no such power in New York, a commissioner in that state has no authority to take bail for the appearance of a person accused for examination before himself at a future day. A recognizance so taken is of no validity. *United States v. Case*, §§ 1523-32.

§ 1511. The federal courts being bound by state laws in the matter of taking bail in criminal cases, and a local statute providing that "every bond or recognizance deemed good and valid as a common law bond shall be a good statutory bond, and no defense to any action, or sci. fa., prosecuted to enforce such bond or recognizance, shall be available unless it would be a legal and valid defense to a suit at common law upon the same," a recognizance, filed of record, and accepted by the court having power to take it, is binding as a voluntary bond, although it was entered into before the clerk who up to that time had not been appointed one of the commissioners of the court. *United States v. Evans*, §§ 1533-35.

§ 1512. Where the clerk, on a day when the court was open, and the defendant was present on trial in court, and there was a mistrial and the cause continued, simply wrote at the foot of a recognizance, "signed, sealed and acknowledged and approved by me," signing his name as clerk of the court, and the bond was indorsed and filed by him in the same manner

as all other papers are indorsed when filed, by whomsoever presented, and there is nothing in the record to show that he acted as a committing magistrate in taking the bond, and there is no recital in the bond or elsewhere that the defendant was brought before the clerk for examination and bail by him as a magistrate authorized to hold to bail, the bond must be presumed to have been taken by the clerk under the immediate direction of the court, and is therefore good, though the clerk had no power to hold to bail as a committing magistrate. *Ibid.*

§ 1513. The nature, extent and limitations of the responsibility incurred and created by a recognizance are to be determined, not by a mere examination of the terms of the instrument, but also by reference to the rules of law which are applicable thereto. These rules apply themselves to the terms of the condition and affect their meaning and operation. *United States v. Rundlett*, §§ 1525-28.

§ 1514. In order that an action may be sustained upon a recognizance the principal cognizor must be called and his default entered, and the legal effect of the condition is such that it is not broken by non-appearance generally, to be proved by any evidence, but only by non-appearance in answer to a call, to be proved by an entry made on the minutes of the magistrate, and returned by him as a part of the proceedings; and such call must appear to have been made at the time and place when and where the cognizor was bound to appear. *Ibid.* See § 1572.

§ 1515. Where a person enters into a recognizance to appear and answer to a complaint before a circuit court commissioner at a certain time and place, an adjournment to another time and place, made in the absence of the accused, does not bind him, though made at the hour named in the recognizance; and where the accused has an hour of grace before his recognizance should be declared forfeited, if adjournment is so made to another place, the recognizance is not forfeited, though, at the expiration of such hour, he is called at the place to which adjournment is made. *Ibid.*

§ 1516. It is the common law of the New England States, and probably of others, that where a party has recognized to appear before magistrates at a certain hour he is not in default until after the expiration of that hour and the commencement of the next. *Ibid.*

§ 1517. In an action on a recognizance it must appear from the record that the principal was called at the time and place when and where he was conditioned to appear; and if it does not so appear it cannot be shown by evidence *alunde* that he had absconded and would not have appeared if he had been called. *Ibid.* See § 1572.

§ 1518. Where the bond did not bind the defendant to answer any particular indictment, but only to answer a "charge against him for passing counterfeit money," the insufficiency of the indictment cannot be relied upon as a defense to a *sci. fa.* upon the forfeited recognizance. *United States v. Evans*, §§ 1533-35.

§ 1519. Upon an application for a warrant for the removal of a citizen from one state or district to another for trial upon a criminal charge, under section 1014 of the Revised Statutes, the district judge has power, without any writ of *habeas corpus*, to reduce the bail required by the committing magistrate, if he thinks it excessive. *United States v. Brawner*, §§ 1536-37.

§ 1520. The discretion of the magistrate in taking bail is to be governed by the compound consideration of the ability of the prisoner to give bail and the atrocity of the offense. *Ibid.*

§ 1521. In a proceeding in the name of the United States upon a recognizance, where a record was introduced showing that on a certain day during the term the necessary steps for the purpose of working and declaring a forfeiture of the recognizance were taken, the defendant was held not allowed to offer testimony to prove that the facts stated in that record, showing the forfeiture, were not true. *United States v. Ambrose*, § 1533.

§ 1522. A prisoner in Connecticut is released from custody upon entering into a recognizance to appear in one of the courts of the state, on a certain day, to answer a certain information against him and abide the order and judgment of the court. He then goes into the state of New York, where he belongs. While there, and before his recognizance is forfeited, he is seized by the authorities of New York and delivered over to the authorities of Maine, upon a requisition from the governor of Maine upon the governor of New York, charging him with the commission of a crime against the laws of Maine before the date of the recognizance, and of which crime his bail knew nothing when they entered into the recognizance. He is taken to Maine, tried and sentenced to imprisonment. It is held that his bail, the recognizance being forfeited, are not released from their obligation by these proceedings. The bail are in fault for the departure of the prisoner to New York, and they could have even then asserted their right to his custody when he was sought to be obtained by the authorities of Maine, and it is to be presumed that they would have obtained him. (*FIELD, CLIFFORD and MILLER, JJ., dissent.*) *Taylor v. Taintor*, §§ 1539-40. See § 1533.

§ 1523. Where a recognizance provides for the personal appearance of the defendant at the next regular term of the circuit court of the United States at a certain place, and also at

any subsequent term to be thereafter held at that place, the provision for his appearance at any subsequent term has reference to such subsequent term as may follow in regular succession in the course of business of the court. If the defendant appears at the next regular term referred to, and, without the consent of the sureties, enters into an agreement with the government, entered on the minutes of the court, to postpone the trial for a period of uncertain duration, until final decrees shall be entered in the district court, which event may not happen within many months, such agreement releases the defendant from appearing at any subsequent term following the then next term in regular succession, and substitutes a contract that he need appear only at such term as may be held after the happening of a contingent event. It therefore supersedes the condition of the recognizance, and releases the sureties. *Reese v. United States*, §§ 1541-45.

§ 1524. By a recognizance the principal is, in the theory of the law, committed to the custody of his sureties as to jailors of his own choosing, and he is so far placed within their power that they may at any time arrest him upon the recognizance and surrender him to the court. As they cannot arrest him outside of the territory of the United States, and as there is an implied covenant on the part of the principal with his sureties that he will not depart out of this territory without their assent, and as there is an implied covenant on the part of the government that it will not in any way interfere with this covenant between them, if the government enters into a stipulation with the principal, without the concurrence or knowledge of the sureties, consenting to his departure from the United States to remain abroad for an indefinite period, the sureties are discharged. *Ibid.*

[NOTES.— See §§ 1546-1597.]

UNITED STATES v. RUNDLETT.

(Circuit Court for New Hampshire: 2 Curtis, 41-43. 1854.)

Opinion by CURTIS, J.

STATEMENT OF FACTS.—This is an action of debt on a recognizance. The amended declaration, which is demurred to, shows that one Woodbury Gilman was complained of before Horace Webster, one of the commissioners appointed by the circuit court of the United States for the district of New Hampshire, and therein was charged with the crime of presenting to the commissioner of pensions certain false and fraudulent papers for the purpose of obtaining an allowance of a claim for a pension, and the payment of a sum of money from the United States in satisfaction of such claim. That the said Gilman was arrested and brought before the commissioner at his office in Portsmouth, on the 30th day of August, 1853, and such proceedings were thereupon had that Gilman was ordered by the commissioner to recognize in the sum of \$2,500, with three sureties, in the sum of \$833.33 each, to be and appear before the commissioner at his office in Portsmouth on the 1st day of September then next, at 10 of the clock in the forenoon, further to answer to the said complaint, and then and there wait and abide the order of the said commissioner; that the said Gilman and three sureties, of whom the defendant was one, did so recognize.

That Gilman did not appear at the office of the commissioner on the 1st day of said September, at 10 of the clock in the forenoon, according to the tenor of his recognizance; and the commissioner adjourned to the court-house in Portsmouth, at the same hour, and then and there Gilman was three times solemnly called, and made default, and the sureties were also then and there three times solemnly called to bring in the body of their principal, but did not appear, or bring the principal, and so default was made in the condition of the recognizance, and the same was declared by the commissioner to be forfeited; all which will appear by the record, etc.

§ 1525. *Power of commissioners to admit to bail. Governed by state laws.*

Several questions have been argued upon the demurrer. The first is, whether the commissioner had authority to take the recognizance of a defendant,

with surety, to appear before himself. It is argued that the powers of a commissioner, in this particular, are the same as those of a justice of the peace; that at common law, a justice of the peace cannot order a prisoner to recognize to appear before himself; that though there is, by statute in New Hampshire, as in other states, authority conferred on justices of the peace to let to bail persons accused before them, while the complaint is pending, and no order has been made thereon, there is no act of congress which confers this power on commissioners.

By the first section of the act of August 23, 1842 (5 Stat. at Large, 516), it is provided that the commissioners shall exercise all the powers that any justice of the peace, or other magistrate of any of the United States, may now exercise, in respect to offenders for any crime or offense against the United States; by arresting, imprisoning or bailing the same, under and by virtue of the thirty-third section of the act of September 24, 1789 (5 Stat. at Large, 91). To that section we must look for the powers of the commissioners over this subject; and it provides that, for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found, *agreeably to the usual mode of process against offenders in such state, be arrested and imprisoned or bailed*, as the case may be, for trial before such court of the United States, etc.

My opinion is, that it was the intention of congress by these words, "agreeably to the usual mode of process against offenders in such state," to assimilate all the proceedings for holding accused persons to answer before a court of the United States, to the proceedings had for similar purposes by the laws of the state where the proceedings should take place; and, as a necessary consequence, that the commissioners have power to order a recognizance to be given to appear before them, in those states where justices of the peace, or other examining magistrates, acting under the laws of the state, have such power; as they have in New Hampshire, by the Revised Statutes (p. 564, § 8). It is, perhaps, admissible to consider the taking of a recognizance to be strictly, and literally, within the meaning of the word process. See *Beers v. Houghton*, 9 Pet., 329; *United States v. Knight*, 14 Pet., 301. But if not so, I consider the words "mode of process," as used in this law, to be synonymous with mode of proceeding, and to include power to let to bail. This must be so, because the law expressly says, the prisoner is not only to be arrested and imprisoned, but bailed, agreeably to the usual mode of process in the state; and though this refers to his being bailed to appear and answer before the court, it shows that the words "mode of process" were not confined to the form of the warrant or *mittimus*, but were used in the larger sense above mentioned. See *Duncan v. Darst*, 1 How., 306, and cases there cited; and *Gwin v. Breedlove*, 2 How., 29. This objection must therefore be overruled.

§ 1526. *A recognizance is not forfeited except by the failure of the principal cognizor to appear in answer to a call made at the proper time and place.*

The next objection is more formidable. It is that the condition of the recognizance required the principal to appear at the office of the commissioner at 10 o'clock; that the legal effect of this was, that he had until 11 o'clock to appear; that he was not bound to appear at any other place; that the recognizance could not be forfeited without calling him at the commissioner's office, and entering his default for non-appearance there; that the adjournment to the court-house, at 10 o'clock, did not impose on the accused a duty to follow the

commissioner, and make his appearance there before 11 o'clock; and consequently, when he failed to answer the call at the court-house, he was not thereby in default, and so there was no forfeiture.

To maintain an action on a recognizance the declaration must show a breach of its condition. And as the recognizance is required and taken by the commissioner pursuant to an authority conferred on him by law, and to satisfy certain legal requirements, the nature, extent and limitations of the responsibility created thereby are to be determined, not by a mere examination of the terms of the instrument, but also by reference to the rules of law which are applicable thereto. These rules apply themselves to the terms of the condition, and affect their meaning and operation. *Beers v. Houghton*, 9 Pet., 329; *United States v. Knight*, 14 Pet., 301. One of these rules of law requires the principal cognizor to be called and his default entered; and the legal effect of the condition is such, that it is not broken by non-appearance, generally, to be proved by any evidence, but only by non-appearance in answer to a call, to be proved by an entry made on the minutes of the magistrate, and returned by him as part of the proceedings. This has been decided in New Hampshire and elsewhere, upon reasons which, to me, are satisfactory. *State v. Chesley*, 4 N. H., 366; *Dillingham v. United States*, 2 Wash., 422; *State v. Grigsby*, 3 Yerg., 280; *White v. State*, 5 id., 183; *Park v. State*, 4 Ga., 329.

It is clear, also, that the declaration must show a default to answer to a call, made at a time and place when and where the cognizor was bound by law to answer. And the question here is, whether Gilman was bound by law to answer the call made at the court-house. By the terms of the recognizance, he was to appear at the office of the commissioner, at the hour of 10 o'clock in the forenoon, and then and there further answer to the complaint, and wait and abide the order of the said commissioner. Any lawful order which the commissioner was empowered to pass in the course of proceedings upon this complaint is within the very terms of the condition. If he had appeared and the hearing had not been finished on that day, and the commissioner had adjourned the hearing to the next day, the defendant would undoubtedly have been bound by the recognizance to appear on the next day.

§ 1527. *The power to adjourn is incident to the power to hear and determine, but orders to adjourn must be made in the presence of the cognizor, otherwise he is not bound thereby.*

The commissioner also had power to make an order to adjourn to a more convenient place, for the purpose of hearing the complaint. This power is incident to the power to hear and determine. It includes adjournments both of time and place. Where, as in some of the states, the power is regulated by statute, of course those statute limits must be observed. Where it has not been thus regulated, it must be a reasonable exercise of the power, in reference to the circumstances of the case, for the purpose of more conveniently or speedily or safely discharging the duty of examining the complaint. *Morrell v. Near*, 1 Cow., 112; *Caswell v. Ward*, 2 Doug. (Mich.), 374. In this case no objection is made to the mode of exercising this power, save that the order to adjourn was made in the absence of the defendant, and before he was bound to be present. That the order to adjourn was made in his absence is averred by the amended declaration. That it was made at 10 o'clock in the forenoon is also averred. I do not think he was bound to be present before, or precisely at, 10 o'clock. I have always understood it to be part of the common law of the New England States, and I believe it is so held in other states, that in pro-

ceedings before magistrates, which are notified to begin at a fixed hour, neither party is in default until the expiration of that hour and the commencement of the next. This is a convenient rule, prevents surprise, and exacts as much promptness as is safe and reasonable. It seems quite clear from the case of *Pownor v. Hollister*, 14 N. H. 122, that it is part of the law of this state.

Under these circumstances, I am of opinion the commissioner had not lawful authority to make the order to adjourn, that the order was not binding on the defendant, so as to oblige him to answer at the court-house, and consequently that his failure to answer there was not a breach of the condition of the recognizance,—and this for the following reasons: The general rule is, that, in criminal proceedings, no action affecting any right of the accused should take place in his absence. In this particular case it might be of no importance to the defendant whether the adjournment took place in his absence or not. In many cases it might be of practical importance. I cannot consent to make a precedent which might be used injuriously to the substantial rights of persons examined for offenses by magistrates. When they have bound themselves to appear before a magistrate and answer to a complaint at a particular place, they must be allowed an opportunity to appear there, and offer such reasons as they may have why they should not be compelled to answer elsewhere; and those reasons must be considered by the magistrate before they are required to answer at another place.

As has already been said, the power to adjourn is incident to the power to hear and determine. But if the defendant avoids, there is no hearing or determination. Until he appears, therefore, there is no power to hear and determine, and consequently, a power to adjourn, which is merely incidental to the power to hear, and which is to be exercised, if at all, only for the more convenient, safe or speedy execution of the principal power, not only need not be exerted, but can hardly be said to exist. If the defendant had been in any default for not being present at the time the order to adjourn was made, it might be urged, perhaps, that he was bound to take notice of the adjournment, and to follow the commissioner to the court-house. Adjournments by courts of record thus bind persons who are under recognizance.

But, as has already been declared, his appearance at any time before 11 o'clock, at the office of the commissioner, would satisfy the condition of the recognizance; and I can make no distinction between an order of the commissioner to adjourn at 10 o'clock, before he appeared, and an order at 9 o'clock, or any earlier hour. In neither case was the defendant bound to be present, or in default for not being present; and I do not perceive upon what ground he could be required to take notice of and obey the order of adjournment in one case, rather than in the other. Several cases in the state of New York have been decided upon principles somewhat analogous to those above stated. *Wiest v. Critsinger*, 4 Johns., 117; *Stewart v. Meigs*, 12 id., 417; *Morrell v. Near*, 1 Cow., 112.

§ 1528. — *the fact that the cognizor had absconded, and could not have answered the call even if properly made, is of no importance.*

It was stated at the bar that Gilman, the defendant, actually absconded, and had no intention to appear, and did not, nor would, at any time or place, appear to answer the complaint; that this was well known to his sureties, and that it was of no practical importance to him or them whether the adjournment took place or not. This may be so; but the case must be decided upon fixed principles of law, applicable to all cases of such recognizances taken by magis-

trates, and whatever the intentions or acts of Gilman may have been, if there was no breach of the condition of the recognizance, no recovery can be had. Being of opinion that there was no breach, the judgment must be for the defendant.

UNITED STATES *v.* CASE.

(Circuit Court for New York: 8 Blatchford, 250-254. 1871.)

STATEMENT OF FACTS.— This action was commenced in the district court on a recognizance taken by a circuit court commissioner, conditioned for the appearance of the accused before the commissioner for further examination on a charge of perjury. There was a verdict and judgment for the defendants, and the case was brought up on writ of error.

Opinion by WOODRUFF, J.

I concur in the conclusion of the court below, that a commissioner has no authority to take bail for the appearance of a party accused, for examination before himself at a future day. It is unnecessary to repeat the reasoning contained in the opinion of the district judge upon that point. It may be conceded that a commissioner, under the statutes of the United States in virtue of which he is appointed, has, in the matter of taking bail, the same power as a judge of the supreme, circuit or district court, or a justice of the peace, and, therefore, the question is, Has either of the officers last named such power?

§ 1529. *Power of commissioners to take bail under section 33 of the judiciary act.*

It is quite clear, I think, that the thirty-third section of the judiciary act of 1789 (1 U. S. Stat. at Large, 91), was rightly construed by Judge Curtis, in *United States v. Rundlett*, 2 Curt., 41 (§§ 1525-28, *supra*), and that, in a state where a justice of the peace has power to take a recognizance to appear from day to day pending the examination of an accused, there a United States commissioner has such power. There seems no good reason why the officers of the United States should not have the same power in this respect in whatever state they exercise their jurisdiction; but, congress having seen fit to direct that a party accused may, "agreeably to the usual mode of process against offenders" in the state "where he may be found," "be arrested and imprisoned or bailed," the court cannot say that a recognizance not warranted by the laws of the state, nor by any other act of congress, is of any validity. Indeed, in the case above referred to, the doubt considered in the opinion of Judge Curtis was, whether the terms, "agreeably to the usual mode of process" in the state, could be so construed as to confer power to take such bail even in a state where such bail was authorized. The statutes of New Hampshire authorizing the taking of such a recognizance, it was held that a commissioner, by virtue of his powers as commissioner, and of the act of congress of 1789, might do so. The case of *Potter v. Kingsbury*, 4 Day, 98, shows, also, that, in Connecticut, a bond or recognizance for such appearance might be taken pending an examination; but the court refer the power solely to the statute.

§ 1530. — *in New York he cannot take a recognizance binding the accused to appear before him at a future time.*

No such statute exists in New York, and I am referred to no decision of her courts affirming the power of her magistrates to take such a recognizance.

Unless the power can be inferred from the general authority given to take bail, it cannot be affirmed at all; and, in considering that question, it is not material whether the statutes of the state of New York are referred to, or the

broad language of the acts of congress. Section 33 of the act of 1789 declares, quite as broadly as any statute of the state of New York, that, "upon all arrests in criminal cases, bail shall be admitted." Whether such language is to be construed to require the judge, justice or commissioner to take bail for appearance from day to day may be ascertained by inquiring what was the meaning of the term "bail," as understood and used, either at common law or in the statutes of England, by which the subject was chiefly regulated in that country. I have searched in vain to find any authority for giving it the construction contended for. It meant, at that early day, when the sheriff of the county, as a peace officer, exercised the power of holding to bail, the taking of security for the appearance of the party accused at the court, at the time and place for trial. It has that meaning, and, indeed, is so described, in terms, in the statutes which were passed restricting, regulating and finally withdrawing that power from sheriffs and conferring it exclusively upon courts, justices or other magistrates. See English Statutes at Large, 3 Edw. 1, ch. 15; 6 Edw. 1, ch. 9; 1 Rich. 3, ch. 3; 3 Henry 7, ch. 3; 19 Henry 7, ch. 10; 1 and 2 Ph. & M., ch. 13; 1 Edw. 4, ch. 2. I have noticed no English statute which warrants the taking of any other bail than above described, until the enactment of 1 and 2 Geo. 4, ch. 218, which specially authorizes constables in the Metropolitan Police District, attending the watch-houses between 8 o'clock in the afternoon and 6 in the forenoon, to take bail, from parties arrested without warrant for petty misdemeanors, for their appearance before the justice in Bow street, at 10 in the morning.

§ 1531. *The duty and power of magistrates to take bail from the accused to appear from day to day considered with reference to common law.*

It cannot be said, I think, that the power to take such security for attendance for examination from day to day exists at common law, or that it is a necessary incident to the power and duty to inquire whether there is ground for holding the accused for trial. The duty of the justices to examine, and to complete such examination within a reasonable time, is often affirmed in the early English cases, and the power, also, to commit pending the examination; and it has been held that for unreasonable detention, for the purposes of examination, justices are liable to an action. The duty to examine speedily and to discharge, if no sufficient proof of guilt appears, to justify holding for trial, is stringently maintained, and no doubt because, the accused being lawfully held in actual custody until such examination is had, due regard to the liberty of the subject demands that no unreasonable delay be permitted. It may also be suggested that, until the official inquiry into the probable guilt of the accused and the degree of enormity of the offense committed, the magistrate has no guide by which to determine what amount of security for appearance would be justly required. True, where the power has been expressly conferred, the magistrate may be governed by the charge made, and, for the purpose of fixing the security to be given to appear from day to day, may assume the guilt of the accused, and that the offense is as charged in the complaint; and a party arrested may prefer to give such security, if able to do so, rather than remain in custody. Nevertheless, the theory, and the just theory, was that, until examination by the magistrate, he could not, in justice to the accused or to the state, by any safe guide, determine whether bail ought to be required, or fix its amount; and hence, justice required that he should proceed without unreasonable delay to the investigation of the matter charged, that the accused might be speedily relieved, if no sufficient cause for holding to trial appeared.

§ 1532. *The power to admit to bail, granted by act of congress, relates only to bail to appear at the proper court.*

I conclude, therefore, that the duty and power to admit to bail, declared by the acts of congress, as well as by the constitution of the United States, no less than by the constitution and statutes of New York, relate to the acceptance of bail for appearance at the proper court, to answer there for the offense charged. In the sense in which bail for appearance at the next court is spoken of, the commissioner holds no court. He acts as an arresting, examining and committing magistrate. It may seem to be a hardship—no doubt, it may often be in fact a great hardship—where, from circumstances wholly beyond the control either of the prosecutor or the accused, the examination consumes many days, that the accused is not entitled to demand a relief from actual custody, on tendering good security for due attendance from day to day; but a remedy for this must, I think, be sought in such legislation as has already been had in some of the states, whose example congress may deem it wise to follow. At present, I think a commissioner has no power to take such security, and that the recognizance sued upon in this action is void. The judgment must be affirmed.

UNITED STATES v. EVANS.

(Circuit Court for Tennessee: 2 Flippin, 605-610. 1890.)

STATEMENT OF FACTS.—Evans was indicted for passing counterfeit money, and after a mistrial entered into a recognizance before the clerk for his appearance at a future term. Judgment *nisi* was taken and a *sci. fa.* issued.

Opinion by HAMMOND, J.

This is a *sci. fa.* upon a forfeited recognizance submitted upon the foregoing agreed statement of facts and the record of the proceedings in the case. It is first insisted by the defendants that the indictment is bad in not charging the offense to have been committed on a particular date. The caption is "May Term, A. D. 1876," and the offense is alleged to have been committed "on the — day of —, A. D. 1876." It is urged that for this defect, upon conviction, the judgment would be arrested. Whart. Cr. L., sec. 264. It is denied for the plaintiff that this case falls within that rule, if, indeed, such defense can be made to the *sci. fa.*, which is also denied.

§ 1533. *Upon a return of a sci. fa. on a forfeited bail bond, the defendant cannot set up the insufficiency of the indictment. The law of Tennessee as to sufficiency of bail bonds and recognizances.*

I express no opinion on the sufficiency of the indictment, for, conceding it to be defective, and fatally so, it is, I think, no defense to this *sci. fa.* In the first place, the bond did not bind the defendant to answer this indictment, but only a "charge against him for passing counterfeit money." He was bound to appear to answer the charge, whether upon this indictment or some other indictment or information to be preferred against him. His appearance at court was the thing to be secured, and a further condition was that he should continue in attendance until discharged by the court. He cannot abscond, forfeit his bond, and, on the *sci. fa.*, try collaterally the merits of the case upon the sufficiency of the indictment or other matter of defense. The defendant and his sureties would, by such practice, be allowed to judge of the propriety and utility of his appearance, which cannot be permitted. *State v. Adams*, 3 Head, 259; *State v. Rye*, 9 Yerg., 336; *United States v. Reese*, 4 Saw., 629; *United States v. Stein*, 13 Blatch., 127; *State v. Stout*, 6 Halst., 124.

§ 1534. *Bond taken by clerk. Federal courts bound by state laws.*

The defense most relied on is that the clerk had no authority to take this bond, and, having no authority, the *sci. fa.* must be quashed. It is argued that this *sci. fa.* must speak by the record, strictly pursue it, and show by it the validity of the bond; that it was taken by a competent officer, and all the jurisdictional facts to support his action; that, by this record, it appears that the clerk, as of his own authority, took this bail bond, because the minutes of the court do not show that he took it by order of the judge sitting either as an officer authorized to hold to bail, or as a court acting under its general powers in the premises; and that, inasmuch as the clerk is not named in the Revised Statutes, sections 1014, 1015, as an officer authorized to hold to bail, the bond is void. In support of this position many authorities are cited showing how strict the practice was that the *sci. fa.* must be based on a record showing all the essential jurisdictional facts to support the validity of the proceedings and justify an award of execution. *State v. Edwards*, 4 *Humph.*, 226; *State v. Austin*, id., 213; *State v. Cherry*, id., 232; *State v. Smith*, 2 *Me.*, 62; *Bridge v. Ford*, 4 *Mass.*, 641; *People v. Kane*, 4 *Denio*, 530; *State v. Edgarton*, 7 *Rep.*, 122 (Boston, 1879); *Foster's Sci. Fa.*, 279.

It is to be observed, however, that in Tennessee, since the above cases, these niceties of practice have been abandoned by legislative direction. Act of 1852, ch. 256; T. & S. Code, sec. 5155. By this section "every bond or recognizance deemed good and valid as a common law bond shall be a good statutory bond, and no defense to any action or *sci. fa.* prosecuted to enforce such bond or recognizance shall be available unless it would be a legal and valid defense to a suit at common law upon the same." The federal courts are bound, in this matter of taking bail in criminal cases, by the state laws by express command of the statutes. R. S., secs. 1014, 1015 and 716; *United States v. Rundlett*, 2 *Curt.*, 41 (§§ 1525-28, *supra*); *United States v. Horton*, 2 *Dill.*, 94, 97. This Tennessee act of the legislature has been construed to be a new dispensation, designed to abolish those "dry technicalities," which were said to have operated as "a judicial pardon to offenders," and to have put statutory bonds and recognizances upon an equal footing with common law bonds. *State v. Quinby*, 5 *Sneed*, 418.

I think the effect of it is to make this voluntary obligation, however taken, filed in court to secure the release of one of the obligors, binding, to all intents and purposes, as if taken by a proper officer. I do not wish to be understood as holding that one arrested, and under duress to find bail or stand committed, by an officer having no authority to hold to bail, can be lawfully bound to bail upon the judicial determination of an unauthorized officer; but only that, by the operation of this statute, on the agreed facts in this case, this is a voluntary bond, filed of record and accepted by the court having power to take it, and which binds these defendants as if it had been, in all respects, a proper statutory bond or recognizance. By the influence of the same principle, without any statute, it was held, in *McLean v. State*, 8 *Ileisk.*, 22, 235, that the approval of a tax collector's bond by a tribunal which had no legal existence, and whose acts were void, did not release the sureties. It was a voluntary obligation, accepted by the state and acted on by all parties, and they would not be heard to say it was taken by an improper officer.

Here the court had power to take a bail bond and release the defendant; and while so lawfully in custody before a proper tribunal, he and his sureties executed and filed this bond. It was accepted by the court, or otherwise he could

not have been discharged, and after such acceptance and discharge they will not be heard to say that it was not properly acknowledged and approved. This statute was enacted for the very purpose of obviating such objections when made in this class of cases.

§ 1535. *Presumption where the clerk takes a bail bond on a day when the court is in session.*

But, on the other ground, I am of opinion this defense must fail. It assumes that the clerk acted as a committing magistrate in taking this bond. There is nothing in the record to show this to have been the case. There is no recital in the bond, or elsewhere, that the defendant was brought before the clerk for examination and bail by him as a magistrate authorized to hold to bail. He simply wrote at the foot of the bond, "signed, sealed and acknowledged and approved by me," signing his name as clerk of this court, and the bond is indorsed filed by him in the same manner as all other papers are indorsed when filed by whomsoever presented. The bond itself does not show that it was ordered or taken by any officer whatever, but is in the common form, and ample under the statute. T. & S. Code, 5153. I think the presumption of law is that he acted as clerk, there being nothing to show that he assumed to act as a committing magistrate. The record shows the court was open that day; that defendant was present on trial in court; that there was a mistrial, and the case continued. From all this, and the presence of the bond in the record, it appears by the record that the bond was taken by the clerk under the immediate direction of the court itself. The proof *dehors* the record shows that he did so act in fact. Now it is true the act of February 26, 1853 (U. S. Stat., 163), in terms, gave the clerk power to administer oaths, take acknowledgments, etc., and that this provision has not been carried into the Revised Statutes. I doubt if that act would authorize a clerk to act as committing magistrate and hold to bail. Recognizances cannot be taken by an officer out of court without a commission or statutory authority. Viner's Abridg., title "Recog., A. 13." But they could always be taken in courts by virtue of the inherent power to do so. *Id.* and Bac. Abridg., title "Bail." And one of the clerks of the enrollment, or a deputy, is to attend the acknowledging, vacating, etc., of all deeds and recognizances. Viner's Abridg., title "Recog., A. 15." A clerk has no statutory power to administer oaths, yet he or his deputy may do it. All such acts are done by him in his ministerial capacity, presumably in the presence of the court, and by its express order. *United States v. Nichols*, 4 McL., 23; *United States v. Babcock*, *id.*, 115.

I have no difficulty in holding, therefore, that without any statutory authority, the clerk may take the acknowledgment and justify the obligors to a bail-bond, when required by the court to do so. Judgment for the plaintiff.

UNITED STATES v. BRAUNER.

(District Court for Tennessee: 7 Federal Reporter, 86-90. 1881.)

STATEMENT OF FACTS.—This is a question of removal from this jurisdiction to that of Missouri, where defendant is charged with counterfeiting. The bail required by the commissioner before whom the defendant was brought was \$5,000, and this amount it is alleged is excessive.

Opinion by HAMMOND, D. J.

It is apparent that the bail required by the commissioner is excessive, and the eighth amendment of the constitution is a guaranty against excessive bail. It

is objected that the action of the commissioner cannot be reviewed by the district judge on this application, nor the bail reduced by him, except upon *habeas corpus*, when, it is conceded, the case could be reviewed and the bail reduced. Hurd. Hab. Corp., 436; Jones v. Kelly, 17 Mass., 116; *Ex parte Kaine*, 3 Blatch., 4; *In re Martin*, 5 Blatch., 303; *In re Henrich*, id., 414 (§§ 3447-53, *infra*); *In re Stupp*, 12 Blatch., 501 (§§ 3462-67, *infra*); *In re Macdonnell*, 11 Blatch., 174; *In re Van Campen*, 2 Ben., 421; United States v. Bloomgart, 7 Int. Rev. Rec., 148.

§ 1536. *A judge of a district court may review the action of a committing magistrate and reduce the bail required by him.*

Whether, on *habeas corpus*, the court or judge has plenary power to review or supervise the action of the committing magistrate I do not find it necessary to determine. If he can go only to the extent of reducing the bail where it is excessive, that would be sufficient here, and the judge could advise or direct a writ of *habeas corpus*, if necessary to sustain his authority to reduce excessive bail. But I have come to the conclusion that, without any writ of *habeas corpus*, the judge of the district, acting under the authority of section 1014 of the Revised Statutes, has ample power to reduce the bail, if he thinks it excessive, and to review the action of the commissioner, or other committing magistrate, on a proceeding under that section.

The very purpose of conferring the power is to secure the judicial sanction of a supervisory judge for the action of the committing magistrate, in so important a matter as that of removing a citizen from one state or district to another for trial upon a criminal charge. If the warrant of removal is to be issued mechanically, and as a mere ministerial act, there is no reason why the committing magistrate should not have been required to issue it at once, upon neglect or refusal to give bail. The necessary implication, from the method of procedure adopted by the statutes, is that the "judge of the district," whether it be the district judge or some other, as is intimated in *In re Bailey*, 1 Woolw., 422, it may be, must judicially determine whether the prisoner shall be taken to another district for trial, and that he may refuse his warrant where it appears that the removal should not be made, or where he would admit the party to bail. Doubtless the action of the committing magistrate is *prima facie* sufficient as a basis for the warrant, but it is not conclusive; and while the judge should not unnecessarily require another or further preliminary examination, if it appear to him necessary that the bail should be reduced, or that for any reason the prisoner should again be heard in defense, I have no doubt that it is his duty to pass fully upon the case, and determine for himself whether he should be further held or removed. These views are abundantly supported by the authorities. Conk. Tr. (4th ed.), 582; Murray, U. S. Courts, 29; *In re Buell*, 3 Dill., 116, at p. 120 (§§ 3183-87, *infra*); United States v. Jacobi, 14 Int. Rev. Rec., 45; United States v. Pope, 24 Int. Rev. Rec., 29; United States v. Volz, 14 Blatch., 15; United States v. Haskins, 3 Saw., 262 (§§ 3188-91, *infra*); *In re Alexander*, 1 Low., 530 (§ 3194, *infra*); United States v. Shepard, 1 Abb., 431 (§§ 3195-99, *infra*); *In re Doig*, 4 Fed. R., 193 (§§ 3192-93, *infra*); and cases cited in these opinions. In some of the cases there was a writ of *habeas corpus*, and in some the original examination was before the district judge, and in one the question arose in the district to which the removal was made, on a motion to quash the indictment; but in none of them does it seem to have been treated as a matter of much importance by what form of procedure the action of the judge is invoked, and in none is it denied that he may determine for himself

whether the removal is proper. In Buell's Case, *supra*, there was both a *habeas corpus* and an application for a warrant of removal, which latter was refused. In the case of *United States v. Somerville*, related in Volz's Case, *supra*, it seems that the district judge himself took the bail bond after a commitment by the commissioner, and the question there was whether the commissioner had a continuing power after commitment to take bail, it being held that he did. But no one seems to have suggested that the judge had not the power to do what he did.

§ 1537. *Rule as to excessive bail. Removal to another district.*

Without further examination here of the cases, it is sufficient to say that, while I do not find one holding that the judge may, on the application for the removal warrant, inquire into the facts, or reduce the bail, I have no doubt it is a proper practice. In some cases it may be necessary to issue a *habeas corpus* and *certiorari* in order to bring before him the entire record of the evidence before the committing magistrate; or, technically, it may be that the judge could not discharge the prisoner without a *habeas corpus*, while he might refuse his warrant of removal, leaving him where the commitment had placed him, until application for *habeas corpus* should be made. But my judgment is that, having the prisoner before him, with the plenary power conferred by the statute to grant or refuse the warrant of removal, and the only object and purpose of the commitment being to take his judgment whether there shall be removal, the power to discharge exists without any *habeas corpus*, and is necessarily implied from the statute. In the case of *United States v. Lawrence*, 4 Cranch C. C., 518, it is said that "to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law." The discretion of the magistrate in taking bail is to be guided by the compound consideration of the ability of the prisoner to give bail and the atrocity of the offense. It is a rule of our courts in this district to require \$2,000 in cases like this, though it is very frequently increased under special circumstances. As this is a case for trial in another district, that circumstance should perhaps increase the amount somewhat, but I think \$2,500, under the circumstances here, as much as should be required of this prisoner, and any larger amount would be excessive. I shall, therefore, discharge him on giving bail before me in that sum.

Telegrams from the district attorney at St. Louis say the court is now in session, with a jury in attendance to be discharged in a few days, and the question is whether the prisoner shall be bound to appear at this present term, and immediately, or at the next term of the court. The cases we have been considering indicate that the proceeding on the preliminary examination is in accordance with the usages of law in the district where the arrest is made, and this seems to be a plain requirement of the statute. R. S., § 1014 *et seq.* The Tennessee code directs that bail, when not taken in open court, shall be given by a written undertaking, signed by the defendant and at least two sufficient sureties, requiring the defendant to appear "at the next term of the court," while, when given in open court, it is to appear "at the present term." T. & S. Code, §§ 5152, 5153, 5154. It is generally understood that the federal courts, in this matter of bail, are governed by the state statutes. *United States v. Evans*, 12 Ch. Leg. N., 271; S. C., 2 Fed. R., 147, 150, and cases there cited. I readily see how this requirement might greatly delay trials, and that it may be sometimes impracticable to adhere strictly to the statutes of the states. And, like the acts of congress adopting the practice of the states in suits at

law, it may go no further than to adopt the state statutes "as near as may be." R. S., § 914. Whether the committing magistrate, therefore, may disregard this requirement of the state statute in a proper case, and take the bond demanding an appearance at some other time than the next term, I shall not now decide, because I see in this case no special reason for departing from the ordinary practice, and have determined to allow this defendant to give bond to the next term of the court at St. Louis, as the commissioner did. I shall not interfere with his action further than to reduce the amount of bail as before indicated. The prisoner will be allowed a few days to communicate with his friends, who live some distance, and in the mean time will remain in the custody of the marshal, with leave to the district attorney to make a further application for a removal warrant, if bail be not furnished. So ordered.

UNITED STATES v. AMBROSE.

(Circuit Court for Ohio: 7 Federal Reporter, 534-538. 1891.)

Opinion by MATTHEWS, J.

STATEMENT OF FACTS.—This proceeding is a *scire facias* in the name of the United States against Harry T. Ambrose and Thomas Ambrose, upon a recognizance entered into by them in this court, in the sum of \$5,000, conditioned for the appearance of Thomas Ambrose, from day to day, to answer to an indictment pending against him, and not depart the court without leave, at the April term, 1880, and alleging a breach of the condition. The answer denies the breach and the replication perfects the issue. To sustain the issue on its part, the United States introduced and read a record of the court showing that on a certain day during that term the necessary steps for the purpose of working and declaring a forfeiture of the recognizance were taken. To that the defendant offered testimony to prove that the facts stated in that record, showing the forfeiture, were not true; that, in point of fact, Thomas Ambrose was not called as therein recited; and that, in point of fact, Harry T. Ambrose, his surety, was not called upon to produce his body, as therein declared, and the question is whether or not that testimony is competent. I think it is not.

§ 1538. *A recognizance is matter of record, imports absolute verity, is an estoppel against the parties to it, and cannot be contradicted by any testimony.*

The proceeding with reference to a recognizance is a proceeding of the court. The recognizance itself constitutes a part of the records of the court; it is a contract of record. The proceeding in the forfeiture of a recognizance is a proceeding of the court, and is a matter of record; and it seems to me that it is, as in other cases of records, a case where the record imports such absolute verity that no one against whom it is producible shall be permitted to aver against it. In the case of *The King v. Carlile*, 2 Barn. & Ad., 362, which is fully cited in the note to the *Duchess of Kingston Case*, in *Smith's Leading Cases*, "the defendant had been convicted of a seditious libel, and brought a writ of error to the queen's bench, assigning for error in fact that there was but one of the justices named in the commission present when the jury gave their verdict. On the record returned to the king's bench (and which was made up in the ordinary way) it appeared that a sufficient number of justices were present, and the court held that it was not competent to the defendant to question the fact as stated." In delivering the opinion, the court said that it was clear upon the authorities that a party cannot be received to aver, as error in fact, a matter contrary to the record.

In 1 Inst., 260, Lord Coke says: "The rolls being the records or memorials of the judges of the courts of record, import in them such incontrollable credit and verity as they admit of no averment, plea or proof to the contrary. And if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself; and the reason thereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end to controversies which would be inconvenient."

The rule is stated in Starkie on Evidence, 317, with a good deal of terseness, and makes the distinction, which is to be borne in mind, that there are two purposes for which a verdict or judgment may be offered in evidence: *First*, with a view to establish the mere fact that such a verdict was given or judgment pronounced, and those legal consequences which result from that fact; and, *second*, with a view to a collateral purpose,—that is, not to prove the mere fact that such a judgment has been pronounced, and so to let in all the necessary legal consequences of that judgment, but as a medium of proving some fact as found by the verdict, or upon the supposed existence of which the judgment is founded.

The author of the note in the Duchess of Kingston Case, in referring to that distinction, divided judgments into two kinds, viz., judgments *in rem* and judgments *in personam*, or judgments *inter partes*, and says: "With regard to both of these classes one observation may be made; that is, that for the mere purpose of proving the existence of a judgment the production of a record of either sort is conclusive upon all the world."

The particular question, in its application to recognizances, has more than once been decided, and especially in the case of *Calvin v. State of Ohio*, 12 Ohio St., 60, where the facts of the case are not distinguishable from the facts in this case, and wherein the court, through Judge Peck, says: "The settled practice in these cases, which may be said to be the law of such judicial undertakings, required that Squires should appear in said court on the day named in the recognizance, and answer to the criminal charge specified therein, and that the defendants, his sureties, should have him then and there for that purpose; and that, if Squires was not so present or produced, the several parties to said recognizance were to be called and required to comply with its obligation; and also that, on a failure to comply, it would be the duty of the court before which it was acknowledged to declare it forfeited, and that the forfeiture so declared should forthwith be deemed a record of said court.

"Such being the law of this species of undertakings, how can it be said that the calling and forfeiture of such a recognizance is an *ex parte* proceeding in the sense alluded to by the counsel for the defendants? They voluntarily appeared in open court, and became parties to an inchoate judicial proceeding, and were conversant, or, at least, cannot plead ignorance of the legal course prescribed for its fulfillment and its forfeiture. They therefore knew, or must be presumed to have known, when entering into that engagement, that, in case of a default, it would be the duty of the court before whom it was acknowledged, without process or further notice, to enter against them a forfeiture of the entire penalty, which entry would have all the force and effect of a record of the court. It was *ex parte*, perhaps, but only so in the sense in which a judgment made by default, where a service of notice has been acknowledged, could be so termed; and no one would say that a judgment so rendered is not final and conclusive against the defendant, until reversed or set aside in due course of law.

"The record may be only evidence of the forfeiture, but it is, by the statute, evidence of a superior degree — *evidence by record*,—and, on general principles, cannot be met and overthrown by testimony of an inferior grade, as was attempted in the case at bar."

And the opinion of the supreme court of the state of Ohio is sustained by citation of authorities from Iowa and New York to the same effect.

Now I am referred, on the other side, to two cases only: One in 9 Wall., 13 (§§ 1541-45, *infra*), the case of *Reese v. United States*, where all that was decided is that the contract of suretyship in a recognizance is like a contract of suretyship in all other cases in respect to this point: that in case the contract is altered in respect to the principal by the consent of the party to whom the recognizance is given, that that releases the surety. The other case is that of *Griswold v. Stewart*, 4 Cow., 457. That was a *scire facias* against Stewart, and set forth a judgment of the court in favor of the plaintiff against Walton for \$5,000 and costs, on the 29th of October, 1813; that execution thereof still remained to be made; that Walton was dead, and commanded the sheriff of Columbia county to warn the heirs and tenants of all the land in his bailiwick whereof Walton, or any person or persons in trust for him, was seized on the 29th day of October, 1813, the day on which the judgment was entered, or at any time after, to show cause why the debt and costs should not be made of those lands and tenements. Stewart being warned as one of the tenants on the day of the rendition of the judgment, appeared and made the plea that on the day on which the judgment was entered Walton was dead, and that consequently the judgment was void by reason of the want of jurisdiction in the court over the person of Walton for the purpose of rendering the judgment. It was held that that plea was a good plea, because it did not contradict the record, but only undertook to avoid the effect of it by showing that the court had no jurisdiction to render the judgment. But it did not contradict the fact of the rendition of the judgment, or any of the transactions of the court which took place on that day, and I see nothing in that which is not consistent with the rule that is applied in the other case.

There will, therefore, be a judgment for the plaintiff for the amount of the recognizance.

TAYLOR v. TAINTOR.

(16 Wallace, 366-377. 1872.)

ERROR to the Supreme Court of Errors of Connecticut.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is a writ of error issued under the twenty-fifth section of the judiciary act of 1789, to the supreme court of errors of the state of Connecticut. The attorney of the state for the county of Fairfield presented to the superior court for that county, at the August term, 1866, an information charging Edward McGuire with the crime of grand larceny. A bench warrant, returnable to the same term, was thereupon issued. McGuire was arrested and held in custody. The court fixed the amount of bail to be given at \$5,000. On the 24th of September, 1866, McGuire and the other plaintiffs in error entered into a recognizance to the defendant in error in that sum, conditioned that McGuire should appear before the superior court, to be held at Danbury, in Fairfield county, on the third Tuesday of October, 1866, to answer to the information before mentioned, and abide the order and judgment of the court. McGuire was thereupon released from custody. He failed to appear according

to the condition of the recognizance, and it was duly forfeited on the 16th of October, 1866. This suit was thereupon instituted in the superior court of Fairfield county to recover the amount of the obligation. The facts developed at the trial, and relied upon by the defendants to defeat the action, were, according to the practice in that state, found and certified by the court, and became a part of the record. So far as it is necessary to state them, they are as follows:

After the recognizance was entered into McGuire went into the state of New York, where he belonged. While there, upon a requisition from the governor of Maine upon the governor of New York, he was seized by the legal officers of New York, and was by them forthwith, on the 19th of October, 1866, delivered over to the proper officers of the state of Maine, by whom he was immediately and against his will removed to that state. The requisition charged a burglary alleged to have been committed by McGuire in Maine before the recognizance in question in this case was taken. At the time of the forfeiture of the recognizance McGuire was, and he has been ever since, legally imprisoned in Maine. In June, 1867, he was tried there for the burglary charged in the requisition, and convicted and sentenced to confinement in the penitentiary for fifteen years, and was, at the time of the trial of this case in the court below, serving out his time under that sentence. Neither of the sureties knew, when they entered into the recognizance, that there was any charge of crime against McGuire other than the one alleged in the information in Connecticut. If the testimony were admissible, the plaintiff proved that the sum of \$8,000 was placed in the hands of the sureties to indemnify them against the liability they assumed, and, if the testimony were admissible, the sureties proved that the money was not placed in their hands by McGuire, nor by any one in his behalf; and that, so far as the sureties knew, it was done without his knowledge. The superior court gave judgment for the plaintiff. The defendants thereupon removed the case to the supreme court of errors for Fairfield county. That court affirmed the judgment, and the defendants thereupon brought this writ of error.

§ 1539. *The liability of sureties not affected by the fact that they are indemnified.*

The fact that the sureties were indemnified was proper to be considered by the superior court upon an application for time to produce the body of McGuire. *Bank of Geneva v. Reynolds*, 12 Abb. Pr., 81; *Bank of Geneva v. Reynolds*, 20 How. Pr., 18. But it could have no effect upon the rights of the parties in this action, and may, therefore, be laid out of view.

§ 1540. *Sureties not discharged where the principal is unable to appear on account of his arrest in another state.*

It is the settled law of this class of cases that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law. *People v. Bartlett*, 3 Hill, 571; *Co. Litt.*, 206, a; *Bacon's Abr.*, tit. "Conditions," (2); *Viner's Abr.*, tit. "Condition" (Gc.), pl. 18, 19, and (I. c.), pl. 16; *Hurles*, Bonds, 48. Where the principal dies before the day of performance, the case is within the first category. Where the court before which the principal is bound to appear is abolished without qualification, the case is within the second. If the principal is arrested in the state where the obligation is given and sent out of the state by the governor, upon the requisition of the governor of another state, it is within the third. *State v. Allen*, 2 Humph., 258; *Devine v. State*, 5 Sneed, 626; *State*

v. Adams, 3 Head, 260. In such cases the governor acts in his official character, and represents the sovereignty of the state in giving efficacy to the constitution of the United States and the law of congress. If he refuse, there is no means of compulsion. *Commonwealth of Kentucky v. Dennison*, 24 How., 66 (§§ 3615-25, *infra*). But if he act, and the fugitive is surrendered, the state whence he is removed can no longer require his appearance before her tribunals, and all obligations which she has taken to secure that result thereupon at once, *ipso facto*, lose their binding effect. The authorities last referred to proceed upon this principle.

It is equally well settled that if the impossibility be created by the obligor or a stranger, the rights of the obligee will be in nowise affected. *People v. Bartlett*, 3 Hill, 570. And there is "a distinction between the act of the law proper and the act of the obligor, which exposes him to the control and action of the law." *United States v. Van Fossen*, 1 Dill., 409. While the former exonerates, the latter gives no immunity. It is the willing act of the obligor which creates the obstacle, and the legal effect is the same as of any other act of his, which puts performance out of his power. This applies only where the accused has been convicted and sentenced. Before judgment — *non constat* — but that he may be innocent.

Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. *Hagan v. Lucas*, 10 Pet., 400; *Taylor v. Carryl*, 20 How., 584; *Troutman's Case*, 4 Zab., 634; *Ex parte Jenkins*, 2 Am. L. Reg., 144. It is, indeed, a principle of universal jurisprudence, that where jurisdiction has attached to person or thing, it is — unless there is some provision to the contrary — exclusive in effect until it has wrought its function. Where a demand is properly made by the governor of one state upon the governor of another, the duty to surrender is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter state have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied. The duty of obedience then arises, and not before. In the case of *Troutman*, cited *supra*, the accused was imprisoned in a civil case. It was held that he ought not to be delivered up until the imprisonment had legally come to an end. It was said that the constitution and law refer to fugitives at large, in relation to whom there is no conflict of jurisdiction.

The law which renders the performance impossible, and therefore excuses failure, must be a law operative in the state where the obligation was assumed, and obligatory in its effect upon her authorities. If, after the instrument is executed, the principal is imprisoned in another state for the violation of a criminal law of that state, it will not avail to protect him or his sureties. Such is now the settled rule. *Withrow v. Commonwealth*, 1 Bush (Ky.), 17; *United States v. Van Fossen*, 1 Dill., 406; *Devine v. State*, 5 Sneed, 625; *United States v. French*, 1 Gall., 1; *Grant v. Fagan*, 4 East, 190. When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break

and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the re-arrest by the sheriff of an escaping prisoner. 3 Bl. Comm., 290; *Nicolls v. Ingersoll*, 7 Johns., 152; *Rugles v. Corry*, 3 Conn., 84, 421; *Commonwealth v. Gaoler*, 2 Yeates, 263; 8 Pick., 140; *Boardman v. Fowler*, 1 Johns. Cas., 413; *Commonwealth v. Riddle*, 1 Serg. & R., 311; *Wheeler v. Wheeler*, 7 Mass., 169. In 6 Mod., p. 231, case 339, Anon., it is said: "The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge." The rights of the bail in civil and criminal cases are the same. *Harp v. Osgood*, 2 Hill, 218. They may doubtless permit him to go beyond the limits of the state within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee. *Devine v. State*, 5 Sneed, 625; *United States v. Van Fossen*, 1 Dill., 410; *Commonwealth v. Gaoler*, 2 Yeates, 263, cited *supra*.

In the case of *Devine v. State*, 5 Sneed, 625, the court, speaking of the principal, say, "The sureties had the control of his person; they were bound at their peril to keep him within their jurisdiction, and to have his person ready to surrender when demanded. . . . In the case before us, the failure of the sureties to surrender their principal was, in the view of the law, the result of their own negligence or connivance, in suffering their principal to go beyond the jurisdiction of the court and from under their control." The other authorities cited are to the same effect.

The plaintiffs in error were not entitled to be exonerated for several reasons: When the recognizance was forfeited for the non-appearance of McGuire, the action of the governor of New York, pursuant to the requisition of the governor of Maine, had spent its force and had come to an end. McGuire was then held in custody under the law of Maine to answer to a criminal charge pending there against him. This, as already stated, cannot avail the plaintiffs in error. The shortness of the time that intervened between the arrest in New York and the imprisonment in Maine on the one hand, and the failure and forfeiture in Connecticut on the other, are entirely immaterial. Whether the time were longer or shorter — one year or one day — the legal principle involved is the same, and the legal result must be the same.

If McGuire had remained in Connecticut he would probably not have been delivered over to the authorities of Maine, and would not, therefore, have been disabled to fulfil the condition of his obligation. If the demand had been made upon the governor of Connecticut, he might properly have declined to comply until the criminal justice of his own state had been satisfied. This right, it is not to be doubted, he would have exercised. Had he failed to do so, the obligation of the recognizance would have been released. The plaintiffs in error are in fault for the departure from Connecticut, and they must take the consequences. But their fault reached further. Having permitted their principal to go to New York, it was their duty to be aware of his arrest when it occurred, and to interpose their claim to his custody. *Alguire v. Commonwealth*, 3 B. Monr., 349, 351.

We have shown that when McGuire was arrested in New York the original imprisonment, under the information in Connecticut, was continued; that the bail had a right to seize him wherever they could find him; that the prosecution in Connecticut was still pending, and that the superior court having acquired jurisdiction, it could neither be arrested nor suspended *in invitum* by

any other tribunal. Though beyond the jurisdiction of Connecticut, he was still through his bail in the hands of the law of that state, and held to answer there for the offense with which he was charged. Had the facts been made known to the executive of New York by the sureties at the proper time, it is to be presumed he would have ordered McGuire to be delivered to them and not to the authorities of Maine. The result is due, not to the constitution and law of the United States, but to their own supineness and neglect. Under the circumstances they can have no standing in court to maintain this objection.

The act of the governor of New York, in making the surrender, was not "the act of the law" within the legal meaning of those terms; but in the view of the law was the act of McGuire himself. He violated the law of Maine, and thus put in motion the machinery provided to bring him within the reach of the punishment denounced for his offense. But for this, that machinery, so far as he was concerned, would have remained dormant. To hold that the surrender was the act of the law, in the sense contended for, would be as illogical as to insist that the blow of an instrument used in the commission of a crime of violence is the act of the instrument and not of the criminal. It is true that in one case there would be a will and purpose as to the result in question, which would be wanting in the other, but there would be in both the relation of cause and effect, and that is sufficient for the purposes of the analogy. The principal in the case before us cannot be allowed to avail himself of an impossibility of performance thus created; and what will not avail him cannot avail his sureties. His contract is identical with theirs. They undertook for him what he undertook for himself.

The act of the governor of New York was the act of a stranger. It is true that the constitutional provision and the law of congress, under which the arrest and delivery were made, are obligatory upon every state and a part of the law of every state. But the duty enjoined is several and not joint; and every governor acts separately and independently for himself. There can be no joint demand and no joint neglect or refusal. In the event of refusal, the state making the demand must submit. There is no alternative. In the case of McGuire no impediment appeared to the governor of New York, and he properly yielded obedience. The governor of Connecticut, if applied to, might have rightfully postponed compliance. If advised in season he might have intervened and by a requisition have asserted the claim of Connecticut. It would then have been for the governor of New York to decide between the conflicting demands. Whatever the decision — if the proceedings were regular — it would have been conclusive. There could have been no review and no inquiry going behind it. *In re Clark*, 9 Wend., 221; *Ex parte Jenkins*, *supra*. We cannot hold that Connecticut was in any sense a party or consenting to what was done in New York. It follows that if McGuire had been held in custody in New York, at the time fixed for his appearance in Connecticut, it would not in anywise have affected the obligation of the recognizance.

A different doctrine would be fraught with mischief. It could hardly fail, by fraud and connivance, to lead frequently to abuses, involving the escape of offenders of a high grade, with pecuniary immunity to themselves and their sureties. Every violation of the criminal laws of a state is within the meaning of the constitution, and may be made the foundation of a requisition. *Commonwealth of Kentucky v. Dennison*, 24 How., 66 (§§ 3615-25, *infra*); *Certain Fugitives*, 24 Law Mag., 226. Hence the facility of escape if this instrumentality could be used to effect that object. The rule we have announced

guards against such results. The supposed analogy between a surrender under a treaty providing for extradition and the surrender here in question has been earnestly pressed upon our attention. There, the act is done by the authorities of the nation—in behalf of the nation—pursuant to a national obligation. That obligation rests alike upon the people of all the states. A national exigency might require prompt affirmative action. In making the order of surrender, all the states, through their constituted agent, the general government, are represented and concur, and it may well be said to be the act of each and all of them. Not so here.

The judgment of the supreme court of errors of Connecticut is affirmed.

JUSTICES DAVIS and HUNT did not sit in this case.

JUSTICES FIELD, CLIFFORD and MILLER dissented, holding that the sureties were discharged by the act of the law. That the term "act of the law" will embrace a proceeding authorized by any law of the United States. That "a proceeding sanctioned by such law, which renders the performance of the condition of the recognizance impossible, ought, upon plain principles of justice and according to the authorities, to release the sureties." The opinion, delivered by MR. JUSTICE FIELD, closed as follows: "It seems to me that it would be a more just rule to hold that, whenever sureties on a recognizance are rendered unable to surrender their principal, because he has been taken from their custody without their assent, in the regular execution of a law or treaty of the United States, their inability thus created should constitute for their default a good and sufficient excuse. The execution of the laws and treaties of the United States should never be allowed in the courts of the United States to work oppression to any one."

REESE v. UNITED STATES.

(9 Wallace, 13-23. 1869.)

ERROR to U. S. Circuit Court, District of California.

STATEMENT OF FACTS.—This was a proceeding against Reese upon a forfeited bail bond, upon which he was surety, for the appearance of one Limantour to answer to two indictments against him in the federal court at San Francisco, California. The recognizance was conditioned for the appearance of Limantour at the next regular term of the circuit court, and any subsequent term to be thereafter held in San Francisco. The cases in which the recognizance was given were, without the consent of the sureties, continued, on motion on the part of the government, to await the termination of certain civil suits. After the continuance, Limantour, with his witnesses, went to Mexico and never returned. The civil cases being determined, the criminal cases were set for trial, and Limantour not appearing the bond was forfeited. By stipulation of the parties the action on the bond was tried without a jury, and judgment was entered against the defendant.

Opinion by MR. JUSTICE FIELD.

As a defense to this action the defendant relied in the circuit court upon several grounds, the principal of which were these: First. That the acts charged in the two indictments did not, at the time of their alleged commission, constitute any offense under the laws of the United States; and, as a consequence, that the indictments and all proceedings thereunder, including the requiring of

bail for the appearance of the party indicted, were void. Second. That if the indictments and proceedings thereunder were not void, the stipulation of August, 1857, for a postponement of the trials, released the sureties from liability on their recognizance; and Third. That the recognizance was void in embracing the amount required as bail upon both indictments.

The third ground here stated is not pressed in this court. The other two grounds are substantially the same which are urged here, differing only in their form of statement. Upon the first of these we express no opinion. Upon the second we are of opinion that the circuit court erred, and for reasons which may be briefly stated.

§ 1541. *A condition in a recognizance providing for the appearance of the defendant "at the next regular term, and at any subsequent term," means an appearance at the next regular term, and such subsequent term as might follow in regular succession.*

The condition of the recognizance provided for the personal appearance of Limantour at the then next regular term of the circuit court in San Francisco, and also at any subsequent term to be thereafter held in that city. It has been suggested that the provision for the appearance of the party at any term subsequent to that succeeding his arrest is unusual and invalid, but we do not pass upon the suggestion, and for the purposes of this case we shall treat the recognizance as unobjectionable in form. At the next regular term after its execution the party personally appeared with his witnesses and pressed the trial of the indictments. The first portion of the condition of the recognizance was thus complied with. The provision for his appearance at any subsequent term had reference to such subsequent term as might follow in regular succession in the course of business of the court. It was inserted to obviate the necessity of renewing the bail every time the cases were, from any cause, continued from one term to another. It was not intended to apply to any distant future term to which either party might be disposed to postpone the trials without reference to any intervening term. The principal and sureties, by their recognizance, covenanted with the United States that the principal should appear before the court and answer all such matters as might be objected against him at the next term, and from term to term until the cases were disposed of; not that he should appear at the next term, and then at a term years later, depending for its designation upon the happening of a contingent event.

§ 1542. — *and an agreement with an accused for a postponement of his case for a period of uncertain duration will release the surety, if made without his knowledge or consent.*

The stipulation in this case was for a postponement of the trial of the criminal actions for a period of uncertain duration, until final decrees should be rendered by the district court of the United States in certain cases pending on appeal from the board of commissioners created under the act of March 3, 1851, to ascertain and settle private land claims in the state of California. Cases on appeal from that board were not heard upon the record transmitted to the court, and therefore were not subject to be disposed of whenever they could be argued. They were tried anew upon the testimony and proceedings had before the board and such further testimony as might be produced by the parties in the district court. *United States v. Ritchie*, 17 How., 533; *Grisar v. McDowell*, 6 Wall., 375. The proceedings in the court advanced slowly when new testimony was produced, as it was required to be taken in writing and by question and answer. Independent of this circumstance it was difficult to an-

ticipate the period which any case, meeting with opposition and seriously contested, would occupy. The difficulty of determining in advance the duration of litigated proceedings, which exists in all cases, was increased with respect to Mexican land cases, appealed from the board to the district court of the United States, by a variety of causes; among others, from the manner in which the testimony was taken, as already stated; the necessity of looking into the archives of the former department of California, and sometimes of the supreme government at the city of Mexico, of examining Mexican witnesses, ignorant of our language, and of interpreting Mexican and Spanish usages, ordinances and laws. In the cases of the city of San Francisco and of the city of Sonoma (3 Wall., 684) the appeals were pending in the district court for over eight years. These cases of Limantour involved lands in the city of San Francisco and adjoining it, covered with buildings and expensive and permanent improvements, which were of the value of many millions. His claims were, for this reason, as well as their supposed fraudulent character, vigorously contested, not only by the United States, but by citizens of San Francisco, acting in concert with the district attorney. A final disposition of them until after the lapse of many months, and perhaps of several years, could not, therefore, have been reasonably anticipated.

The stipulation to postpone the trials until after such final disposition was inconsistent with the condition of the recognizance. It released Limantour from the obligation of appearing at any subsequent term following the then next term in regular succession. It substituted for it an agreement that he need not appear at any such subsequent term, but only at such term as might be held after the happening of an uncertain and contingent event. The stipulation, in other words, superseded the condition of the recognizance. This will readily appear if we consider the condition which, subsequent to that stipulation, must have been exacted in a new recognizance, if the sureties on the present recognizance had surrendered their principal. It could not have been for the appearance of the defendant at the next regular term thereafter, or any succeeding term, for such a condition would have been inconsistent with the stipulation. It could only have been for his appearance at such term as might be designated by the district attorney or the circuit court, after the final decrees were rendered by the district court in certain land cases pending therein on appeal from the board of land commissioners; provided always that such decrees were against the claimant; and provided further, that the term designated allowed reasonable time to the defendant to prepare for trial, and to procure the attendance of witnesses residing out of the state. It requires no argument to show that a condition like this would be a very different one from that embodied in the existing recognizance.

If, now, we apply the ordinary and settled doctrine which controls the liabilities of sureties, it must follow that the sureties on the recognizance in suit are discharged. The stipulation, made without their consent or knowledge, between the principal and the government, has changed the character of his obligation; it has released him from the obligation with which they covenanted he should comply, and substituted another in its place.

§ 1543. *Liability of sureties generally.*

It is true, the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts. The former can at any time discharge themselves from liability by surrendering their principal, and they are discharged by his death. The latter can only

be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking.

§ 1544. *Power of sureties to arrest principal.*

There is also another view of the stipulation which leads to the same result. By the recognizance the principal is, in the theory of the law, committed to the custody of the sureties as to jailors of his own choosing, not that he is, in point of fact, in this country at least, subjected, or can be subjected by them to constant imprisonment; but he is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, and, to the extent necessary to accomplish this, may restrain him of his liberty. This power of arrest can only be exercised within the territory of the United States; and there is an implied covenant on the part of the principal with his sureties, when he is admitted to bail, that he will not depart out of this territory without their assent. There is also an implied covenant on the part of the government, when the recognizance of bail is accepted, that it will not in any way interfere with this covenant between them, or impair its obligation, or take any proceedings with the principal which will increase the risks of the sureties or affect their remedy against him.

§ 1545. *A stipulation made by the government, with the distinct understanding that the defendant in a criminal case may leave the territory of the United States, releases the surety.*

The stipulation in this case was made with the distinct understanding of the parties, that upon its execution Limantour and his witnesses would return to Mexico, and would remain there until the civil cases in the district court were finally disposed of, and that he should afterwards have time allowed him to obtain his witnesses and return to this country with them. The government thus consented that Limantour might depart out of the territory of the United States to a foreign country, where it would be impossible for the bail to exercise their right to arrest and surrender him; and further, it consented that he might remain abroad for a period of indefinite duration. This was all done without the concurrence or even knowledge of the sureties, whose risks were thus greatly increased.

It would be against all principle and all justice to allow the government to recover against the sureties for not producing their principal, when it had itself consented to his placing himself beyond their reach and control. *Rathbone v. Warren*, 10 Johns., 587, 589; *Niblo v. Clark*, 3 Wend., 24, 27; *S. C. on error*, 6 Wend., 236, 245; *Bowmaker v. Moore*, 7 Price, 223, 231, 234; *S. C.*, 3 Price, 214. Judgment reversed and the cause remanded for a new trial. (a)

§ 1546. **Right to bail.**—Where a person guilty of contempt of a federal court absconds from the district in which the offense is committed, he must be arrested and imprisoned, if not bailed, before a warrant can issue for his removal to the proper district for trial. The accused has the right to be admitted to bail if satisfactory bail is offered. *United States v. Jacobi*, 1 Flip., 118.

§ 1547. A person who has been committed for felony, and admitted to bail, and has forfeited his recognizance, is no more entitled to be bailed than one who has broken prison, unless the presumption of his guilt arising from his default is satisfactorily explained away. *Territory v. Mullin*,* 3 N. Y. Leg. Obs., 210.

§ 1548. The accused, being charged in three indictments, was admitted to bail upon condition to appear in court to answer any charge, and not to depart without leave. He was present at the trial of one of these indictments, but disappeared during the trial, when the jury were returning with their verdict, and not answering on being called, his recognizance was forfeited. A verdict of guilty was returned, and the defendant was afterward taken into custody on a bench warrant. He was then brought into court and sentenced to pay a fine and be imprisoned. The president remitted the imprisonment on condition that the fine should be paid, which condition was complied with. There was nothing in this pardon to affect the prosecution of the two untried indictments. By order of commitment from the court he was taken into custody under these untried indictments, the marshal receiving him from the penitentiary. The prisoner's counsel moved to enter bail, and at the suggestion of the court that the question might be more fully developed upon a writ of *habeas corpus*, the writ was issued, and the prisoner brought before the court. On the hearing of the writ, it was held that the prisoner might avail himself of bail as often as occasion might occur without his own inexcusable fault, but that after an unexcused and unatoned, wilful breach of the essential condition of the privilege of liberation upon bail, the privilege does not continue to exist; nor is a renewal of the privilege then demandable of right. The prisoner was considered to have forfeited his privilege of liberation upon bail, independently of any question of contempt. It being apparent from the prisoner's former flight that he might probably again abscond if bail were granted, he was held not entitled to the renewal of his privilege to be bailed as of *grace* or in the exercise of regulated judicial discretion. The forfeiture of this privilege was held, however, not to affect the prisoner's right to a speedy trial, and the detention having been prolonged during two terms, during which indictments might have been found for other accusations against the prisoner, and there being no probability of a trial at the next session of the court, the defendant was admitted to bail, his former breach being considered in fixing the amount and determining the sufficiency of the sureties. *Case of Lee*,* 6 Phil., 96.

§ 1549. The court of appeals or the judges of the superior courts of the territory of Florida may, in the exercise of sound discretion and for good cause, let to bail prisoners charged with capital offenses, either before or after indictment. But this discretion should be regulated by settled and established rules and adjudications. After indictment found this discretion ought not to be exercised except in extraordinary circumstances and for most potent reasons. *Territory v. Mullin*,* 3 N. Y. Leg. Obs., 210.

§ 1550. Under the organic law of the territory of Florida of 1813, securing the right to bail in all cases, except capital offenses, where the "proof is evident" or the "presumption great," the court will not, upon an application for bail, after examination and commitment, followed by indictment, for a capital offense, examine the proof and take testimony, with a view to that point. *Ibid.*

§ 1551. It is no ground for bailing a prisoner that a continuance was granted at the motion of the district attorney on account of the absence of material witnesses, which motion was not supported by affidavit, when the reasons given for the continuance were satisfactory to the court. *United States v. Jones*,* 3 Wash., 224.

§ 1552. The law favors the liberation of a prisoner on bail when confinement is injurious to his health. It is not necessary that the danger which may arise from the confinement should be either immediate or certain. If, in the opinion of a skilful physician, the nature of his disorder is such that confinement must be injurious and may be fatal, the prisoner ought to be bailed. *Ibid.*

§ 1553. A prisoner charged with high treason and committed on warrant of the district judge, brought before the court on *habeas corpus* and admitted to bail. *United States v. Hamilton*,* 3 Dal., 17.

§ 1554. **Requisites of bond.**—To avoid rendering a recognizance to appear before the examining magistrate an anomaly in judicial proceedings, as close an analogy between such a recognizance and the common one to appear at the court to which it is returned should be observed as the nature of the case will admit. The material parts of the obligation, and of the condition, should be set forth in the body of it, so as to admit of extension, consistently

with the terms of it; and the proceedings to establish and recover for a breach of the condition should be substantially the same as if it had been a recognizance in common form, to appear before the court where the trial is to be had. *Dillingham v. United States*, 2 Wash., 422.

§ 1555. A recognizance was executed by defendant and another person, before a justice of the peace, for the appearance of the defendant before a United States court to answer to a charge of stealing from the mail. Three days after the signing and acknowledgment one H. appeared and signed the recognizance, the justice adding a memorandum as to the signing and acknowledgment. The name of H. was not inserted in the bond. *Held*, that H. was not liable jointly with the other parties. *United States v. Pickett*,* 1 Bond, 123.

§ 1556. It seems that it would have been competent, and proper, for the justice to have taken a separate recognizance from H. *Ibid*.

§ 1557. It seems, also, that an acknowledgment, without the signatures of the parties, with the certificate of the justice, is all that is required to make a valid recognizance under the laws of the United States. *Ibid*.

§ 1558. Whether taken by competent court and pursuant to law.—In an action on a recognizance it seems that it is sufficient that the papers filed in the principal case or proceeding, and the entries of record therein, show that the recognizance is one taken by a competent court or officer in a proceeding properly commenced, and within the jurisdiction of the tribunal or magistrate taking the obligation. *United States v. George*,* 3 Dill., 431.

§ 1559. Recognizances taken for the appearance of the accused in criminal cases are valid only when taken in pursuance of law and the order of a competent court or officer. *United States v. Goldstein*,* 1 Dill., 413; *United States v. Horton*,* 2 Dill., 94.

§ 1560. Bonds and recognizances for the appearance, of a person charged with a crime, before the court at the next succeeding term are binding only when taken in pursuance of law and the order of a competent officer or court. So where a commissioner ordered a person charged with two offenses to give bonds in each, in distinct amounts, to appear at the next term of court, one bond, in the aggregate amount, will be invalid and confers no obligation on the sureties. *United States v. Goldstein*,* 1 Dill., 418.

§ 1561. Describing the offense.—A recognizance provided that the defendant should appear at a time and place to answer for "unlawfully, falsely and deceitfully uttering and publishing, as true, certain false, forged and counterfeited writings for the purpose of defrauding the United States," but did not describe the writings. *Held*, that as the intent was the gravamen of the offense, the offense was sufficiently described. *United States v. George*,* 3 Dill., 431.

§ 1562. A recognizance need not be as certain as an indictment; it is sufficient if it sets out an act punishable by the statute, without any of the particulars. *United States v. Dennis*,* 1 Bond, 104.

§ 1563. A recognizance is sufficient which describes the offense as "stealing from the mail of the United States, contrary to the statute," etc. *Ibid*.

§ 1564. There is no statute of the United States which punishes a conspiracy to burn a steamboat on the Mississippi river, and a recognizance to answer such a charge is void. *United States v. Hand*,* 6 McL., 274.

§ 1565. Amount of bail.—Where an indictment does not describe an indictable offense, the justice of the peace who takes bail in the case has a discretion as to the amount of the bail, and no corrupt motive can be imputed to him from the smallness of the bail taken. *United States v. Smith*, 4 Cr. C. C., 727.

§ 1566. Upon the indictment of a justice of the peace for taking insufficient bail, the act of taking the bail not being illegal, the court refused to admit evidence of a corrupt motive. *Ibid*.

§ 1567. Taken before a commissioner.—A recognizance taken before a court commissioner need not show on its face that the commissioner had authority or jurisdiction to take it; or that the offense was committed within the district; or the time when it was committed. *United States v. George*,* 3 Dill., 431. See §§ 1509, 1510.

§ 1568. The power of a United States commissioner to take bail does not cease on the commitment of an offender pending an order for his removal to the district in which the offense in question was committed, and especially at any time before the warrant for removal is issued. *United States v. Volz*,* 14 Blatch., 15.

§ 1569. Arrest after forfeiture.—An accused may be arrested to answer the indictment against him, after he has given a recognizance of bail, and forfeited the same by not appearing. The recognizance is taken to secure the due attendance of the accused to answer the indictment, to submit to trial and the judgment of the court. It is not designed as a satisfaction of the offense, when it is forfeited and paid. *Ex parte Milburn*,* 9 Pet., 704. *Contra*, *United States v. Milburn*,* 4 Cr. C. C., 553.

§ 1570. A justice of the peace of the state of North Carolina has the power in preliminary hearings to take bail for the appearance of an accused before him at a future day. United States commissioners in that state as examining and committing magistrates may, under section 1014, Revised Statutes, exercise the same power in enforcing the criminal laws of the United States. *United States v. Harden*, 4 Hughes, 455; 10 Fed. R., 802 (§§ 2700-2707).

§ 1571. President cannot take bail.—The question of bail is a judicial one, not executive. Therefore, the president of the United States cannot admit to bail a person imprisoned for an offense against the United States. *In re Pease*,* 1 Op. Att'y Gen'l, 213.

§ 1572. Forfeiture.—To save his recognizance, even in case of a misdemeanor, the defendant must appear personally. *United States v. Mayo*,* 1 Curt., 433. See §§ 1514, 1517.

§ 1573. A defendant in a criminal case is liable to be called on his recognizance either on motion of the district attorney, or by the order of the court, on its own motion, if it sees fit to direct it. *Ibid.*

§ 1574. It is essential to the breach of the condition of a recognizance, upon which the forfeiture is to arise, that the party who is to appear should be solemnly called before his default is entered; and in an action thereon, it should be clearly proven that the party was called and warned, and neglected to appear. *Dillingham v. United States*, 2 Wash., 422.

§ 1575. The defendant, in a case of misdemeanor, recognized to appear, must appear on the first day of the term to which the writ is returnable. *United States v. Hodgkin*, 1 Cr. C. C., 510.

§ 1576. Forfeiture—Death of principal.—After the forfeiture of a recognizance a *scire facias* was issued, but before the service the principal died. The surety appeared and asked to be discharged, but the court ordered a *scire facias* to issue to bring in the representative of the deceased principal, returnable at the next term, and reserved till then the question whether to remit or modify the forfeiture in accordance with section 1020 of the Revised Statutes. *United States v. Winstead*,* 4 Hughes, 464.

§ 1577. The death of the principal in a recognizance after default and forfeiture does not release his sureties. *United States v. Van Fossen*,* 1 Dill., 406.

§ 1578. Relief of bail.—The act of February 28, 1839, authorizing the courts to relieve bail in certain cases, seems to contemplate a case where there has been no collusion with the principal, no aid extended to him to escape, and no effort made to defeat the ends of justice. *United States v. Duncan*,* 2 Pittsb. R., 328.

§ 1579. The courts exercised the power to relieve bail under the common law, and acts of parliament on the subject were regarded as merely in affirmance of the common law. *Ibid.*

§ 1580. The power may be exercised by the federal courts after judgment. *Ibid.*

§ 1581. Setting aside forfeiture.—Whether a party is entitled to have the penalty remitted upon a forfeited recognizance, on the ground that at the time the forfeiture accrued he was in custody of the officers of a state under a warrant out of a state court, should be determined in an action on the bond rather than on a motion to remit such penalty. *United States v. Stricker*,* 12 Blatch., 389.

§ 1582. An application to set aside a forfeiture of a recognizance on the ground of irregularities as to the time and place of calling the principal and of entering the forfeiture will not be entertained when it appears that he has absconded and is a fugitive from justice. *United States v. Stein*,* 13 Blatch., 127.

§ 1583. A person indicted for smuggling, having forfeited his recognizance, made application to the court to have the forfeiture set aside. It appeared that he had, subsequently to the forfeiture, appeared before the court, and that the jury by which he was tried failed to agree, and a *nolle prosequi* had been entered. It appearing to the court that the defendant was guilty of assisting in the smuggling, the application was refused. *United States v. Mercer*,* Deady, 502.

§ 1584. Where a defendant who has recognized to appear for trial at a certain time makes default, and he shows by way of excuse that he was taken sick before the time of trial at a distant place in which he was compelled by no necessity to be, and it appears that he could not have reached the place of trial in time had he started the day he was taken sick, it seems that his default must be held to be wilful. *Ibid.*

§ 1585. After the term at which a recognizance has been forfeited, in a criminal case, the court has no power to remit the forfeiture. *United States v. Cookendorfer*, 5 Cr. C. C., 113.

§ 1586. The object of a recognizance is not to enrich the treasury but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty. If the accused has, under circumstances which show that there was no design to evade justice, forfeited his recognizance, but repairs the fault as much as it is in his power, by appearing at the succeeding term and submitting himself to the law, the real intention of the recognizance is effected, and no injury is done. In such a case, all proceedings on the recognizance may be stayed, until it shall appear whether the accused shall continue to sub-

mit himself to the law, or shall attempt to evade the justice of the nation. *United States v. Feely*,* 1 Marsh., 256.

§ 1587. Where, during the trial for a misdemeanor, the defendant, being on bail, left the court without leave, and the trial proceeded, and he was acquitted, the court directed the default and estreat to be set aside, under the authority of the act of February 23, 1839, providing that in case of the forfeiture of a recognizance in a criminal case, the court shall have authority, in its discretion, to remit the whole or a part of the penalty, whenever it shall appear that there has been no wilful default of the parties, and that a trial can, notwithstanding, be had in the case, and that public justice does not otherwise require the same penalty to be exacted. *United States v. Santos*,* 5 Blatch., 104.

§ 1588. A recognizance is a contract between the cognizors and the government of the United States that, if the latter would release the principal cognizor from custody, the former would undertake that he should personally appear at the specified time and place, to answer the indictment. The condition of the recognizance is broken by his failure to appear; and the parties to it become absolute debtors to the United States for the amount of the penalty, and must be held liable to pay the same, unless they can show some matter legally sufficient to excuse the failure. *United States v. Van Fossen*,* 1 Dill., 406.

§ 1589. A person arrested in Kansas for robbing the mails gave bail to appear and answer in a federal court. Pending the trial he went into Missouri, where he had committed a felony, for which he was condemned and imprisoned. It was alleged that the felony was prior to the date of the recognizance. *Held*, that his sureties were not exonerated, either on the ground that the inability of the defendant was caused by the act of the obligee or of the law, because his failure to appear was brought about by his own act. *Ibid*. See § 1522.

§ 1590. To answer any indictment that might be found.—The circuit court having certified a division of opinion on the question raised by a motion to quash an indictment, in order that the question might be passed upon by the supreme court, the prisoner was required to give a moderate bond to answer any indictment that might be found against him at the next term of the district court. *United States v. Petit*,* 11 Fed. R., 58.

§ 1591. After a bill of indictment has been found against the prisoner, the court will not inquire into the evidence for the purpose of taking bail. *United States v. Jones*,* 3 Wash., 224.

§ 1592. Effect of vacating judgment of conviction.—Where the court sets aside a judgment of conviction, at the same term at which it was rendered, the indictment remains, and the recognizance of the defendant and his sureties to appear and answer to it is valid. *Basset v. United States*,* 9 Wall., 38.

§ 1593. Trial — *Nul tiel record*.—Upon a plea of *nul tiel record* to a suit on a recognizance, denying the recognizance and the pendency of the indictment at the time the recognizance was taken, the trial is to be by the court if its own record is denied, and by a jury if the record of another court is denied. *Ibid*.

§ 1594. Quashing indictment.—A recognizance in the usual form, to appear on a certain day, and from day to day, to answer to a certain indictment, and not to depart without leave of court, is not discharged by the quashing of the indictment. *United States v. White*,* 5 Cr. C. C., 368.

§ 1595. If a recognizance is not binding on the principal it is not binding on the surety. *United States v. Hand*,* 6 McL., 274.

§ 1596. Power to demand bail.—Congress having made provisions in regard to bail in civil cases, the marshal has no right to require bail in an action of debt at the instance of the United States in the circuit court, for the recovery of a penalty under an act of congress. *United States v. Mundel*,* 6 Call (Va.), 245.

§ 1597. The power to demand bail must depend on some precise law, and power to direct the practice of the court cannot be extended to include the power to require bail. *Ibid*.

XXII. JURISDICTION.

[See §§ 14-22, 22, 374, 375, 519, 520, 523.]

SUMMARY — *Passing counterfeit national bank-bills*, § 1598.—*Indian reservations in a state*,

§§ 1599, 1608.—*Extent of state jurisdiction*, § 1600.—*Places within the exclusive jurisdiction of the United States*, §§ 1601-1605, 1607.—*Crimes committed in forts within a state*, § 1606.—*Power of congress, how limited*, § 1607.—*Plundering a wreck*, § 1609.—*Man-slaughter on a river in a foreign state*, § 1610.—*Robbery on and running away with a vessel belonging to foreigners*, § 1611.—*Meaning of the term high seas*, § 1612.

§ 1598. The exclusive cognizance of the offense of passing counterfeit national bank-bills is in the federal courts, and the state courts have no jurisdiction to punish the offense. *Ex parte Houghton*, §§ 1613-14.

§ 1599. The act admitting Colorado into the Union did not reserve to the United States courts jurisdiction of an indictment for murder committed within the Ute reservation. *United States v. McBratney*, § 1615.

§ 1600. The criminal jurisdiction of a state is co-extensive with its boundaries, and embraces bays, rivers and such portions of water as are inclosed by land, the jurisdiction of such places not being divested by that clause of the constitution conferring admiralty and maritime jurisdiction on the federal courts. *United States v. Bevans*, §§ 1616-19.

§ 1601. A ship of war is not a "place" within the exclusive jurisdiction of the United States, under the eighth section of the crimes act of April 30, 1790, so that the crime of murder committed thereon is within the jurisdiction of the federal courts. *Ibid*.

§ 1602. The places over which exclusive jurisdiction is granted to the United States, by the constitution, are those which have been purchased by the United States for some of the purposes specified in the constitution, and the grant of power does not extend to a place or tract of land rented temporarily to the government for a camp. *United States v. Tierney*, § 1620.

§ 1603. To sustain an indictment under the sixteenth section of the act of April 30, 1790, punishing larceny when committed "within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas," the jurisdiction of the United States over the places referred to in the statute must be sole and exclusive. The averment in an indictment under this statute, that the place of the commission of the crime was a tract within the limits of Camp Hurtt, a military camp of the United States, does not withdraw it from the jurisdiction of the state. *Ibid*.

§ 1604. An indictment charging the offense to have been committed "in the marine hospital at Chelsea, Massachusetts, a building belonging to the United States, the site whereof has been ceded to the United States by the state of Massachusetts," does not bring the case within the crimes act of 1790, ch. 36, § 16, providing "that if any person, within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with intent to steal or purloin the personal goods of another," he shall be liable to a certain punishment. *United States v. Davis*, §§ 1621-23.

§ 1605. The act of 1825, declaring "that if any offense shall be committed in any of the places aforesaid (that is, forts, dock-yards, etc., or the site of any other needful buildings), the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon conviction in any court of the United States, etc., be liable to and receive the same punishment as the laws of the state in which such fort, etc., is situate, provide for the like offense," etc., authorizes the punishment of larceny committed in the marine hospital at Chelsea, Massachusetts, it being a needful building of the United States, and not within the sole and exclusive jurisdiction of the United States so as to be punishable by section 16 of the crimes act of 1790, ch. 36. *Ibid*.

§ 1606. A state court has exclusive jurisdiction over crimes committed within a fort erected by the United States while it owned the land, and before the admission of the state, in all cases in which the state has not ceded such jurisdiction to the United States. *United States v. Stahl*, § 1624.

§ 1607. The authority of congress to provide for the punishment of crime is limited to such subjects and circumstances as are peculiar to the federal government; as, for instance, over a crime committed in some place over which the national government has sole and exclusive jurisdiction. *United States v. Ward*, §§ 1625-27.

§ 1608. The act of congress of June 30, 1834 (4 Stat. at L., 729), conferred upon the federal courts jurisdiction over crimes committed in certain territory which included an Indian reservation. A state was afterwards admitted which in its territorial boundaries embraced the reservation. The act admitting the state admitted it on the same footing as the other states, and provided that its jurisdiction should extend over all Indian reservations not placed under federal jurisdiction by treaty stipulations. *Held*, that as the reservation in question was not so protected by treaty, the law of 1834 was not in force as to it, and that the United States had no jurisdiction over a crime committed therein. *Ibid*.

§ 1609. Under the ninth section of the act of 1825, declaring it to be a felony "if any person shall plunder, steal or destroy any money, goods, merchandise or other effects from or belonging to any ship or vessel, or boat or raft, which shall be in distress, or which shall be wrecked, lost, stranded or cast away upon the sea, or upon any reef, shoal, bank or rocks of the sea, or in any place within the admiralty or maritime jurisdiction of the United States," the locality is attached to the ship or vessel, and not to the property plundered, stolen or destroyed. The act prohibits plundering, stealing or destroying such property, whether the act be done on shore, or in any of the enumerated places below high-water mark. The plundering, stealing or destroying need not be from any ship or vessel. It is sufficient if the property belongs to any such ship or vessel. The theft, plunder or destruction of such property, above high-

water mark, upon Rockaway Beach, on the coast of the state of New York, is therefore within the jurisdiction of the circuit court of the United States. *United States v. Coombs*, §§ 1628-32.

§ 1610. The crime of manslaughter committed upon a river within the dominion of a foreign sovereign is not within the cognizance of the courts of the United States under the crimes act of April 30, 1790. *United States v. Wiltberger*, §§ 1633-36.

§ 1611. The courts of the United States have no jurisdiction, under the acts of congress of April 30, 1790, and May 15, 1820, to punish the offenses of robbery, and of running away with a vessel, when committed by any person, whether citizen of the United States or not, on board of a foreign vessel owned exclusively by French subjects and sailing under the French flag. And this, notwithstanding the crimes are committed within a marine league of the coast of the United States. *United States v. Kessler*, §§ 1637-39.

§ 1612. The act of 1825, ch. 276, § 22, declares "that if any person or persons upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, on board of any vessel, etc., etc., shall, with a dangerous weapon, or with intent to kill, etc., commit an assault upon another, such person shall, on conviction thereof, be punished," etc. The term "high seas," in this section, is used in contradistinction to arms of the sea, and bays, creeks, etc., within the narrow headlands of the coast, and comprehends only the open ocean, which washes the seacoast, or is not included within the body of any county in any particular state. Such parts of rivers, arms and creeks, etc., are deemed to be within the bodies of counties where a man standing on the one side may see what is done on the other. It is held, therefore, that the circuit court has no jurisdiction of the offense punished by this statute when committed on board of a vessel lying at anchor between Lovell's Island, George's Island and Gallop's Island, the place being within the body of the county of Suffolk, Massachusetts. *United States v. Grush*, §§ 1640-41.

[NOTES.—See §§ 1642-1753.]

EX PARTE HOUGHTON.

(District Court for Vermont: 7 Federal Reporter, 657-665; 8 Federal Reporter, 897. 1881.)

Opinion by WHEELER, D. J.

STATEMENT OF FACTS.—This is a motion by the relator for a discharge, on *habeas corpus*, from imprisonment in a prison of the state, under sentence of a court of the state for passing counterfeited national bank-bills, on the ground that the state court had no jurisdiction over this offense, and that the imprisonment is contrary to the constitution and laws of the United States.

The constitution of the United States provides: "Article VI. This constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Under this provision the limits of power between the United States and the several states are to be sought for in that constitution and the laws of congress which have been made pursuant to it. It provides, article 1, section 8: "The congress shall have power . . . to coin money, regulate the value thereof, and of foreign coin; . . . to provide for the punishment of counterfeiting the securities and current coin of the United States." This provision extends to passing counterfeited coin and securities, as well as to counterfeiting them. *United States v. Marigold*, 9 How., 570. It also provides, article 3, § 2, that "the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, . . . and fifth amendment; . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." It is well established that congress may exclude the jurisdiction of the courts of the states from offenses within the power of congress to punish. *Houston v. Moore*, 5 Wheat., 1 (Const., §§ 161-190); *The Moses Taylor*, 4 Wall., 411; *Martin v. Hunter*, 1 Wheat., 304; *Com. v. Fuller*, 8 Metc. (Mass.), 313; 1 Kent, Com., 399.

§ 1613. *A state court has no jurisdiction of the crime of counterfeiting national bank-notes. Cases cited. Construction of statutes.*

National banks are organized under the laws of the United States; their bills are issued to them by the treasury department of the United States, secured by bonds of the United States on deposit there, which fact is to be expressed on their face by the signatures of the treasurer and register, and the seal of the treasury of the United States. R. S., § 5172. They are securities of the United States which congress has power to protect by punishing counterfeiting them, and the passing of counterfeits of them, and are so declared to be in the laws of the United States. R. S., § 5413. Whether the state court had jurisdiction over this offense or not depends upon whether congress has excluded that jurisdiction or left it to those courts under the laws of the states.

The judiciary act of 1789 provided, section 11: "That the circuit courts shall have . . . exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct. . . ." 1 St. at Large, 78.

By the act of April 21, 1806, provision was made for punishing counterfeiting of the coin of the United States, and by that of February 24, 1807, for that of forging notes of the Bank of the United States, and by that of March 3, 1825, for that of forging certificates of public stocks or other securities of the United States, counterfeiting coin of the United States and other countries, and passing counterfeit coin. Section 26 of the act of 1825 provided, as similar sections in each of the other acts had done, that nothing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states over offenses made punishable by this act. 4 Stat. at Large, 122. This provision expressly left to the states jurisdiction of the particular offenses mentioned in those acts, the same as if congress had never exercised its power to punish them.

A person was convicted under a statute of Ohio for passing counterfeit coin, and the conviction was upheld as not being contrary to the laws of the United States. *Fox v. State of Ohio*, 5 How., 410 (Const., §§ 496-500). So under a statute of Vermont (*State v. Randall*, 1 Aik., 89) and a statute of Massachusetts (*Com. v. Fuller*, 8 Metc., 313). But upon demurrer to an indictment under the laws of New Hampshire for punishing perjury generally for perjury committed in proceedings under the bankrupt act of 1841, it was held that the state court had no jurisdiction over that offense. *State v. Pike*, 15 N. H., 83. In *Moore v. Illinois*, 14 How., 13, the respondent was convicted of harboring and secreting a negro slave contrary to a statute of Illinois. It was argued that the state court had no jurisdiction, because the laws of the United States provided for punishing obstructing the owner of a negro slave in endeavoring to reclaim him, and concealing the fugitive after notice; but the jurisdiction of the state was maintained on the ground that the offenses were different. The supreme court of Massachusetts took jurisdiction of an embezzlement of a private special deposit in a national bank by an employee of the bank, on the ground that congress had not provided for that particular offense. *Com. v. Tenny*, 97 Mass., 50. The national bank acts were passed in 1863 and 1864, and provision was made for the punishment of counterfeiting their bills and passing the counterfeits, but there was no reservation to the state in making these provisions. Without such reservation, the states had no power left to them to supplement the acts of congress by legislation covering the same

ground. *Sturges v. Crowninshield*, 4 Wheat., 122 (CONST., §§ 1937-39); *Prigg v. Pennsylvania*, 16 Pet., 539.

The statute of Vermont under which the relator was indicted and is imprisoned was passed in 1869. At that time, and until the adoption of the Revised Statutes of the United States, June 22, 1874, there was nothing giving up to the states the jurisdiction which congress had taken over this offense or any part of it. The Revised Statutes contain a title of "Crimes," in which the provisions for punishing counterfeiting national bank-bills are placed. It also has this general provision: "Section 5328. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

The provisions of the judiciary act relating to the criminal jurisdiction of the circuit court are brought into section 629, twentieth, with the qualification of exclusive cognizance changed to "except where it is, or may be, otherwise provided by law." If these provisions were all, it might be said that congress had expressly withdrawn the jurisdiction before taken of offenses mentioned in the title of "Crimes," so far as the states might choose to exercise similar jurisdiction through their courts. But chapter 12 of the title on "Judiciary," entitled "Provisions common to more than one court or judge," was placed in the revision and enacted as a part of the Revised Statutes. It commences with section 711: "The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states: *First*, of all crimes and offenses cognizable under the authority of the United States."

This provision was not in the statutes of the United States anywhere before. It was framed *ex industria*, and placed there for some purpose. It is not merely the provision of the judiciary act relating to the jurisdiction of the circuit courts brought forward and placed here, as well as in the chapter relating to those courts, to express the same thing again in another connection; but it is a different thing. That provision made the jurisdiction of the circuit courts exclusive of all other courts, federal as well as state, except as otherwise provided. This applies to all the courts of the United States, and expressly excludes, and seems to be made expressly to exclude, the jurisdiction of the courts of the states. Both provisions are necessary to place the jurisdiction in these cases where it is reposed, among the federal courts, and exclude that of the state courts, and the latter would be unnecessary if that of the state courts was not to be excluded.

The language of the section quoted from the title on "Crimes" does not save the jurisdiction of the courts of the states over the offenses made punishable by that title, as section 26 of the act of 1825 saved it over offenses made punishable by that act. It says nothing about offenses, as such, to express or specify its application. There are many offenses made punishable by that title—some of them such as never could be offenses against the laws of any of the states; some, such as the obstructing the executive officers in the performance of their duties, and the service of the processes of the courts of the United States, where the same act might constitute one offense against the laws of the United States, and another different offense against the laws of the states. This section of the title is general, and might be applicable to all these if taken in its broadest sense. It might be, or be claimed to be, that making any act punishable under the laws of congress would prevent the states from punishing a different offense involved in the same act. An assault upon a marshal,

to obstruct his service of process, would be punishable under this title for the obstruction, but not for the assault; the assault might be punishable under the state laws, but not the obstruction. The title makes certain offenses against the laws of the United States punishable. This section seems to mean that making them so punishable shall not prevent the states from taking hold of any offenses which may be involved that are contrary to the state laws, and not cognizable under the United States laws, and punishing them. And, taken in connection with the section making the jurisdiction of the United States courts over offenses cognizable under authority of the United States wholly exclusive of the state courts, it must mean this. Such construction leaves all the sections standing operative, while the other would leave the one declaring the jurisdiction exclusive inoperative. The section on "Crimes" is later than the other in the order of the statutes, and might be said to be controlling for that reason; but that ground of inference is expressly removed by the statutes themselves, which provide that no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed. Section 5600.

The act of passing these counterfeited bills, made punishable under the statute of the state upon which the relator was indicted, might, and often would, concur with others to constitute a cheat which would be punishable by laws of the state of long standing against obtaining money or goods by privy or false tokens. Gen. St. Vt., 671, § 23. It was upon this ground that the passing the counterfeited national bank-bill was a mere private cheat under the laws of Virginia, that the conviction was upheld by the majority of the court in *Jett v. Virginia*, 18 Gratt., 933 (7 Am. L. Reg., 260), cited at this hearing.

The indictment against the relator does charge him with passing a counterfeited national bank-bill, knowing the same to be false, with intent to defraud one Margaret McDaniels, which is, in terms, a somewhat different offense from that made punishable by the laws of the United States, which consists merely in passing such counterfeited bill, knowing it to be counterfeited. R. S., § 5415. The indictment appears to have been drawn according to the statute in force before the act of 1869, which made an intent to defraud an ingredient of the offense, but did not in exact language apply to national banks. Gen. St. Vt., 678, § 3. But this section of the general statutes was expressly superseded by the act of 1869, and the element of an intent to defraud was left out, so that the offense made punishable by the laws of Vermont was the passing such counterfeit bill, knowing it to be counterfeited, precisely the same offense made punishable by the law of the United States. The material allegations of an indictment are those which set forth the charges which are contrary to the law and make up the offense, and not those which charge things not contrary to the law, however morally wrong they may be, and which are not necessary to constitute the offense. A plea of not guilty to this indictment would only put in issue the passing the counterfeit bill knowing it to be such, and the plea of guilty only confessed as much. The relator, therefore, stands convicted in the state court of precisely an offense cognizable under the authority of the United States, and is restrained of his liberty under that conviction.

There are respectable opinions and weighty authorities which hold that in the United States there are two governments,—the United States, within the sphere marked out by the constitution, and the several states,—and that the same act may be an offense, and some of them that it may be the same offense, against each, for which punishment may be inflicted by each, and that the

safety of the accused from excessive punishment under the two systems lies in the pardoning power, and in the benignant spirit with which the laws of each are administered. *United States v. Wells*, 7 Am. L. Reg., 424; Mr. Justice Daniel, in *Fox v. Ohio*, 5 How., 410; Mr. Justice Johnson, in *Houston v. Moore*, 5 Wheat., 1.

That the same act, constituting different criminal offenses, may be punished for one under the United States, and for another under the state, cannot, under the authorities before cited, well be doubted, and most of the examples cited to show that the same offense may be punished by both are examples of that class. That the states cannot make criminal offenses out of what the United States makes lawful, nor against the laws of the United States, was well settled in *Prigg v. Pennsylvania*, 16 Pet., 539; *The Moses Taylor*, 4 Wall., 411, and other cases before cited. The provision in the constitution prohibiting putting twice in jeopardy for the same offense was for the protection of the people from oppression. *Houston v. Moore*, 5 Wheat., 1. It may be said that this only applied to the tribunals of the United States; but, if so, it is a restraint of the courts under the laws of congress. Under it, congress could not make the same offense punishable twice. And if congress could not do this directly, it could not indirectly, by creating an offense, and leaving the states to punish it once, and providing by its own laws to punish it again.

§ 1614. *One unlawfully restrained of his liberty by a state court for an alleged offense against the laws of the United States may be discharged upon habeas corpus by a court of the United States.*

This offense appears to be one over which the state court had no jurisdiction, and the relator is restrained of his liberty without warrant of law. The next question is whether he can be relieved in this mode. In 1867 the writ of *habeas corpus* from the courts and judges of the United States was extended to persons in custody, in violation of the constitution, or of a law or treaty of the United States. R. S., § 753. The law of the United States was, and is, that the relator should be tried by the courts of the United States, and not by those of the state, and, if guilty, that he should be punished according to the laws of the United States, and not under those of the state under which he is in custody. This court has jurisdiction of the relator under these provisions by this writ.

The inquiry into the cause of his confinement is not a review of the proceedings of the state court. If the attention of that court had been called to this aspect of the case, probably this proceeding would have been wholly unnecessary; but the record shows that it was not. The point here is not at all that the relator was not proceeded with in a proper manner by the state court, but that the court had no jurisdiction over him for this offense. In such cases the remedy may be by *habeas corpus*. *Ex parte Lange*, 18 Wall., 163 (§§ 1767-74, *infra*). *Brown v. United States*, 14 Am. L. Reg., 566, before Erskine, J., and afterwards before Mr. Justice Bradley, is an authority that section 711 gives exclusive jurisdiction to the courts of the United States over offenses cognizable under the authority of the United States, and that *habeas corpus* from a federal court or judge is a proper remedy. This is not a proceeding for relieving criminals at all from just punishment. It is intended to relieve persons from punishment contrary to the laws of the United States, but not from liability to be punished according to those laws. If the relator was still liable to punishment according to those laws, he would be held by order of court until the district attorney could proceed against him; but the offense for which he

has already suffered considerable punishment is now apparently barred by the statute of limitations of the United States. Therefore further detention would be unavailing. The relator is discharged from this imprisonment.

UNITED STATES *v.* McBRATNEY.

(14 Otto, 621-634. 1881.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Colorado.

Opinion by MR. JUSTICE GRAY.

STATEMENT OF FACTS.—The defendant, having been indicted and convicted, in the circuit court of the United States for the district of Colorado, of the murder of Thomas Casey, within the boundaries of the Ute reservation in that district, moved in arrest of judgment for want of jurisdiction of the court. The indictment does not allege that either the accused or the deceased was an Indian. The certificate of division, upon which the case has been brought to this court, states that at the trial it appeared that both were white men, and that the murder was committed in the district of Colorado, within the Ute reservation, the said Ute reservation lying wholly within the exterior limits of the state of Colorado, and that, upon the motion in arrest of judgment coming on to be heard before Mr. Justice Miller and Judge Hallett, their opinions were opposed upon this question: "Whether the circuit court of the United States, sitting in and for the district of Colorado, has jurisdiction of the crime of murder, committed by a white man upon a white man, within the Ute reservation in said district, and within the geographical limits of the state of Colorado?"

§ 1615. *The United States circuit court for Colorado has no jurisdiction of an indictment against a white man for the murder of a white man within the Ute reservation in the state of Colorado. (a)*

The circuit courts of the United States have jurisdiction of the crime of murder committed in any "place or district of country under the exclusive jurisdiction of the United States;" and, except where special provision is made, "the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." R. S., sec. 629, cl. 20; sec. 2145; sec. 5339, cl. 1.

By the second article of the treaty between the United States and the Ute Indians, of March 2, 1868, the United States agreed that a certain district of country therein described should be set apart for the absolute and undisturbed use and occupation of the Indians therein named, and of such other friendly tribes or individual Indians as from time to time they might be willing, with the consent of the United States, to admit among them; and that no persons, except those therein authorized so to do, and except such officers, agents and employees of the government as might be authorized to enter upon Indian reservations in discharge of duties enjoined by law, should ever be permitted to pass over, settle upon or reside in the territory so described, except as otherwise provided in the treaty. The sixth article provided that "if bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the In-

(a) In *United States v. Berry*, * 2 McC., 58, it was held that where a certain tract has been set aside for an Indian reservation, and exclusive jurisdiction over crimes therein has been expressly conferred upon the United States by treaty, such jurisdiction remains until that portion of the treaty is expressly repealed by act of congress, even though such reservation is subsequently included within a state.

dians," the United States, upon proof made to the agent, and forwarded to the commissioner of Indian affairs, would proceed at once to cause the offender to be arrested and punished according to the laws of the United States; and "if bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black or Indian, subject to the authority of the United States and at peace therewith, the tribes herein named solemnly agree that they will, on proof made to their agent, and notice to him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws." By the seventh article, "the president may at any time order a survey of the reservation, and, when so surveyed, congress shall provide for protecting the rights of such Indian settlers in their improvements, and may fix the character of the title held by each;" and "the United States may pass such laws on the subject of alienation and descent of property, and on all subjects connected with the government of the Indians on said reservation and the internal police thereof, as may be thought proper." 15 Stat., 619-621.

By the first section of the act of congress of February 28, 1861, c. 59, to provide a temporary government for the territory of Colorado, all territory which, by treaty with any Indian tribe, was not, without its consent, to be included within the territorial limits or jurisdiction of any state or territory, was excepted out of the boundaries and constituted no part of the territory of Colorado; and by the sixteenth section, "the constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory of Colorado as elsewhere within the United States." 12 Stat., 172, 176. If this provision of the first section had remained in force after Colorado became a state, this indictment might doubtless have been maintained in the circuit court of the United States. *United States v. Rogers*, 4 How., 567; *Bates v. Clark*, 95 U. S., 204; *United States v. Ward*, 1 Woolw., 17, 21 (§§ 1625-27, *infra*).

But the act of congress of March 3, 1875, c. 139, for the admission of Colorado into the Union, authorized the inhabitants of the territory "to form for themselves out of said territory a state government, with the name of the state of Colorado; which state, when formed, shall be admitted into the Union upon an equal footing with the original states in all respects whatsoever;" and the act contains no exception of the Ute reservation, or of jurisdiction over it. 18 Stat., pt. 3, p. 474. The provision of section 1 of the subsequent act of June 26, 1876, c. 147 (19 Stat., 61), that upon the admission of the state of Colorado into the Union "the laws of the United States, not locally inapplicable, shall have the same force and effect within the state as elsewhere within the United States," does not create any such exception. Such a provision has a less extensive effect within the limits of one of the states of the Union than in one of the territories of which the United States have sole and exclusive jurisdiction.

The act of March 3, 1875, necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith. The *Cherokee Tobacco*, 11 Wall., 616. Whenever, upon the admission of a state into the Union, congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. *The Kansas Indians*, 5 Wall., 737; *United States v. Ward*, *supra*. The state of Colorado, by its admission into the Union by congress, upon an equal footing with the original states in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and

in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The courts of the United States have, therefore, no jurisdiction to punish crimes within that reservation, unless so far as may be necessary to carry out such provisions of the treaty with the Ute Indians as remain in force. But that treaty contains no stipulation for the punishment of offenses committed by white men against white men. It follows that the circuit court of the United States for the district of Colorado has no jurisdiction of this indictment, but, according to the practice heretofore adopted in like cases, should deliver up the prisoner to the authorities of the state of Colorado to be dealt with according to law. *United States v. Cisna*, 1 McL., 254, 265; *Coleman v. Tennessee*, 97 U. S., 509, 519.

The record before us presents no question under the provisions of the treaty as to the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, or the regulation by congress of the alienation and descent of property and the government and internal police of the Indians. The single question that we do or can decide in this case is that stated in the certificate of division of opinion, namely, whether the circuit court of the United States for the district of Colorado has jurisdiction of the crime of murder committed by a white man upon a white man within the Ute reservation, and within the limits of the state of Colorado; and, for the reasons above given, that question must be answered in the negative.

UNITED STATES *v.* BEVANS.

(3 Wheaton, 336-391. 1818.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS.—Bevans was indicted for the murder of one Leinstrum, on board the United States ship of war Independence, both parties being in the service of the ship, and the ship at the time being in commission and in actual service. The ship was lying at anchor in the main channel of Boston harbor, in water of sufficient depth at all times for ships of the largest class and burden. The nearest points of land, five in number, were at the following distances, respectively: End of the long wharf, in the town of Boston, half a mile; William's Island, between a quarter and a third of a mile; United States navy-yard, three quarters of a mile; Dorchester Point, two miles and a quarter; Governor's Island, one mile and three quarters.

Two questions were raised: 1. Whether the offense was within the jurisdiction of the state of Massachusetts, or any of her courts. 2. Whether the offense was within the jurisdiction of the circuit court of the United States for the district of Massachusetts.

§ 1616. *The jurisdiction of a state over crimes is co-extensive with its territory, and includes bays and such portions of the sea as are inclosed by land.*

Opinion by MARSHALL, C. J.

The question proposed by the circuit court, which will be first considered, is, Whether the offense charged in this indictment was, according to the statement of facts which accompanies the question, "within the jurisdiction or cognizance of the circuit court of the United States for the district of Massachusetts?"

The indictment appears to be founded on the eighth section of the "act for the punishment of certain crimes against the United States." That section gives the courts of the Union cognizance of certain offenses committed on the high seas, or in any river, haven, basin or bay out of the jurisdiction of any particular state. Whatever may be the constitutional power of congress, it is clear that this power has not been so exercised, in this section of the act, as to confer on its courts jurisdiction over any offense committed in a river, haven, basin or bay, which river, basin or bay is within the jurisdiction of any particular state.

What, then, is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States. It is contended to have been ceded by that article in the constitution which declares that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." The argument is, that the power thus granted is conclusive; and that the murder committed by the prisoner is a case of admiralty and maritime jurisdiction.

Let this be admitted. It proves the power of congress to legislate in the case; not that congress has exercised that power. It has been argued, and the argument in favor of as well as that against the proposition deserves great consideration, that courts of common law have concurrent jurisdiction with courts of admiralty over murder committed in bays which are inclosed parts of the sea; and that for this reason the offense is within the jurisdiction of Massachusetts. But in construing the act of congress, the court believes it to be unnecessary to pursue the investigation which has been so well made at the bar respecting the jurisdiction of these rival courts.

§ 1617. *The jurisdiction of the United States courts over crimes includes only those committed on the high seas, or in bays, rivers, havens, etc., out of the jurisdiction of any state.*

To bring the offense within the jurisdiction of the courts of the Union it must have been committed in a river, etc., out of the jurisdiction of any state. It is not the offense committed, but the bay in which it is committed, which must be out of the jurisdiction of the state. If, then, it should be true that Massachusetts can take no cognizance of the offense; yet, unless the place itself be out of her jurisdiction, congress has not given cognizance of that offense to its courts. If there be a common jurisdiction, the crime cannot be punished in the courts of the Union. Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction. It is obviously designed for other purposes. It is in the eighth section of the second article we are to look for cessions of territory and of exclusive jurisdiction. Congress has power to exercise exclusive jurisdiction over this district, and over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings. It is observable that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the states. It is difficult to compare the two

sections together without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

§ 1618. *The cession to the United States of admiralty and maritime jurisdiction does not divest the states of general and residuary jurisdiction.*

It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts. Suppose, for example, the power of regulating trade had not been given to the general government. Would this extension of the judicial power to all cases of admiralty and maritime jurisdiction have divested Massachusetts of the power to regulate the trade of her bay? As the powers of the respective governments now stand, if two citizens of Massachusetts step into shallow water when the tide flows, and fight a duel, are they not within the jurisdiction, and punishable by the laws, of Massachusetts? If these questions must be answered in the affirmative, and we believe they must, then the bay in which this murder was committed is not out of the jurisdiction of a state, and the circuit court of Massachusetts is not authorized by the section under consideration to take cognizance of the murder which has been committed. It may be deemed within the scope of the question certified to this court to inquire whether any other part of the act has given cognizance of this murder to the circuit court of Massachusetts. The third section enacts "that if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death."

§ 1619. *A ship of war is not a "place" within the meaning of the "crimes act" (1 Stats. at Large, 113). A place is in that sense fixed and territorial.*

Although the bay on which this murder was committed might not be out of the jurisdiction of Massachusetts, the ship of war on the deck of which it was committed is, it has been said, "a place within the sole and exclusive jurisdiction of the United States," whose courts may consequently take cognizance of the offense. That a government which possesses the broad power of war, which "may provide and maintain a navy," which "may make rules for the government and regulation of the land and naval forces," has power to punish an offense committed by a marine on board a ship of war, wherever that ship may lie, is a proposition never to be questioned in this court. On this section, as on the eighth, the inquiry respects not the extent of the power of congress, but the extent to which that power has been exercised. The objects with which the word "place" is associated are all, in their nature, fixed and territorial. A fort, an arsenal, a dock-yard, a magazine, are all of this character. When the sentence proceeds with the words, "or in any other place or district of country under the sole and exclusive jurisdiction of the United States," the construction seems irresistible, that, by the words "other place," was intended another place of a similar character with those previously enumerated, and with that which follows. Congress might have omitted, in its enumeration, some similar place within its exclusive jurisdiction which was not comprehended by any of the

terms employed, to which some other name might be given; and, therefore, the words "other place," or "district of country," were added; but the context shows the mind of the legislature to have been fixed on territorial objects of a similar character.

This construction is strengthened by the fact that, at the time of passing this law, the United States did not possess a single ship of war. It may, therefore, be reasonably supposed that a provision for the punishment of crimes in the navy might be postponed until some provision for a navy should be made. While taking this view of the subject, it is not entirely unworthy of remark that afterwards, when a navy was created, and congress did proceed to make rules for its regulation and government, no jurisdiction is given to the courts of the United States of any crime committed in a ship of war, wherever it may be stationed. Upon these reasons the court is of opinion that a murder committed on board a ship of war, lying within the harbor of Boston, is not cognizable in the circuit court for the district of Massachusetts; which opinion is to be certified to the court.

The opinion of the court, on this point, is believed to render it unnecessary to decide the question respecting the jurisdiction of the state court in that case.

Certificate accordingly.

UNITED STATES v. TIERNEY.

(Circuit Court for Ohio: 1 Bond, 571-574. 1864.)

Opinion by the COURT.

STATEMENT OF FACTS.—The indictment against the defendant in this case is based upon section 16 of crimes act of April 30, 1790, which provides "that if any person, within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with intent to steal or purloin, the personal goods of another," etc., he shall be liable to the punishment prescribed. The charge against the defendant is the stealing of a mule at a place called Camp Hurtt, and the indictment alleges that it is "a military camp of the United States, the site of which said camp is within the sole and exclusive jurisdiction of the United States." The defendant has filed a plea to the jurisdiction. By agreement of counsel, the facts in reference to the right of exclusive jurisdiction in the United States over the said camp have been submitted to the court. These facts are, in substance, that on March 19, 1863, by a written agreement between Timothy Kirby and Capt. Hurtt, assistant-quartermaster of the United States, Kirby leased to the United States a pasture-field containing about sixty acres of land for one month, with the privilege of using and occupying the same for six months, at the option of the government, at a stipulated rent.

§ 1620. *Places over which the United States have sole and exclusive jurisdiction are such as are purchased, not rented.*

Was this field, alleged in the indictment to be within the limits of Camp Hurtt, a *place* within the sole and exclusive jurisdiction of the United States, so as to give this court jurisdiction of the larceny? The constitution of the United States, article I, section 8, authorizes congress to exercise exclusive legislation "over all places purchased by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings." Was the field rented by Kirby to the United States a *place*, within the terms of the constitution, within or over

which the United States had "sole and exclusive jurisdiction?" There are several reasons why this jurisdiction did not exist. The places over which exclusive jurisdiction is granted are those which have been *purchased* by the United States for some of the purposes specified in the constitution, and the grant of power does not extend to a place or tract of land *rented* by the government for a temporary purpose. An unanswerable objection to the exercise of exclusive jurisdiction in this case is that the tract of land was not purchased of the United States *by consent* of the legislature of the state of Ohio, for this consent is essential to the exercise of exclusive jurisdiction by the United States.

Again, it is clear, the purpose for which the land was rented is not within any of the specifications of the constitution, or within the scope of any of the terms used. The land was not purchased for the purpose of constructing a fort, magazine, arsenal, dock-yard, or other needful building. The constitution clearly implies the *permanent use* of the property purchased for the construction or erection of some of the structures designated, or some other needful building. It would be strange, indeed, if such an agreement for renting a piece of land to the United States should deprive the state of Ohio of all jurisdiction over it, and confer sole and exclusive jurisdiction to the United States. It is not in the power of a citizen thus to dispose of the right of a state over any part of her territory. The averment in the indictment that this tract was within the limits of Camp Hurtt, a military camp of the United States, does not withdraw it from the jurisdiction of the state. The jurisdiction of the United States would only be such as was necessary for military purposes, such as were required for the enforcement of discipline and the execution of the rules and articles of war. It seems clear, too, on the authority of the case of *United States v. Davis*, 5 Mason, 356 (§§ 1621-23, *infra*), that to sustain an indictment under section 16 of the act of 1790, the jurisdiction of the United States over the places referred to in the statute must be *sole and exclusive*; if merely concurrent with a state, the courts of the United States have no jurisdiction of the offense. The plea to the jurisdiction is sustained.

UNITED STATES *v.* DAVIS.

(Circuit Court for Massachusetts: 5 Mason, 356-365. 1829.)

STATEMENT OF FACTS.—Indictment for larceny. It was charged that the defendant, in the marine hospital at Chelsea, Massachusetts, a building belonging to the United States, the site whereof had been ceded to the United States, etc., did steal a trunk, certain bank-bills, a promissory note, etc. On motion to quash the indictment it was urged that the offense was not within the act of 1825, ch. 276, § 4, because it was specially provided for by the act of 1790, ch. 36, § 16; that it was not within the act of 1790, because the indictment did not aver that it was committed within the sole and exclusive jurisdiction of the United States.

§ 1621. *Offense of larceny not punishable under statute of 1790, unless committed in a place within the sole and exclusive jurisdiction of the United States.*

Opinion by STORY, J.

We have considered the motion, and are of opinion that the objection taken at the bar cannot be maintained in point of law, and the motion ought therefore to be overruled. The crimes act of 1790, ch. 36 [9], § 16, provides "that if any person, *within any of the places under the sole and exclusive jurisdiction*

of the United States, or upon the high seas, shall take and carry away, *with intent to steal or purloin*, the *personal goods* of another," etc., he shall, on conviction, be liable to a certain punishment prescribed by the act. It is clear that no person is punishable under this act unless his case falls within the descriptive terms used in the act. If he should take and carry away, with intent to steal or purloin, any thing not the "*personal goods*" of another, or should commit the offense in a place not "under the *sole and exclusive jurisdiction* of the United States," he would not be liable to punishment under the act. And an indictment which did not contain all the material statements to bring the case within the statute would be bad, and judgment might, even after verdict, be arrested for the defect. And an indictment, to be properly framed, must follow, if not the very words, at least the substance of the statute. Now, it is clear that the present indictment could not be supported for a moment on the act of 1790, for it does not state that the place is "under the sole and exclusive jurisdiction of the United States;" nor does it use the words of the statute, "take and carry away with *intent to steal or purloin*," both of which defects would be fatal. For in criminal cases, courts of law are not at liberty to make intendments and inferences to support indictments, in the same manner as they may do to support civil actions. How, then, can the court say, upon this motion, that the offense described in this indictment is the same offense provided for in the act of 1790? If the words of the act of 1790 describe the offense of larceny or theft at the common law, still the indictment must use the words of the statute, for it is punishable as a statute offense; and it would not be sufficient to allege that the party was guilty of larceny or theft. And for the same reason it would not be sufficient to use any other words, not being those of the statute, although in the sense of the common law they may be descriptive of the same offense. Whether the words, "take and carry away with intent to steal," are exactly in all cases of the same legal import with "feloniously steal, take and carry away," it is unnecessary to consider.

§ 1622. *Under the penal statute of 1790, "personal goods" do not embrace choses in action.*

Farther, an indictment on the act of 1790 lies only where the offense is committed in respect to the "*personal goods*" of another. To ascertain what is the meaning of these words we must resort to the common law, for that furnishes the proper rule of interpretation. Now, in the strict sense of the common law, personal goods are goods which are movable, belonging to, or the property of, some person, and which have an intrinsic value. Bonds, bills and notes, which are choses in action, are not esteemed, by the common law, goods whereof larceny may be committed, being of no intrinsic value, and not importing any property in possession of the person from whom they are stolen, but only evidence of property. See 2 Bl. Com., 383, 387, 394, 396, 397; 4 Bl. Com., 232-234; 2 East, Pl. Cr., 587; 2 Russell, Crimes, 1095; 1 Hawk. P. Cr., B. 1, ch. 33, §§ 34, 35. It is true that the words, "goods" or "chattels," may, in the construction of wills, include bonds, notes, bank-bills, etc.; but this is upon the presumed intention of the testator, where a liberal exposition of his words is allowable, and upon principles derived from the civil and canon law. 2 Roper on Legacies, ch. 16. But in penal statutes a more strict construction is adopted; and the analogy of the common law in respect to larceny may well furnish the proper rule for decision. We think, then, that "*personal goods*," in the sense of the act of 1790, do not embrace choses in action. And the present indictment is, in part, founded on a larceny of choses in action.

But the decisive objection against the motion is, that to bring the case within the act of 1790 the offense must be committed in a place within "the *sole and exclusive jurisdiction* of the United States." The allegation in the present indictment is, that the site of the marine hospital "has been and is ceded by the state of Massachusetts to the United States;" which allegation is quite consistent with its not being a sole or exclusive jurisdiction. At least the court cannot intend otherwise upon a motion of this nature. It cannot judicially say that a cession of jurisdiction is, *ipso facto*, equivalent to, and necessarily, a sole and exclusive jurisdiction. If we are at liberty to look into the statute of Massachusetts (Stat. 1825, ch. 181, 4th of March, 1826), ceding jurisdiction of a place for a marine hospital in Chelsea, which, as a public statute, we may take notice of (though we cannot judicially know that the place described in the indictment was purchased under the authority of that statute), we shall find, from the terms of that statute, that there was not an unconditional consent to the cession. The words are, "that the consent of this commonwealth be and hereby is granted to the United States to purchase a tract of land, not exceeding ten acres, which shall be found necessary for the marine hospital to be built at Chelsea in the county of Suffolk, and may hold the same during the continuance of the use and appropriation aforesaid. Provided, that this commonwealth shall retain, and does hereby retain, *concurrent jurisdiction with the United States* in and over said land, *so far that all civil and criminal process, issued under the authority of this commonwealth or any officer thereof, may be executed on any part of said land*, or in any building which may be erected thereon, in the same way and manner as though this consent had not been granted as aforesaid." And then follows another proviso, "that persons removing upon the tract of land shall be deemed to be inhabitants of Chelsea, and enjoy rights and privileges, and perform duties as such, except serving on juries or doing military duty." The constitution of the United States has authorized congress "to exercise *exclusive legislation* over all places purchased by consent of the legislature of the state, in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings." And there is nothing in this act of cession which excludes the exercise of exclusive legislation in this tract of land by congress, for no power to punish offenses committed there is retained by the state. If, therefore, by the terms "sole and exclusive jurisdiction," in the act of 1790, no more is meant than "exclusive legislation," an indictment founded on that act, so far as this objection goes, might be maintained. In the case of *The Commonwealth v. Clary*, 8 Mass., 72, the supreme court of Massachusetts considered the mere reservation in a cession, of a right to execute such civil and criminal process, as not inconsistent with an exclusive jurisdiction in the United States. And that decision was adopted and followed by the circuit court in *United States v. Cornell*, 2 Mason, 60. In the cession referred to in *The United States v. Cornell*, 2 Mason, 60, the words "concurrent jurisdiction" are not to be found in the proviso. But in the cession by the statute of Massachusetts (Statute 25th of June, 1798), referred to in *The Commonwealth v. Clary*, 8 Mass., 72, the words "concurrent jurisdiction" are found in the same connection. And indeed the clause of the present cession appears to be borrowed, in substance, from that of the statute of 1798. So that the authority is directly in point. The act of congress of the 2d of March, 1795, ch. 105, seems incidentally to justify the same construction, for it declares cessions for light-houses, etc., made with such reservations, shall be deemed sufficient; and further provides that, where such

reservations have not been made, the state process may nevertheless be executed there. But it is not necessary absolutely to decide this point in the present case, since the present indictment does not allege that the offense was committed in a place under the sole and exclusive jurisdiction of the United States; so that it does not judicially appear to be an offense punishable under that act. If there was a concurrent jurisdiction, the offense is clearly not punishable by the act of 1790; if there was an exclusive jurisdiction, that is not shown on the face of the indictment. Either way, therefore, we cannot say that the offense is provided for in the place where it was committed, so as to be punishable by this court, if the party had pleaded guilty under the act of 1790.

§ 1623. *Where a special punishment is not provided for a particular offense by the penal act of 1790, it may yet be punishable under the third section of the crimes act of 1825.*

But it is said that it is not necessary that the offense should be so punishable, to except it out of the operation of the third section of the crimes act of 1825; all that is required is, that the *offense* should have been provided for by some prior act, as a substantive offense in some place, as in a fort, or on the high seas, etc., although not in a hospital. We cannot yield to this argument. The object of the act of 1825 was to provide for the punishment of offenses committed in places under the jurisdiction of the United States, where the offense was not before punishable by the courts of the United States under the actual circumstances of its commission. The language of the act is, "that if any offense shall be committed in any of the places aforesaid (that is, forts, dock-yards, etc., or the site of any other needful buildings), *the punishment of which offense is not specially provided for by any law of the United States*, such offense shall, upon a conviction in any court of the United States, etc., be liable to, and receive, the same punishment as the laws of the state in which such fort, etc., is situate, provide for the like offense," etc. Now it is plain that no law of the United States punishes this offense, if the place was not within its sole and exclusive jurisdiction. It was, therefore, within the very words of the section an offense, "the punishment of which was not *specially* provided for by any law of the United States." The purposes of the section would be wholly defeated by any other construction of the words; and we can readily perceive no solid objection to that which we have given to it. It appears to us to be a rational and obvious construction of it. The motion to quash the indictment is therefore overruled.

UNITED STATES v. STAHL

(Circuit Court for Kansas: 1 Woolworth, 192-198. 1868.)

Opinion by MILLER, J

STATEMENT OF FACTS.—In this case the defendant is indicted for murder, alleged in the bill to have been committed in the district of Kansas, at a place under the sole and exclusive jurisdiction of the United States of America, to wit, at Fort Harker, on land occupied by the United States for a military post and purposes connected therewith. To this indictment the defendant pleads to the jurisdiction of the court, alleging that Fort Harker was first established as a military post in the year 1863, under the authority of the war department; that no purchase of the land on which it was established had ever been made by the government of the United States with the assent of the state of Kansas; and that the consent of that state had never been given in any other mode to

the exercise by the federal government of an exclusive jurisdiction over the land included within the post. To this plea there is a demurrer, which we are now to decide.

§ 1624. *Exclusive federal jurisdiction over forts, arsenals, etc. Cession by the state necessary notwithstanding title in the United States.*

The state of Kansas was admitted into the Union by an act of congress, approved January 29, 1861 (12 Stats. at Large, 126), which declared that she was thereby placed upon an "equal footing with the original states in all respects." This act, after describing the boundaries of the new state, excepts from its jurisdiction any territory which, by treaty with Indian tribes, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory, and declares that it shall not be included within said state. In the case of *The United States v. Ward*, decided at the May term, A. D. 1863 [Woolw., 17; §§ 1625-27, *infra*], this court held that the jurisdiction of the state over the crime of murder was exclusive of that of the federal government, although the offense was committed on soil to which the Indian title had not been extinguished, unless it was soil occupied by one of the tribes which had treaties with the United States of the character above described. We held that the state had no jurisdiction in such territory, because it was no part of the state.

It is not claimed that Fort Harker is included within territory of the character last mentioned. Here it is insisted that because the fee of the soil was in the United States when the fort was established, and because the federal government continued in the use and occupation of such soil as a fort, therefore the right to exercise jurisdiction in case of murder committed there vests in the United States. It needs no argument to show that the jurisdiction of the crime of murder, or of any other offense, committed within the limits of her territory, must belong to the state of Kansas, except in some special cases, which, by a positive rule of law, are constituted exceptions to the general principle.

In this case the exception is claimed to rest on that provision of the federal constitution which empowers congress "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." It is very obvious that the *situs* of Fort Harker does not come within the literal sense of this provision; for it was not purchased by the United States at all, and no consent was ever given by the state legislature to its use as a fort. As the United States was already the owner of the land before the establishment of the fort upon it, and before Kansas was organized into a territory or admitted as a state, it was impossible to comply with these literal terms of the constitution, so far as the purchase was concerned. But as no purchase could be made, so none was necessary. The only object of a purchase, namely, the acquisition of a title, was already accomplished.

The government of the United States, when it admitted Kansas into the Union upon the same footing as the original states, retained the legal title to all the lands which it then owned in the state of Kansas. So far as general purposes of government were concerned, however, with certain reservations and exceptions, it parted with jurisdiction over it. The first exception reserved

the lands of Indian tribes which had treaties exempting them from state jurisdiction; the second, the power to tax the lands of the United States and of the Indians. It was competent to the federal government, and it would have been appropriate at that time, to have also excepted out of this grant of jurisdiction, places for forts, arsenals, etc., if such had been the policy of congress. But it was not done.

So far as the consent of Kansas to the exercise of this exclusive jurisdiction by congress is concerned, that state stands on the same footing as the original thirteen. The question then is, when congress purchases the fee-simple of a portion of territory included within one of the original states for the purpose of erecting a fort thereon, what kind of consent is necessary to be obtained from the state legislature in order to vest jurisdiction in the federal government? It is not material now to inquire whether the United States could erect and occupy a fort without the consent of the legislature. The language is, that congress shall exercise exclusive legislation over all places purchased with that consent. But whether the constitution requires that consent as a condition precedent to the establishment and use of the place as a fort may well be doubted. It does not seem probable that the framers of the constitution, who conferred on congress full powers of making war, raising armies, and suppressing insurrections, and also declared that the federal government was established for the express purpose of providing for the common defense, would have left its power of erecting forts, so important to the execution of that purpose, subject to the volition of state legislatures. However this may be, it is clear that in order to withdraw from a state a jurisdiction which it had possessed and exercised, and confer it on the general government, the consent of the former was made a prerequisite. This is the material point aimed at by the provision of the constitution.

All the important uses of a fort, arsenal or magazine could be secured without the exercise of exclusive legislation within their walls, and there was manifest propriety in requiring the assent of the state to the exercise of this important and delicate power, which of right belonged to the local authority, and which could be needed by or useful to the general government only in special cases. This jurisdiction having been vested in the state of Kansas by the act admitting her into the Union, and never divested, it cannot now belong to the United States. The power provided for in the constitution is one of exclusive legislation. The act under which the defendant is indicted applies in exact terms to places only in which the United States is empowered with exclusive legislation. Moreover, the indictment describes the place as being within the exclusive jurisdiction of the federal government. The question of concurrent jurisdiction, therefore, does not and cannot arise in this case. These views find support in many adjudged cases. The demurrer to the defendant's plea to jurisdiction is overruled.

UNITED STATES *v.* WARD.

(Circuit Court for Kansas: 1 Woolworth, 17-25. 1863.)

STATEMENT OF FACTS.—Indictment for murder committed on the reservation of the Kansas tribe of Indians in Lyons county, Kansas. The accused and the deceased were white men. The question was whether the offense was committed within the sole and exclusive jurisdiction of the United States.

§ 1625. *Exclusive federal territorial jurisdiction. Indian reservations within the territory of a state.*

Opinion by MILLER, J.

The circumstances, much enlarged upon at the bar, that the reservation is but a small tract of country, that emigration has filled up the adjoining lands, that the state has included the *locus in quo* within an organized county, and by its courts of justice, and its people, by their customs and intercourse, have assumed new and close relations to this tribe of Indians, afford no assistance in determining the question before us. The argument drawn from these circumstances assumes that the state has authority to legislate over these lands, and that is the very point in question. Or, if it be conceded that at one time the sole and exclusive jurisdiction was in the United States, the contention of the counsel for the defendant is based on the assumption that circumstances — the changed condition of affairs — has withdrawn that jurisdiction from the federal and conferred it upon the state government, the statement of which position shows its fallacy. We must recur to the provisions of law, as written in the statute books and the treaties, for an answer to the question before us. *Worcester v. Georgia*, 6 Pet., 515; *United States v. Ciska*, 1 McL., 254.

§ 1626. *The authority of congress to provide criminal legislation is confined to subjects peculiar to the federal government. Among these is the punishment of crime committed within the exclusive territorial jurisdiction of the federal authorities.*

The authority of congress to provide for the punishment of crime is limited to such subjects and circumstances as are peculiar to the federal government. That government may coin money, and therefore congress may provide for the punishment of counterfeiting the national coin. It may establish postoffices and post-roads, and may punish robbing its mails; but it cannot punish counterfeiting the issues of state banks nor robbing express companies. It may punish murder when it is committed under certain circumstances or in certain places, as when the murdered person is its officer, and at the time of the assault was in the discharge of his official duties, and the killing was in resistance to him therein; or when the homicide was committed in some place over which the national government had sole and exclusive jurisdiction, as, for instance, over forts, arsenals, etc.

§ 1627. *An Indian reservation within the territory of a state is not within the sole and exclusive jurisdiction of the federal authorities, unless withdrawn from the state jurisdiction by a proviso of the act admitting the state, pursuant to a guaranty by the federal government in the treaty making the reservation.*

Jurisdiction is claimed here to punish this homicide because it was committed on an Indian reservation. That circumstance alone is not sufficient to give us jurisdiction. There is no act of congress giving the federal courts jurisdiction of every murder committed on any Indian reservation. We have jurisdiction only when such reservation is "within the sole and exclusive jurisdiction of the United States." The act of June 30, 1834, provides that the section of country in which this reservation is situated shall be Indian country, and that the laws of the United States for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force therein. This provision brings the reservation within our jurisdiction. If it remained unchanged or unqualified, it would conclude the question. It is insisted that the provisions of the act organizing the territory, and the act admitting the state into the Union, withdraw the locality from the

force and effect of the act. It is unnecessary to consider the former of these enactments, as all that can be claimed under it may be found in the latter.

The first clause of this act provides that the state shall be admitted into the Union "on an equal footing with the original states in all respects whatever." Congress does not possess the power to withdraw from any one of the original states, without its consent, the authority to try and punish a man for murder, even in the smallest portion of its territory. It cannot be said of the new state of Kansas that she stands upon "an equal footing with the original states in all respects whatever," if congress can take from her courts and vest in us jurisdiction to try a man for murder committed within the state;— if congress can, without her consent, exclude her from the right and the power to enforce the laws which she has made for the protection of the lives, persons and property of her citizens on every portion of her soil. This power to enforce her criminal laws throughout her boundaries, which is unqualified and exclusive, and is to be possessed, enjoyed and exercised by the new state alone, and not concurrently with the federal government, is a necessary incident to her equality with the original states. It follows, then, unless the clause above cited in the act admitting Kansas into the Union is qualified by some other provision, it operates as a repeal of the act of 1830, so far as that state is concerned, and we are without jurisdiction.

But there were, at the time of the passage of the act of admission, tribes of Indians within the boundaries of the new state, as described therein, with which the United States had treaties; and in these treaties the government stipulated that their lands should never be brought within the bounds, nor subjected to the jurisdiction, of any state. Among other such tribes we may mention the Shawnees. A treaty had been made with this tribe, giving and assuring to it certain lands; and by the tenth article it was provided that "the United States guaranty that said lands shall never be within the bounds of any state or territory, nor subject to the laws thereof." 7 Stats. at Large, 355, 357. It is evident that the congress which passed the act of admission apprehended the principle above expressed, and foresaw the predicament in which the United States would be placed if it admitted the state without any provision for such Indians, and for the lands of such Indians, as had treaties containing such a guaranty. It was foreseen that when once Kansas was admitted into the Union upon an equal footing with the original states in all respects whatever, the general government could not protect these obligations.

Accordingly a proviso was annexed to the clause declaring Kansas in the Union. By this proviso, all territory was excepted out of, and was not to be included within, the state, which belonged to a tribe having such a treaty. So that, recurring to the case of the Shawnees, their reservation was not in the state. It was within the outside boundaries of the state, as described in its constitution, and yet was without the state, without its jurisdiction, and without its territory. And the converse of this proposition is inferable; that is, that congress intended to, and did, concede to the new state, and it acquired and holds irrevocably, except as it sees fit to surrender the same, full right and authority to legislate, to enforce her laws, and to exercise plenary jurisdiction over all such parts of her territory as were not covered by such treaties. Or, rather, to express the matter more exactly, all territory which was not covered by such treaties was included within the state, within its jurisdiction and within its territory; and this irrevocably, unqualifiedly and exclusively.

It remains now to inquire whether the reservation here in question is within

the proviso; whether the Kansas tribe of Indians, upon whose reservation this homicide was committed, had such a treaty with the United States as the Shawnees have been shown to have had, in which it was guarantied to them by the United States that their reservation should not be brought within any state, nor subjected to its laws. If it had a treaty with such a clause, then the reservation was not in the state, and is subject to federal jurisdiction. On the other hand, if it had not a treaty with such a clause, then the reservation was within the state, and is subject to the state jurisdiction. This question is to be determined by an examination of the treaty with this tribe, in order to see whether or not it contains such a clause. The last treaty with the tribe was made in 1859, and ratified in 1860 (12 Stats. at Large, 1111), and is before us. We have carefully examined it, and find that it does not contain the guaranty mentioned. It is conceded by the counsel for the government that none exists in any former treaty with this tribe. It therefore results that the state of Kansas has jurisdiction to try and punish the defendant for the offense set forth in this indictment; it follows that we have not jurisdiction.

The case of *The United States v. Bailey*, 1 McL., 234, although decided before the act of 1834 was passed, and therefore not directly in point, is, in its reasoning, strongly corroborative of the views which we have taken. No other case decided by a federal court, bearing on the case before us, has been brought to our attention. The demurrer to the plea must be sustained, and the case dismissed for want of jurisdiction.

UNITED STATES *v.* COOMBS.

(12 Peters, 72-83. 1838.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a case certified upon a division of opinion of the judges of the circuit court for the southern district of New York. The case, as stated in the record, is as follows:

Lawrence Coombs was indicted under the ninth section of the act entitled "An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," approved the 3d of March, 1825, for having, on the 21st of November, 1836, feloniously stolen, at Rockaway Beach, in the southern district of New York, one trunk of the value of \$5, one package of yarn of the value of \$5, one package of silk of the value of \$5, one roll of ribbons of the value of \$5, one package of muslin of the value of \$5, and six pairs of hose of the value of \$5, which said goods, wares and merchandise belonged to the ship *Bristol*, the said ship then being in distress, and cast away on a shoal of the sea, on the coast of the state of New York, within the southern district of New York. On this indictment the prisoner was arraigned, and pleaded not guilty, and put himself upon his country for trial. It was admitted that the goods mentioned in the indictment, and which belonged to the said ship *Bristol*, were taken above high-water mark, upon the beach, in the county of Queens; whereupon the question arose whether the offense committed was within the jurisdiction of the court; and on this point the judges were opposed in opinion. Which said point, upon which the disagreement has happened, is stated above, under the direction of the judges of said court, at the request of the counsel for the United States and Lawrence Coombs, parties in the cause, and ordered to be certified unto

the supreme court at the next session, pursuant to the act in such case made and provided.

§ 1628. *Congress has power to authorize the punishment of offenses against persons or property committed on the shores of the United States above high-water mark.*

The ninth section of the act of 1825, ch. 276, on which the indictment in the present case is founded, is in the following words: "That if any person shall plunder, steal or destroy any money, goods, merchandise or other effects from or belonging to any ship or vessel, or boat or raft, which shall be in distress, or which shall be wrecked, lost, stranded or cast away upon the sea or upon any reef, shoal, bank or rocks of the sea, or in any place within the admiralty or maritime jurisdiction of the United States; or if any person or persons shall wilfully obstruct the escape of any person endeavoring to save his or her life from such ship or vessel, boat or raft, or the wreck thereof; or if any person shall hold out or show any false light or lights, or extinguish any true light, with intention to bring any ship or vessel, boat or raft, being or sailing upon the sea, into danger or distress or shipwreck, every person so offending, his or their counselors, aiders or abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by a fine not exceeding \$5,000, and imprisonment and confinement at hard labor not exceeding ten years, according to the aggravation of the offense." 3 Story's Laws of the U. S., 2001. The indictment, as has been already stated, charges the offense to have been committed on Rockaway Beach, and, as is admitted, above high-water mark.

Before we proceed to the direct consideration of the true import and interpretation of this section, it seems highly important, if not indispensable, to say a few words as to the constitutional authority of congress to pass the same. For if, upon a just interpretation of the terms thereof, congress have exceeded their constitutional authority, it will become our duty to say so, and to certify our opinion on the points submitted to us in favor of the defendant. On the other hand, if the section admits of two interpretations, each of which is within the constitutional authority of congress, that ought to be adopted which best conforms to the terms and the objects manifested in the enactment, and the mischiefs which it was intended to remedy. And again, if the section admits of two interpretations, one of which brings it within, and the other presses it beyond, the constitutional authority of congress, it will become our duty to adopt the former construction, because a presumption never ought to be indulged that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous. And, accordingly, the point has been presented to us under this aspect, in the argument of the attorney-general, on behalf of the government.

§ 1629. *The power to punish offenses on the shores of the United States above high-water mark is given in the clauses conferring the right to regulate commerce, but not in those giving admiralty jurisdiction.*

There are two clauses of the constitution which may properly come under review in examining the constitutional authority of congress over the subject-matter of the section. One is the delegation of the judicial power, which is declared to extend "to all cases of admiralty and maritime jurisdiction." The other is the delegation of the power "to regulate commerce with foreign nations and among the several states;" and, as connected with these, the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing power," etc.

§ 1630. — *in cases purely dependent upon the locality of the act done, admiralty jurisdiction is limited to the sea, and to tide waters, as far as the tide flows, and does not reach beyond high-water mark.*

In regard to the first clause, the question which arises is, what is the true nature and extent of the admiralty jurisdiction? Does it, in cases where it is dependent upon locality, reach beyond high-water mark? Our opinion is that, in cases purely dependent upon the locality of the act done, it is limited to the sea, and to tide waters, as far as the tide flows; and that it does not reach beyond high-water mark. It is the doctrine which has been repeatedly asserted by this court; and we see no reason to depart from it. Mixed cases may arise, and, indeed, often do arise, where the acts and services done are of a mixed nature; as where salvage services are performed partly on tide waters, and partly on the shore, for the preservation of the property saved; in which the admiralty jurisdiction has been constantly exercised to the extent of decreeing salvage. That this is a rightful exercise of jurisdiction by our courts of admiralty, was assumed as the basis of much of the reasoning of this court in the case of *The American Ins. Co. v. Canter*, 1 Pet., 511. It has also been asserted and enforced by Lord Stowell on various occasions; and especially in the case of *The Augusta or Eugenie*, 1 Hagg. Adm., 16; *The Jonge Nicolaas*, 1 Hagg. Adm., 201; *The Ranger*, 2 Hagg. Adm., 42; and *The Happy Return*, 2 Hagg. Adm., 198. See, also, *The Henry*, of Philadelphia, 1 Hagg. Adm., 264; *The Vesta*, 2 Hagg. Adm., 189; *The Salacia*, 2 Hagg. Adm., 262. And this has been done, not only in conformity to the doctrines of the maritime law, but also to what has been held in the courts of common law. For it has been laid down that, if the libel is founded upon one single continued act, which was principally upon the sea, though a part was upon land; as if the mast of a ship be taken upon the sea, though it be afterwards brought ashore, no prohibition lies. Com. Dig. Adm., F. S.; 1 Rolle's Adm., 533, C. 13; Com. Dig. Adm., E. 12. It is true, that it has been said that the admiralty has not jurisdiction of the wreck of the sea. 3 Bl. Com., 106, 107. But we are to understand by this, not what, in the sense of the maritime and commercial law, is deemed wreck or shipwrecked property, but "wreck of the sea," in the purely technical sense of the common law; and constituting a royal franchise, and a part of the revenue of the crown in England; and often granted as such a royal franchise to lords of manors. How narrow and circumscribed this sort of wreck is, according to the modern doctrines of the courts of common law, may be perceived by the statement of it in Mr. Justice Blackstone's Commentaries. 1 Bl. Com., 290 to 317. Who also shows that it is this, and this only, which is excluded from the admiralty jurisdiction. Lord Stowell manifestly acted upon the same doctrine in the case of *The Augusta or Eugenie*, 1 Hagg. Adm., 16; 3 Bl. Com., 106, 107.

A passage has been sometimes relied on, in one of the earliest judgments of Lord Stowell—the case of *The Two Friends*, 1 Rob., 271,—in which it is intimated that if the goods, which are subject to salvage, have been landed before the process of the admiralty court has been served upon them, the jurisdiction over them for the purposes of salvage may be gone. But his lordship, so far from deciding the point then, greatly doubted it; and has, as it should seem, since silently overruled the objection. Indeed, the supposed difficulty in that case was, not that the instance court had not jurisdiction, but that, in cases of salvage on the instance side of the court, no process of the court could be served on land, but only on the water. Now, this is wholly inapplicable to the

courts of the United States where admiralty process, both in the instance and prize sides of the court, can be served on land as well as on water. These explanations have been made for the sake of clearing the case from some apparent obscurities and difficulties as to the nature and extent of the admiralty jurisdiction, in cases where it is limited by the locality of the acts done. In our judgment, the authority of congress, under this clause of the constitution, does not extend to punish offenses committed above and beyond high-water mark.

§ 1631. *The power to regulate commerce defined and explained.*

But we are of opinion that, under the clause of the constitution giving power to congress "to regulate commerce with foreign nations and among the several states," congress possessed the power to punish offenses of the sort which are enumerated in the ninth section of the act of 1825, now under consideration. The power to regulate commerce includes the power to regulate navigation, as connected with the commerce of foreign nations and among the states. It was so held and decided by this court, after the most deliberate consideration, in the case of *Gibbons v. Ogden*, 9 Wheat., 189 to 198 (CONSTR., §§ 1183-1201). It does not stop at the mere boundary line of a state, nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land which interfere with, obstruct or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among the states. Any offense which thus interferes with, obstructs or prevents such commerce and navigation, though done on land, may be punished by congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers. No one can doubt that the various offenses enumerated in the ninth section of the act are all of a nature which tend essentially to obstruct, prevent or destroy the due operations of commerce and navigation with foreign nations and among the several states. Congress have, in a great variety of cases, acted upon this interpretation of the constitution, from the earliest period after the constitution, as will be abundantly seen by the punishment of certain offenses on land, connected with piracies and felonies on the high seas, in the act of 1790, ch. 36, §§ 10, 11 (1 Stat. at Large, 114); and in the acts for regulation of commerce and navigation, and for the collection of the revenue, passed from time to time, in which many of the penalties, forfeitures and offenses provided for are such as are or may be done on land; and yet which arise from the power to regulate commerce and navigation, and to levy and collect duties. The ship registry act of 1792, ch. 45 (1 Stat. at Large, 287); the act of 1793, ch. 52 (1 Stat. at Large, 305), for the enrollment and licensing of vessels in the coasting trade and fisheries; the act of 1790, ch. 102 (1 Stat. at Large, 131), for the regulation and government of seamen in the merchants' service; and the revenue collection act, from the act of 1789, ch. 5 (1 Stat. at Large, 29), to that of 1799, ch. 128 (1 Stat. at Large, 627), afford many pointed illustrations. We do not hesitate, therefore, to say that, in our judgment, the present section is perfectly within the constitutional authority of congress to enact; although the offense provided for may have been committed on land and above high-water mark.

§ 1632. *The act of congress (4 Stat. at Large, 116) which punishes theft, robbery and other offenses to vessels stranded, etc., construed.*

Let us now proceed to the interpretation of the section under consideration. Does it mean, in the clause in which this indictment is founded, to prohibit and

punish the plundering, stealing or destroying of any property belonging to any vessel in distress, or wrecked, lost, stranded or cast away, only when the same property is then on board of the vessel, or is then upon the sea, or upon any reef, shoal, bank or rock of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States? Or does it mean equally to prohibit and punish such plunder, stealing or destroying of such property, whether the act be done on shore or in any of the enumerated places below high-water mark? In our opinion, the latter is the true interpretation of this clause of the section. In the first place, this is the natural meaning of the words of the clause, taken in their natural import and connection. There is no absolute locality assigned to the offense. It is not said, as it is in every one of the preceding sections, that the offense shall be committed in a particular place; in a fort, dock-yard, navy-yard, etc., etc., or upon the high seas, or in an arm of the sea, or in a river, etc., within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state. The language is: "If any person or persons shall plunder, steal or destroy any money, goods, merchandise or other effects, from or belonging to any ship or vessel," etc. The plundering, stealing or destroying need not, then, be from any ship or vessel. It is sufficient if it be of property "belonging to any ship or vessel." It is nowhere stated that this property, belonging to any ship or vessel, shall be in any of the enumerated places when the offense is committed, but only that it shall be property belonging to the ship or vessel which is in distress or wrecked, lost, stranded or cast away. Locality, then, is attached to the ship or vessel, and not to the property plundered, stolen or destroyed. And this qualification is important, because it is manifest congress possess no authority to punish offenses of this sort generally when committed on land; but only to punish them when connected with foreign trade and navigation, or with trade and navigation among the several states.

In the next place, the mischiefs intended to be suppressed by the section are precisely the same whether the offense be committed on the shore or below high-water mark. There is, and there can be, no sound reason why congress should punish the offense when committed below high-water mark, which would not apply equally to the offense when committed above high-water mark. In such case, the wrong and injury to the owners, and to commerce and navigation, is the same; and the public policy of affording complete protection to property, commerce and navigation against lawless and unprincipled freebooters is also in each case the same. There is, then, no reason, founded in the language or policy of the clause, to insert a restriction and locality which have not been expressed by the legislature. On the contrary, upon general principles of interpretation, where the words are general, the court are not at liberty to insert limitations not called for by the sense, or the objects, or the mischiefs of the enactment.

In the next place, the succeeding clauses of the same section greatly aid and fortify this construction; for in neither of them is there any locality given to the offenses therein stated; and, indeed, any locality would seem inconsistent with the professed objects of these clauses. Thus, in the next clause, it is provided that, "if any person or persons shall wilfully obstruct the escape of any person endeavoring to save his or her life, from such ship or vessel," etc., he shall be punished in the manner provided for in the section. Now, it is plain that this obstruction may be as well by an act done on shore as by an act done below high-water mark. It may be by cutting a rope, or hawser, or other

thing used as a means of escape, and fastened to the shore; or by removing a plank affixed at one end to the shore; or by striking or wounding a person on his arrival at the shore; or by intimidating him from landing, by threatening to fire on him on landing, or otherwise, by attempting, on shore, to prevent him from saving his life. But the remaining clause is still more direct. It provides for the case of holding out or showing a false light, or extinguishing a true light, with the intention to bring any ship or vessel, etc., sailing upon the sea, into danger or distress, or shipwreck. Now, it is most manifest that these acts are such as ordinarily are done, and contemplated to be done, on land. We do not say contemplated, exclusively, to be done on land, for they may be done on the sea. But to suppose that congress could intend to punish these acts only when done on the sea, and not to punish them when committed on shore, would be to suppose that they were solicitous to punish acts of possible and rare occurrence only; and to leave unpunished those which would be of the most frequent and constant occurrence, for such inhuman purposes, and most mischievous in their consequences.

If, then, the other clauses of the same section, defining offenses of a kindred nature, have no reference whatever to any locality, but indifferently apply to the same offense, whether committed on land or on the sea; and if (as is the fact) all these clauses are connected together, and must be read together, in order to arrive at the denunciation of the punishment which is equally applied to all, there does seem to us to be very strong reason to believe that congress, throughout the whole enactment, had the same intent; an intent to punish all the enumerated offenses, whether committed on land or on tide waters, because they were equally within the same mischief, and the prohibitions equally necessary to the protection of the commerce and navigation of the United States. It has been suggested that there is not the same necessity for the interposition of congress in the case of the offense contained in the present indictment, when committed on land, as when committed on the sea, or in other places within the admiralty and maritime jurisdiction of the United States; because, when committed on land, the offense is, or may be, cognizable by the state judicatories, under the state laws. But this reasoning is equally applicable to the other offenses enumerated in the other clauses of the same section; and yet it can hardly be doubted that they were designed to be punished when committed on land. And it may be further suggested, that it could scarcely be deemed prudent or satisfactory wholly to rely upon state legislatures or state laws for the protection of rights and interests specially confided by the constitution to the authority of congress.

Independently, however, of these considerations, there are others, which ought to have great weight, and, in our opinion, decisive influence, in a question like the present. In the first place, the act of 1825, ch. 276, manifestly contemplates that in some of the offenses enumerated in it, the state courts would or might have a concurrent jurisdiction; for the twenty-third section of the act expressly provides "that nothing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction, under the laws of the several states, over offenses made punishable by this act." Now, there are no other sections in the act to which this last section can more pertinently apply than to offenses committed on land, within the ninth section. It does, indeed, apply with equal force to the twenty-third section of the act (which is also derived from the power to regulate commerce), which provides for the punishment of conspiracies, combinations and confederacies, "on the

high seas, or within the United States," to cast away, burn, or otherwise destroy any ship or vessel, for the fraudulent purposes stated in the section; and also affixes a like punishment to the building or fitting out, aiding in the building or fitting out, "within the United States," of any ship or vessel, with intent that the same shall be cast away, burnt or destroyed for the like purpose.

In the next place, it is a most important consideration, that, in cases of shipwreck, there must always be great practical difficulties in ascertaining the precise place, whether below or above high-water mark, where the property is first plundered, stolen or destroyed; as well as by direct evidence to identify the particular persons by whom the offense was committed. These dreadful calamities usually occur upon coasts, and in places where the officers and crew are total strangers to all the inhabitants. The personal sufferings of the officers and crew often disable them from making any efforts, or giving any care or aid in the preservation of the property. The hurry and confusion incident to such events make them intent upon consulting their own safety, and often absorb all their thoughts. The darkness of the night, as well as the perils of the weather, often compel them to forego all resistance to the depredators; and the latter often assemble in numbers so large as to make opposition hopeless, and identification of individuals and of packages impracticable. While some are on the waves bringing the plunder to the shore, others are or may be on the shore stationed to guard and secure the booty. Under such circumstances, if the jurisdiction of the courts of the United States were limited to acts of depredation or destruction committed below high-water mark, the enactment would become practically almost a dead letter; for in most cases it would be impossible to establish, by direct proof, that the property was taken below high-water mark. A prosecution in the state court would, in many cases, be equally liable to a failure, from the utter impossibility of establishing whether the act was not committed within the admiralty and maritime jurisdiction of the United States. The wisdom of the enactment, therefore, which, upon a prosecution in the courts of the United States, should cut off any defense founded upon the mere absence of such proof where the offense was committed, would seem to be as clear as its policy is obvious. It could scarcely escape the attention of the legislature as indispensable for the due administration of public justice. And so far from wondering that the section in question does not contain any restriction as to locality of the offense, the surprise would have been great if it had been found there. We think ourselves justified in saying that, upon the true interpretation of the section, it contains no such restriction; and that there is no ground, in constitutional authority, in public policy, or in the nature or object of the section, which calls upon us to insert any.

Upon the whole, our opinion is that it be certified to the circuit court for the southern district of New York that the offense committed was within the jurisdiction of that court.

UNITED STATES *v.* WILTBERGER.

(5 Wheaton, 76-105. 1820.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Pennsylvania.

STATEMENT OF FACTS.—Indictment for manslaughter committed on an American ship. The defendant was the commander of the vessel, which was lying at the time in the river Tigris, in the empire of China, about one hundred yards from shore and thirty-five miles from the mouth of the river. The water

was four and a half fathoms deep, and fresh, except in very dry seasons. The tide ebbed and flowed at and above the place where the offense was committed.

Opinion by MARSHALL, C. J.

The indictment in this case is founded on the twelfth section of the act entitled "An act for the punishment of certain crimes against the United States." That section is in these words: "And be it enacted, that if any seaman, or other person, shall commit manslaughter on the high seas, or confederate," etc., "such person or persons so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding \$1,000."

§ 1633. *A river is not a part of the high seas, at a place thirty-five miles from its mouth.*

The jurisdiction of the court depends on the place in which the fact was committed. Manslaughter is not punishable in the courts of the United States, according to the words which have been cited, unless it be committed on the high seas. Is the place described in the special verdict a part of the high seas? If the words be taken according to the common understanding of mankind, if they be taken in their popular and received sense, the "high seas," if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide, and in the interior of a country. This extended construction of the words, it has been insisted, is still further opposed by a comparison of the twelfth with the eighth section of the act. In the eighth section congress has shown its attention to the distinction between the "high seas" and "a river, haven, basin or bay." The well known rule that this is a penal statute, and is to be construed strictly, is also urged upon us.

On the part of the United States, the jurisdiction of the court is sustained, not so much on the extension of the words "high seas," as on that construction of the whole act which would engraft the words of the eighth section, descriptive of the place in which murder may be committed, on the twelfth section, which describes the place in which manslaughter may be committed. This transfer of the words of one section to the other is, it has been contended, in pursuance of the obvious intent of the legislature; and in support of the authority of the court so to do, certain maxims or rules, for the construction of statutes, have been quoted and relied on. It has been said that, although penal laws are to be construed strictly, the intention of the legislature must govern in their construction. That if a case be within the intention, it must be considered as if within the letter of the statute. So, if it be within the reason of the statute.

§ 1634. *Penal statutes should be construed strictly, but not so as to defeat the intention of the legislature.*

The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment.

It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. This is true. But this is not a new independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as

to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.

§ 1635. *Crimes act of April 30, 1790, section 12, construed.*

Having premised these general observations, the court will proceed to the examination of the act, in order to determine whether the intention to incorporate the description of place contained in the eighth section, into the twelfth, be so apparent as to justify the court in so doing. It is contended that, throughout the act, the description of one section is full, and is necessarily to be carried into all the other sections which relate to place or to crime. The first section defines the crime of treason, and declares "that, if any person or persons owing allegiance to the United States of America, shall levy war," etc., "such person or persons shall be adjudged guilty of treason," etc. The second section defines misprision of treason; and, in the description of the persons who may commit it, omits the words "owing allegiance to the United States," and uses, without limitation, the general terms "any person or persons." Yet it has been said these general terms were obviously intended to be limited, and must be limited, by the words "owing allegiance to the United States," which are used in the preceding section.

It is admitted that the general terms of the second section must be so limited; but it is not admitted that the inference drawn from this circumstance, in favor of incorporating the words of one section of this act into another, is a fair one. Treason is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary. The words, therefore, "owing allegiance to the United States," in the first section, are entirely surplus words, which do not, in the slightest degree, affect its sense. The construction would be precisely the same were they omitted. When, therefore, we give the same construction to the second section, we do not carry those words into it, but construe it as it would be construed independent of the first. There is, too, in a penal statute, a difference between restraining general words and enlarging particular words.

The crimes of murder and of manslaughter, it has been truly said, are kindred crimes; and there is much reason for supposing that the legislature intended to make the same provision for the jurisdiction of its courts as to the place in which either might be committed. In illustration of this position, the third and seventh sections of the act have been cited. The third section describes the places in which murder on land may be committed, of which the courts of the United States may take cognizance; and the seventh section describes, in

precisely the same terms, the places on land, if manslaughter be committed, in which the offender may be prosecuted in the federal courts. It is true that, so far as respects place, the words of the third section concerning murder are repeated in the seventh and applied to manslaughter; but this circumstance suggests a very different inference from that which has been drawn from it. When the legislature is about to describe the places in which manslaughter, cognizable in the courts of the United States, may be committed, no reference whatsoever is made to a prior section respecting murder; but the description is as full and ample as if the prior section had not been in the act. This would rather justify the opinion that, in proceeding to manslaughter, the legislature did not mean to refer us to the section on murder for a description of the place in which the crime might be committed, but did mean to give us a full description in the section on that subject.

So the sixth section, which punishes those who have knowledge of the commission of murder, or other felony, describes the places on land in which the murder is to be committed to constitute the crime with the same minuteness which had been before employed in the third, and was afterwards employed in the seventh section.

In the eighth section, the legislature takes up the subject of murder and other felonies committed on the water, and is full in the description of place: "If any person or persons shall commit upon the high seas, or in any river, haven, basin or bay out of the jurisdiction of any particular state, murder," etc. The ninth section of the act applies to a citizen who shall commit any of the offenses described in the eighth section, against the United States or a citizen thereof, under color of a commission from any foreign prince or state.

It is observable that this section, in its description of place, omits the words, "in any river, haven, basin or bay," and uses the words "high seas" only. It has been argued, and we admit, with great force, that in this section the legislature intended to take from a citizen offending against the United States, under color of a commission from a foreign power, any pretense to protection from that commission; and it is almost impossible to believe that there could have been a deliberate intention to distinguish between the same offense committed under color of such commission on the high seas, and on the waters of a foreign state, or of the United States, out of the jurisdiction of any particular state. This would unquestionably have been the operation of the section had the words, "on the high seas," been omitted. Yet it would be carrying construction very far to strike out those words. Their whole effect is to limit the operation which the sentence would have without them; and it is making very free with legislative language to declare them totally useless when they are sensible, and are calculated to have a decided influence on the meaning of the clause. That case is not directly before us, and we may, perhaps, be relieved from ever deciding it. For the present purpose, it will be sufficient to say that the determination of that question in the affirmative would not, we think, be conclusive with respect to that now under consideration. The ninth section refers expressly, so far at least as respects piracy or robbery, to the eighth; and its whole language shows that its sole object is to render a citizen who offends against the United States or their citizens, under color of a foreign commission, punishable in the same degree as if no such commission existed. The clearness with which this intent is manifested by the language of the whole section might, perhaps, justify a latitude of construction which would not be allowable where the intent is less clearly manifested; where we are to be guided, not so much

by the words in which the provision is made, as by our opinion of the reasonableness of making it.

But here, too, it cannot escape notice that the legislature has not referred for a description of the place to the preceding section, but has inserted a description, and by that insertion has created the whole difficulty of the case. The tenth section declares the punishment of accessories before the fact. It enacts "that every person who shall, either upon the land or the seas, knowingly and wittingly aid and assist, procure, command, counsel or advise any person or persons to do or commit any murder or robbery, or other piracy, aforesaid, upon the seas, which shall affect the life of such persons, shall," etc.

Upon this section, also, as on the preceding, it has been argued that the legislature cannot have intended to exclude from punishment those who shall be accessories before the fact to a murder or robbery committed "in a river, haven, basin or bay out of the jurisdiction of any state;" and now, as then, the argument has great weight. But it is again to be observed that the legislature has not referred, for a description of place, to any previous parts of the law, but has inserted a description, and by so doing has materially varied the obvious sense of the section. "Every person who shall, either upon the land or the seas, knowingly and wittingly aid," etc. The probability is, that the legislature designed to punish all persons amenable to their laws who should, in any place, aid and assist, procure, command, counsel or advise any person or persons to commit any murder or piracy punishable under the act. And such would have been the operation of the sentence had the words "upon the land or the seas" been omitted. But the legislature has chosen to describe the place where the accessorial offense is to be committed, and has not referred to a description contained in any other part of the act. The words are, "upon the land or the seas." The court cannot reject this description. If we might supply the words "river, haven," etc., because they are stated in the eighth section, must we supply "fort, arsenal," etc., which are used in the third section, describing the place in which murder may be committed on land? In doing so, we should probably defeat the will of the legislature. Yet if we depart from the description of place given in the section, in which congress has obviously intended to describe it, for the purpose of annexing to the word "seas," the words "river, haven, basin or bay," found in the eighth section, there would be at least some appearance of reason in the argument, which would require us to annex also to the word "land," the words "fort, arsenal," etc., found in the third section.

After describing the place in which the "aid, assistance, procurement, command, counsel or advice" must be given, in order to give to the courts of the United States jurisdiction over the offense, the legislature proceeds to describe the crime so to be commanded or procured, and the place in which such crime must be committed. The crime is, "any murder or robbery, or other piracy, aforesaid." The place is "upon the seas."

In this section, as in the preceding, had the words "upon the seas" been omitted, the construction would have been that which, according to the argument on the part of the United States, it ought now to be. But these words are sensible and are material. They constitute the description of place which the legislature has chosen to give us; and courts cannot safely vary that description without some sure guide to direct their way. The observations made on this section apply so precisely to the eleventh that they need not be repeated. The legal construction of those sections is doubtful, and the court is not now,

and may perhaps never be, required to make it. It is sufficient to say, that, should it even be such as the attorney-general contends it ought to be, the reasons in favor of that construction do not apply conclusively to the twelfth section. They both contain a direct reference to the eighth section. They describe accessorial offenses, which, from their nature, are more intimately connected with the principal offense than distinct crimes are with each other. The twelfth section takes up the crime of manslaughter, which is not mentioned in the eighth; and, without any reference to the eighth, describes the place in which it must be committed in order to give jurisdiction to the courts of the United States. That place is "on the high seas." There is nothing in this section which can authorize the court to take jurisdiction of manslaughter committed elsewhere.

To prove the connection between this section and the eighth, the attention of the court has been directed to the other offenses it recapitulates, which are said to be accessorial to those enumerated in the eighth. They are admitted to be accessorial; but the court draws a different inference from this circumstance. Manslaughter is an independent crime, distinct from murder, and the legislature annexes to the offense a description of the place in which it must be committed in order to give the court jurisdiction. The same section then proceeds to enumerate certain other crimes which are accessorial in their nature, without any description of places. To manslaughter, the principal crime, the right to punish which depends on the place in which it is committed, congress has annexed a description of place. To the other crimes enumerated in the same section, which are accessorial in their nature, and some of which, at least, may be committed anywhere, congress has annexed no description of place. The conclusion seems irresistible, that congress has not in this section inserted the limitation of place inadvertently; and the distinction which the legislature has taken must of course be respected by the court.

It is the object of the law, among other things, to punish murder and manslaughter on land, in places within the jurisdiction of the United States; and also to punish murder and manslaughter committed on the ocean. The two crimes of murder and manslaughter, when committed on land, are described in two distinct sections, as two distinct offenses; and the description of place in the one section is complete in itself, and makes no reference to the description of place in the other. The crimes of murder and manslaughter, when committed on water, are also described as two distinct offenses, in two sections, each containing a description of the place in which the offense may be committed, without any reference in the one section to the other. That section which affixes the punishment to manslaughter on the seas proceeds to describe other offenses which are accessorial in their nature, without any limitation of place. In every section throughout the act, describing a crime, the right to punish which depends on place, and in some instances where the right of punishment does not depend upon place, the legislature has, without any reference to a preceding section, described the place in which it must be committed in order to bring the offender within the act. This characteristic feature of the law now to be expounded deserves great consideration and affords a powerful reason for restraining the court from annexing to the description contained in one section, parts of the description contained in another. From this review of the examination made of the act at the bar, it appears that the argument chiefly relied on, to prove that the words of one section descriptive of the place ought to be incorporated into another, is the extreme improbability that con-

gress could have intended to make those differences with respect to place which their words import. We admit that it is extremely improbable. But probability is not a guide which a court, in construing a penal statute, can safely take. We can conceive no reason why other crimes, which are not comprehended in this act, should not be punished. But congress has not made them punishable, and this court cannot enlarge the statute.

§ 1636. *The crime of manslaughter, committed on a river within the jurisdiction of a foreign sovereign, is not cognizable in courts of the United States.*

After giving the subject an attentive consideration, we are unanimously of opinion that the offense charged in this indictment is not cognizable in the courts of the United States; which opinion is to be certified to the circuit court for the district of Pennsylvania.

UNITED STATES v. KESSLER.

(Circuit Court for Pennsylvania: 1 Baldwin, 15-35. 1829.)

Charge by HOPKINSON, J.

STATEMENT OF FACTS.—It is a matter of much anxiety and regret to me, and I doubt not to you, that we are deprived of the aid of the learning and experience of the presiding judge of this court in the trial of this cause; and if any arrangement could have been made by which the numerous and important questions of law that have been agitated could have been reserved for his opinion, and, if necessary, carried to the supreme court, it would have been very agreeable to me. But the same law which authorizes a single judge to hold this court makes it his duty to do so whenever required. The defendant has put himself on his trial before us, and he has a right to your judgment and mine on his whole case. Our course is a plain one. We must render that judgment honestly and fearlessly, according to our own consciences and true opinion; and, doing this, we shall be acquitted of any wrong, even if we fall into error, and stand justified to ourselves and our country.

In the indictment now submitted to you, Henry Kessler, the prisoner at the bar, stands charged with four distinct offenses; and your verdict, governed by the evidence and law of the case, will decide whether he is guilty or innocent of all or any of them. It is put beyond all doubt that a fearful crime has been committed, which, indeed, has seldom been exceeded in deep malignity and reckless cruelty. It is our duty, nevertheless, to inquire, with a deliberate and just impartiality, whether the defendant was an actor in the bloody scene, what part he took in it, and whether we have a warrant and authority to bring him to an account for it. The first inquiry will be determined by the evidence you have heard; and the second, by the law of the land, to which we all owe an implicit obedience.

The indictment contains four counts: The *first*, in substance, charges that the prisoner, upon the high seas, with certain persons unknown, on board of a brig or vessel called *L'Elair*, made an assault upon the master of the said brig, put him in fear, and robbed him of certain goods and moneys belonging to him. The *second count* charges the robbery to have been of the goods, effects and moneys of persons unknown, and committed within a marine league of the coast of the United States. The *third* charges the prisoner with piratically and feloniously running away with the said brig, and with certain goods, moneys and effects belonging to persons unknown. The *fourth* and last count

charges the running away with the vessel and the stealing of the goods to have been done within a marine league of the coast of the United States.

It appears that in November last (1828), the brig L'Eclair was in the port of Philadelphia, when the defendant, with five other persons, shipped on board of her as mariners. There were besides on board, the captain, a mate and a young Frenchman. The vessel sailed from Philadelphia for Goree, in Africa, where she arrived, and remained about a month,— she sailed from Goree to Cayenne, and arrived safely there, and remained there about six weeks. At this place the mate, who sailed with her from Philadelphia, left her and another was taken in his place; but all the other persons who went out in her were on board when she sailed from Cayenne. For the occurrences that happened after the vessel left Cayenne, including the horrible transactions which have brought the prisoner to the bar, we are compelled to rely on the testimony of John Battiste, who was cook and steward of the brig, and is the only witness produced to give an account of them.

§ 1637. *How the testimony of an accomplice is to be regarded.*

Before I call your attention to the circumstances and facts testified by this witness, it will be well to explain to you the rules of law by which his credibility may be tested. John Battiste was on board the brig when the enormities were committed; he received, by fear and compulsion, as he says, a part of the plunder; he made no discovery of the crime on his arrival in the United States, but appropriated the money he had received to his own use, telling a falsehood as to the manner in which he had obtained it; and disclosing what he now has sworn to be the truth, only on being arrested and charged with the crime. Still we are hardly authorized to say he is an accomplice; he has made no such confession, nor is he charged as such in the bill before us. If, however, his evidence is to be considered as that of an accomplice, which is putting it in its worst light, it does not follow that it is to be disbelieved. The law, founded not only on good policy, but on good sense also, admits such evidence to be competent, and then endeavors by certain wholesome and reasonable restrictions to guard the innocent from injury from witnesses in such suspicious circumstances.

It is certainly true that when a witness is admitted to be competent, his credibility rests entirely with the jury, who may therefore convict upon the testimony of an accomplice, though unsupported by any other proof, and, if they conscientiously believe him, it is their duty to do so. This, however, is seldom the case; and it is usual for the court to advise a jury not to regard the evidence of an accomplice unless he is confirmed in some parts of his evidence by unimpeachable testimony. But you are not to understand by this that he is to be believed only in such parts as are thus confirmed, which would be, virtually, to exclude him, inasmuch as the confirmatory evidence proves of itself those parts it applies to. If he is confirmed in material parts, he may be credited in others; and the jury will decide how far they will believe a witness from the confirmation he receives by other evidence; from the nature, probability and consistency of his story; from his manner of delivering it, and the ordinary circumstances which impress the mind with its truth.

The credit which shall be given to the evidence of John Battiste is unquestionably of primary importance in the decision of this cause. It is from him only we have the details of the awful crimes which sacrificed three unoffending victims to avarice and cruelty, and of the part taken by the several actors in this bloody tragedy. He avers his ignorance of this conspiracy, he denies

any participation in it, and pretends that his acquiescence was owing to menaces and fear of his own life. On the other hand, we find him receiving, reluctantly he says, his share of the plunder; coming off from the vessel in apparent good fellowship with the murderers and robbers. He comes with them all to Brooklyn, a considerable town opposite to New York; he goes into that city with the present prisoner; he comes on to Philadelphia, and proceeds to Cape May, the place of his residence, never giving the slightest hint of the crimes he had seen committed, nor taking a step to have the offenders brought to justice. On the contrary, he sits himself down quietly to enjoy his portion of the plunder; he buys land, and makes other purchases with the money, and in short appropriated it to his own use, as if it were honestly his own. In addition to this, he told a falsehood to those who inquired how he obtained so much wealth, saying he got it from his sister in the West Indies. All this weighs heavily upon him; and for the part he really took in the murder and robbery, if he took more than he has avowed, he must answer not only to the justice of this country, but to a more awful tribunal hereafter. Notwithstanding all this, he may have told the truth to you, and under circumstances and with corroborations which will entitle him to belief. At most, the circumstances I have alluded to against him only prove him to have been a full accomplice in the crime; but it is often only from such witnesses, and sometimes the worst, that great crimes are discovered and punished. How, then, is this witness corroborated by other unimpeachable evidence? His account of the men on board; the manner and place of their shipping; of the voyage, cargo, and other facts less important, all appear to be strictly correct. He is further confirmed by an overwhelming fact in this business. This brig sailed from Cayenne in March last; and from that time we have heard nothing of her except from John Battiste. Had she perished at sea, with all her crew, we should not see Battiste and Kessler here. If the vessel was lost and the men saved, it would have been easy for the defendant to have given some proof of the fact. But none has been attempted. The vessel is gone, and the men are here. Again, a pair of pantaloons, sworn to belong to the captain, not only by Battiste, but by two most respectable witnesses, are traced to the possession of the defendant; and he was bold and callous enough to wear them as his own. Add to these the money he had, in considerable quantities, consisting of peculiar foreign coins, the same as those plundered from the vessel; and last of all, his admission that he helped to throw the captain overboard, and that in this Battiste had told the truth. Assuredly these are corroborations of a strong character of the evidence of John Battiste; and the more so, as the prisoner has not attempted by a particle of evidence to repel or explain any of these circumstances, nor to contradict any part of Battiste's evidence.

With these remarks, the evidence of J. Battiste is left to the jury, and they will judge of it as it has or has not produced belief on their minds. You are to be reasonably satisfied of its truth before you will found your verdict upon it, and you will make up your opinion on all you have seen and heard in the course of this trial. If, then, you shall believe that the prisoner took the part attributed to him in the transactions of the 4th March, 1829 — a day, he said, he should never forget,—it cannot be questioned that he is a principal in the crime, although he did not strike any of the mortal blows; he was present, aiding and abetting the actual murderers, and you may presume from the manner in which he rendered his assistance, and his whole deportment at the time of the murder and subsequent to it, that he was a party to the whole conspiracy

and design. If, indeed, he acted under terrifying menaces, and a real and well grounded fear of his life had he refused, he will stand excused, but his peril should be violent and clearly proved.

The matter of fact being left entirely to you upon the whole evidence, some important and highly interesting questions of law have been argued in this case, on which it was the duty of the court to give an explicit opinion. It is alleged on the part of the defendant that there is no proof that he is a citizen of the United States, and that it is in full proof that the brig on board of which the crimes charged in the indictment were committed was a foreign vessel; that she was wholly owned by French subjects, and was at the time sailing under the French flag. It is then said that the case presented to you is one in which a foreigner has committed an offense on board of a foreign vessel, and that such a case is not cognizable by the courts of the United States — and so is the law. This argument or inference is founded on the assumption of two facts, which must be settled by you before you receive the conclusion: First, is Henry Kessler a citizen of the United States? This you will decide by the evidence. It appears to me to be hardly susceptible of a doubt. You have had an account of his father residing in New Jersey, since he (the father) was seven years old; of his grandfather living there; of his father and grandmother still living there; of an aunt residing in this city, and no intimation that they had ever been out of this country. Not one of these persons has he produced upon the subject of his birth and citizenship. Such circumstances at least throw the burthen of proof upon him, or leave him to the conclusion every one will draw from them.

§ 1638. *Under the acts of congress the courts of the United States have no jurisdiction over the offenses of robbery and piracy on the high seas committed on board a foreign vessel.*

The next question of fact is, was the brig L'Eclair a foreign vessel, belonging exclusively to French owners and sailing under the French flag? You will remember the evidence on this point; it was clear and uncontradicted in proving that she was altogether owned by French subjects, and sailed under the flag of France; and indeed this fact is conceded by the district attorney. If such shall be your understanding of these two facts, then the case is not that of a foreign subject committing an offense on board of a foreign vessel, but of a citizen of the United States committing an offense on board of a foreign ship. The question of law here presents itself — is this an offense under the acts of congress of the United States, and has this court jurisdiction to try and punish the offense? Happily it is not a new question, but has more than once passed under the solemn consideration of the supreme judicial tribunal of our country. The difficulties and doubts, therefore, in which it may once have been involved, are removed by an authority of the highest respectability in itself, and which this as a subordinate court is bound to obey.

The first, and, as it has been truly called, the leading adjudication on the interesting question now before us, was made in *United States v. Palmer*, reported in 3 Wheat., 610 (§§ 535-541, *supra*). This case came to the supreme court certified from the circuit court of Massachusetts, where certain questions occurred upon which the opinions of the judges of the circuit court were opposed. Eleven questions were in this manner brought up to the supreme court, where they were argued with much care and solemnly decided. The third and fourth questions only are material to our purpose. The third is, whether the crime of robbery committed by persons who are not citizens of the United

States, on the high seas, on board of any ship or vessel belonging exclusively to the subjects of any foreign state or sovereignty, or upon the person of any subject of any foreign state or sovereignty not on board of any ship or vessel belonging to any citizen or citizens of the United States, be a robbery or piracy within the true intent and meaning of the eighth section of the act of congress of the 30th April, 1790, and of which the circuit court of the United States hath cognizance to hear, try, determine and punish the same. It will be perceived that this question embraces that before this court, on the supposition that the defendant is not a citizen of the United States.

The next question equally embraces it, on the supposition that he is a citizen of the United States. It is as follows: whether the crime of robbery committed on the high seas by citizens of the United States on board of any ship or vessel not belonging to the United States, or to any citizens of the United States, in whole or in part, but owned by, and exclusively belonging to, the subjects of a foreign state or sovereignty; or committed on the high seas, on the person of any subject of any foreign state or sovereignty who is not at the time on board of any ship or vessel belonging in whole or part to the United States, or to any citizen thereof, be robbery or piracy within the said eighth section of the act of congress aforesaid, and of which the circuit court of the United States hath cognizance to hear, try, determine and punish the same.

Nothing can be more distinct and unequivocal than the terms in which these questions are propounded, and they so clearly describe the case of the defendant, be he a citizen or an alien, that the answer given to them by the court must decide his case, so far as it depends upon the acts of congress referred to. The opinion of the court on these questions was delivered by the chief justice in his accustomed luminous and exact manner. He says: "the question whether this act extends further than to American citizens, or to persons on board American vessels, or to offenses committed against the citizens of the United States, is not without its difficulties." He then remarks upon the universality of the words of the section, which are of unlimited extent — "*Any person or persons* are broad enough to comprehend every human being." The chief justice then goes into a clear, rational and satisfactory argument to show from various parts of the act the inconveniences and the absurdities that would follow the adoption of the full and literal meaning of the words used; that some limitation must be put to them, and was intended by the legislature. He concludes: "the court is of opinion that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, or persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States." The certificate of the court conforms to this opinion; and was transmitted to the circuit court of Massachusetts as the settled law of our country. This judgment was rendered on the 14th of March, 1818. In the April following, an indictment came on to be tried in this district, in which it became necessary for Judge Washington to refer to the law of Palmer's Case and declare what had been settled by it. He says the question arose whether robbery on the high seas, committed on board a foreign vessel, amounted to piracy within the true intent and meaning of the eighth section, and was cognizable by the courts of the United States. He repeats that the general and unqualified expressions of the section would cover such a case, but says, "upon the whole, it was decided that a robbery committed by any person on the high seas, on

board of a ship belonging exclusively to a foreign state, or to the subjects thereof, or upon the person of a foreign state, in a vessel belonging exclusively to subjects of a foreign state, is not piracy within the true intent and meaning of the eighth section of that law." He adds: "Although the offense of robbery is the only one stated in this decision, yet there can be no doubt but that all the other acts of piracy enumerated in the section are included in the same principle." In another part of this opinion, the learned judge says of Palmer's Case: "That case decides that the act of piracy must be committed on board of an American vessel." *United States v. Howard*, 3 Wash., 334.

Two years afterwards this question came again under the notice of the supreme court, in the case of *United States v. Klintock*, 5 Wheat., 144 (§§ 557, 558, *supra*). The indictment charged the defendant, a citizen of the United States, with piracy committed on the high seas, in a vessel belonging to persons unknown. The facts were that the defendant was a citizen of the United States, and the vessel was owned without the United States. The defendant was found guilty generally; his counsel moved in arrest of judgment on various grounds, one of which was that the act of 30th of April, 1790, does not extend to an American citizen entering on board of a foreign vessel, committing piracy upon a vessel exclusively owned by foreigners. The opinion given in Palmer's Case was here reviewed, and if any mistake or misconception had occurred in it, it would now have been corrected. The opinion of the court is again delivered by the chief justice, and he intends to explain more clearly, if possible, the meaning of the court in Palmer's Case. He says the opinion and certificate given in that case apply exclusively to a robbery or murder committed by a person on board of any ship or vessel belonging exclusively to subjects of a foreign government. To amplify the import of these words, the court say that, to bring the person committing the murder or robbery within them, the vessel on board which he is, or to which he belongs, must be at the time, in point of fact as well as right, the property of the subjects of a foreign state, who must have at the time, in virtue of this property, the control of the vessel; she must at the time be sailing under the flag of a foreign state, whose authority is acknowledged. "This," says the chief justice, "is the case which was decided; we are satisfied that it was properly decided."

At the same session of the supreme court the case of *The United States v. Holmes* and others was decided, and the opinion of the court delivered by Judge Washington. Various questions are here submitted for the judgment of the court. The case of *Klintock* is referred to as the settled law, and the judge says: "It makes no difference whether the offender be a citizen or not. If it be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel belonging to the United States by a foreigner, the offender is to be considered *pro hac vice*, and in respect to this subject, as belonging to the nation under whose flag he sails." That is, the national character of the offender is nothing; the jurisdiction is decided by the character of the vessel. See §§ 552-556, *supra*.

But an act of congress was passed on the 3d of March, 1819, which appears to me to have an important bearing on this question. It will be recollected that the decision of Palmer's Case took place in March, 1818. After which, and the decision in *Howard's Case*, which occurred in the April following, and in these points is substantially the same with Palmer's, the courts of the United States had cognizance of piracies, only: 1. When committed on board

of American vessels; 2. When committed by persons on board of a vessel not belonging to any foreign power, but in the possession of men acknowledging obedience to no government or flag whatsoever; but our courts had not cognizance of piracies as "defined by the law of nations," which is robbery committed on the high seas; forcibly and feloniously seizing, taking and stealing a vessel from her master, with the goods on board; and other acts of the same description, without any regard to the national character of the vessel. To supply this defect in the law of 1790, or rather to try whether it was a defect or not, the fifth section of the act of March, 1819, was enacted.

When congress passed this act, it must be presumed, and was doubtless the fact, they had the opinion of the supreme court in their view, by which the offense of piracy had been restricted as we have seen. By the fifth section of this act of March, 1819, it is enacted, "That if any person or persons whatsoever shall, on the high seas, commit the crime of piracy, *as defined by the laws of nations*, and such offender or offenders shall afterwards be brought into or found within the United States, such offender or offenders shall, upon conviction thereof before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death!"

Here then was an act enlarging the jurisdiction of the courts of the United States in the punishment of piracies greatly beyond the limits assigned to it by the supreme court in their construction of the act of April, 1790; and if the fifth section of the act of 1819 were now in force, it cannot be doubted it would cover the offense charged upon the present defendant, for assuredly the crimes committed on board the brig L'Eclair amounted to piracy under the laws of nations. Congress, however, had felt the force of the reasoning of the court in Palmer's Case; and may have doubted the policy or propriety of extending their penal law beyond their own vessels, leaving it to other nations to do the same with theirs; and therefore declared that this act should be in force only until the end of the next session of congress; and what did they do after making this experiment for one year? They continued, by the act of 15th May, 1820, all the sections of the act of 1819 for another term, except this fifth section, which was suffered to expire; and the third section of the act of May, 1820, was enacted, under which some of the counts of this indictment have been drawn and presented. In this third section it will be found that congress have gone back, in their description of piracy, to the use of the general expressions, "*if any person*" shall commit the crime of robbery in or upon "*any ship or vessel*," employed in the eighth section of the law of April, 1790; well knowing the limited construction the court had put on these words, not only in Palmer's Case, but in Klintock's and Holmes', both of which were decided before the law of May, 1820, and during the session of congress at which it was passed; and they abandoned the attempt to give their courts jurisdiction of piracies "*as defined by the laws of nations*." Further to this point; in March, 1825, congress again legislated on the subject of offenses committed on board of vessels, without an attempt to correct the error, if it were one, of the supreme court, or to extend the jurisdiction of the court in such cases beyond the limits assigned to them by the supreme court. Indeed they rather recognize the principle that the character of the vessel, and not of the offender, shall decide the question of jurisdiction.

In the fifth section it is enacted "that if any offense shall be committed on board of any ship or vessel belonging to any citizen or citizens of the United

States, while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of the said ship," the offense shall be cognizable and punishable by the circuit court of the United States. We see here that neither the national character of the offender, nor the territorial jurisdiction of the place where the offense is committed, is regarded, but solely the national character of the vessel to which the offender belongs, and on board of which the offense is committed. It is also worthy of notice that two of the sections of this act, the fourth and fifth, are introduced to meet two defects in the existing law which had been detected by judicial examination. If then the supreme court, by the principle they have adopted, have subjected us to danger and opprobrium, by making our country a refuge for abandoned criminals, it cannot be denied that the congress of the United States must participate in this reproach, for not correcting the law, when they have the power to do it; or rather for giving those principles an acquiescence, if not a direct approval.

It has been argued by the district attorney, that, if the law of 1820 is the same with that of 1790, why enact it at all? Why not leave the subject to the provisions already in full force? It is an obvious defect in this argument that it takes broader premises than belong to our question. These laws may be the same in the particulars material to the point we are to decide, that is, the true signification of certain forms of expression, but may differ in other matters. We now only speak of the eighth section of the first act, and the third section of the last, which relate to piracy, for in other respects the laws embrace wholly different subjects of criminal legislation. These two sections do not differ in the phrases on which the construction of the supreme court was passed; and it would introduce a strange and intolerable confusion and incongruity in the administration of justice, if the same words were admitted to have one meaning in the first act, and another in the second, both legislating on the same subject. If a man indicted for piracy under the law of 1790 could not be convicted if the offense were committed on board of a foreign vessel, he might be convicted and capitally punished for the same act, committed in the same circumstances, if indicted under the law of 1820. Nay, what would be done when, as in the present case, some of the counts are founded on one of these acts and some on the other? It may be remarked that in the last act the reference to offenses punished with death, if committed in the body of a county, is omitted; and other differences will be found between the two sections. What effect these differences will have upon the law of 1790, on the points in which they occur, we need not now inquire.

On this question of construction of the general words in the law of 1790, it is not amiss to remark that it is distinctly admitted that if, in this case, all was foreign, the offender as well as the flag, the prosecution would fall. But the words of the act, in their full and literal meaning, as a common reader would understand them, would certainly embrace such a case; so that the only difference between the supreme court and the district attorney is that they draw their limits rather closer than he is now willing to do. They differ in the measure, not in the principle; both find it necessary to narrow the broad import of the terms of the act, but they would do so in different degrees and by a different scale.

To pursue the intention and meaning of the third section of the law of 1820 a little closer, let us bring its operative descriptive words and those used in the eighth section of the act of 1790 together, and, on a comparison, see

whether we can be allowed to say that, by one of them, it was intended to describe an offense committed only on board of an American vessel, and by the other to describe an offense committed on board of any vessel, American or foreign. By the act of 1790, *if any person commit upon the high seas, etc., murder or robbery, or if any captain or mariner of any ship or vessel shall piratically run away with such vessel or any goods, etc., every such offender shall be deemed and adjudged a pirate.* By the act of 1820, *if any person shall upon the high seas commit the crime of robbery in or upon any ship or vessel, or the lading thereof, such person shall be adjudged a pirate.* The description in the first act is rather more general than in the second, using the words of the definition of piracy by the laws of nations; that is, robbing on the high seas, referring to no vessel of any description. The supreme court had decided that congress had a right to define piracy, as they had done in the law of 1819, by a reference to the laws of nations; that is, "*as defined by the laws of nations.*" We cannot, therefore, presume that they dropped this definition in 1820 from a doubt of its propriety, and that they intended to cover exactly the same ground by the terms "shall commit the crime of robbery on the high seas," especially as the same court had solemnly adjudged that these terms were not so comprehensive. If they had so intended, they would have said so explicitly, knowing that the court had decided that such expressions would not reach a robbery committed by a citizen or foreigner on board of a foreign vessel, although such would be piracy by the laws of nations, and was included in the definition adopted in the act of 1819. Had it been the intention of the legislature to retain in the act of 1820, as they have done, the words descriptive of the offenses which they had used in 1790, but to repudiate the restricted construction put upon them, it would have been easily done by adding to the words "ship or vessel" *whether belonging to an American citizen or not.* We cannot overlook that the act of 1790 makes the commission of murder or robbery on the high seas piracy, punishable by that act. The law of 1820 speaks of robbery only, omitting murder. It follows that, if the description of the offense in the latter act is to have the larger construction contended for, while the former remains subject to the restriction imposed upon it, our courts will have cognizance to try and punish a robbery committed by an American citizen on board of a foreign ship, but not a murder. Can any reason be assigned why congress should make this distinction?

We may readily imagine good cause, founded not only on national policy, but on strict justice, why congress should finally determine to leave the law as the supreme court had pronounced it, and to decline the trial and punishment of crimes committed in a foreign vessel; that is, within and under a foreign jurisdiction. If we adopt the broad construction of the law of 1820 which its terms import, we must try and punish not only an American citizen, but a foreigner also, for offenses committed on sea in a foreign vessel. It is easy to see that this might get us into difficulties with other nations, who may not choose that we should hang their subjects by the mode of trial and sentence of our tribunals for offenses on board their own ships, under their authority and protection. They may choose to be themselves the judges of the guilt of the accused and of the measure of the punishment. On the other hand, how might our proceeding affect our own citizens? Take the case before you. Suppose this defendant, after a full and fair trial, should convince this jury of his entire innocence, and be by them acquitted. He would, on a fundamental principle of our criminal law, think himself out of jeopardy and absolved from all fur-

ther responsibility on this account. Under this belief he goes to France, with or without his means of defense; he is there arrested and brought to trial. Would the courts of that country pay any regard to your judgment in relation to a crime committed in one of their vessels on the person and property of their subjects, and more especially if the offender also was one of their subjects? Questions and difficulties of this sort are avoided by confining our cognizance of offenses on the high seas to our own ships, leaving other nations to take care of their own.

On this part of the case it is my opinion that those counts of this indictment which are founded on the act of the 30th of April, 1790, fall directly under the decisions of the supreme court giving a construction to that act; and, therefore, if you shall believe, as is indeed conceded by the district attorney, that the offenses charged in these counts were committed on board of a vessel belonging exclusively to subjects of a foreign state, sailing under the flag of a foreign state, whose authority is acknowledged, it is not piracy within the true intent and meaning of that act, and this court hath no cognizance to hear, try, determine and punish the same. As to the counts which are founded on the act of May, 1820, it is my opinion that the general descriptive terms of the offense used in this act must be taken and understood with the same limitations given by the supreme court to the same or similar expressions in the act of April, 1790; and, therefore, that if the offenses charged in these counts were committed on board of a vessel belonging exclusively to subjects of a foreign state, whose authority is acknowledged, it is not piracy within the true intent and meaning of the act of May, 1820, and this court hath no cognizance to hear, try, determine and punish the same.

The district attorney has made another effort to get this case within the jurisdiction of the courts of the United States; and we must agree that any effort to bring such atrocities to punishment is commendable. The second count of the indictment lays the piratical and felonious stealing of the goods, moneys, etc., from and out of the brig *L'Eclair*, to have been done within a marine league of the coast of the United States; and the fourth charges that the defendant, with other persons, within a marine league of the coast of the United States, piratically did run away with the said brig, and with certain goods, moneys and effects, etc. The first step to warrant a conviction on these counts is to establish the facts asserted in them, that is, that the offenses charged were actually committed within a marine league of the coast of the United States; and this it is incumbent upon the prosecution to show. The point of time taken by the district attorney is that when the brig was scuttled and abandoned by the crew, taking with them their plunder. Was she at that period within a marine league of our coast? The only witness who testifies upon this subject is John Battiste, who said, on his first examination, that it was about three miles from the shore, or it might be more. He afterwards said it was about three miles, which may mean more or less; and finally declared he knew nothing about it from his own observation or knowledge, but spoke only from having heard John Mansfield say they were about three miles from the shore. What light is given to this part of the case by the accounts, detailed in a very confused way to my mind, of the direction in which the brig sailed, off and on along the coast for several hours before she was left, you may be able to discover. It appears to me to be altogether imperfect and unsatisfactory. But admitting that the brig was within the marine league of our coast when she was scuttled does not maintain the charge, to wit, that the

moneys and effects were piratically stolen; or that the moneys and effects were piratically run away with. It does not appear so to the court. The goods were stolen when they were taken into the possession of the robbers, and divided between them on the 4th of March, more than a month before they came on our coast. The vessel was run away with at the same time, when she was taken out of the possession of her lawful officers, and her course changed from that she was pursuing. All this was fully accomplished long before she approached our coast. The crime was complete, and nothing was done to add to it, after the arrival at the American shore. I cannot agree to the argument of the district attorney, that jurisdiction is given by bringing the stolen property within the territorial limits of the United States. This is the law as between two counties of the same state, but has been held not to prevail in the case of stolen property brought from one of the United States to another.

It is my duty to go on one step further on this subject; you will remark that this point becomes important to the prosecution only on account of the foreign ownership of this brig. Had she been American, then the crime being committed on the high seas it would have been immaterial whether it was within or without the marine league of the coast, either of this or any other country; but it is argued that, although we may not have jurisdiction of an offense committed on the high seas on board of a foreign vessel at a greater distance than three miles from the shore, yet if it be within that distance we obtain a right to try and punish it. I am not of this opinion. The jurisdiction of this court is derived wholly from the acts of congress on this subject. The description of the place to which or over which it extends is the *high seas*. If then the space within the marine league is not comprehended within this description, this court has no jurisdiction over it; if it be comprehended, as it certainly is, then it is so because it is a part of the high seas, in all respects, and to all purposes the same as any other part of the high seas. Nothing is added to the jurisdiction of the courts of the United States by reason of the offense having been committed within this distance of their coast; nothing is taken from it by reason of its having been committed within the jurisdictional limits of a foreign government, within a marine league of the shore, if done on the high seas, which are held to be any waters on the sea-coast without the boundaries of low-water mark. It follows from these principles that if this court has no power under the act of congress to try and punish this offense committed on board of a foreign vessel on the ocean, it acquires no such power because she was within a marine league of our coast when the offense was committed. The principle on which nations claim this extension of their authority and jurisdictional rights for a certain distance beyond their shores is to protect their safety, peace and honor from invasion, disturbance and insult. They will not have their strand made a theater of violence and bloodshed by contending belligerents. Some distance must be assumed. It varies by different jurists from one league to thirty; and again, as far as a cannon will carry a ball. Such limits may be well enough for their object, but would be extraordinary boundaries of the judicial power and jurisdiction of a court of law.

§ 1639. *Jurisdiction is not conferred by the fact that the offenses of robbery and murder on a foreign ship were committed within a marine league of the coast of the United States.*

It is my opinion that whether this offense was committed within or without a marine league from the coast of the United States is of no importance to the question of the jurisdiction of this court to hear and determine it. The case,

gentlemen, is now left with you to be decided according to your judgment and conscience on the fact and the law. I have given you distinctly, I hope, my opinion of the law of the case, and such observations upon the most prominent facts as I have supposed may be of some service to you in your deliberations on them. (Verdict of acquittal for want of jurisdiction.)

UNITED STATES v. GRUSH.

(Circuit Court for Massachusetts: 5 Mason, 290-302. 1829.)

STATEMENT OF FACTS.—Indictment for assault with intent to kill. The accused was convicted, and a motion was made for a new trial on the ground of want of jurisdiction. The facts on which the objection was founded are stated in the opinion.

Opinion by STORY, J.

It is agreed between the parties that the place where the vessel (the Pacific), on board of which the offense was committed, lay at anchor at the time of the commission of the offense, was between Lovell's Island, George's Island and Gallop's Island, which belong to the city of Boston, as part of its territorial limits. The tide ebbs and flows between these islands into what is called the inner harbor of Boston, and at all times of the tide there is a great depth of water there, the bottom or channel never being dry, and vessels at anchor there are constantly afloat in the stream. The distances between these islands is about one-eighth of a mile. Hale's map of Boston and Wadsworth's chart of the harbor of Boston and the adjacent coasts and headlands are admitted in evidence as accurate delineations of the same. The nearest headlands on the main land on each side are the town of Hull on the southern, and Point Shirley on the northern, side of the harbor of Boston, and the distance between these headlands is about five or six miles. There are a number of islands between these headlands, with narrow inlets and passages for vessels between them. The main channel into the inner harbor of Boston flows also between them, in no instance exceeding one mile in breadth. Nantasket Roads, as it is called, or the outer harbor of Boston, where vessels, going from and coming to the port, are accustomed to lie at safe anchorage, is on the side contiguous to Hull. There are several islands further out towards the ocean; and particularly the Great Brewster, on which the principal light-house stands. The extreme point of the main land, jutting from the southern coast opposite to this light-house, is called Point Allerton, and the distance between them is about one mile and a quarter. Processes from the state courts of the county of Suffolk have been at all times, without objection, served as far down as where the Pacific lay; and even down to the light-house on the Great Brewster; but not below. Vessels are accustomed to anchor where the Pacific lay. The towns of Boston and Chelsea constitute the county of Suffolk. Such are the material facts.

§ 1640. *The term "high seas" expresses that portion of the sea which is without the fauces terræ on the sea-coast.*

The statute on which the present indictment is founded (Stat. of 1825, ch. 276, § 22) declares "that if any person or persons upon the *high seas*, or in any *arm of the sea*, or in any *river, haven, creek, basin or bay* within the admiralty jurisdiction of the *United States*, and *out of the jurisdiction of any particular state*, on board any vessel, etc., etc., shall, with a dangerous weapon, or with in-

tent to kill, etc., commit an assault on another, such person shall, on conviction thereof, be punished," etc., etc.

There cannot, I think, be any doubt as to what is the true meaning of the words "*high seas*" in this statute. Mr. Justice Blackstone, in his Commentaries (1 Com., 110), uses the words "high sea" and "main sea" (*altum mare* or *le haut meer*) as synonymous; and he adds, "that the main sea begins at the low-water mark." But though this may be one sense of the terms to distinguish the divided empire which the admiralty possesses between high-water and low-water mark when it is full sea, from that which the common law possesses when it is ebb sea (see, also, Constable's Case, 5 Coke, 106), yet the more common sense is to express the open, uninclosed ocean, or that portion of the sea which is without the *fauces terræ* on the sea-coast, in contradistinction to that which is surrounded, or inclosed between narrow headlands or promontories. Thus Lord Hale says (De Jure Maris, Harg. Tracts, ch. 4, p. 10), "the sea is either that which lies within the body of the county or without. That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner;" and for this he cites Fitz. Abridg. Corone., 399, 8 Edw. 2. And then he adds, "The part of the sea which lies not within the body of a county is called the *main sea*, or ocean." See Selden's Fortescue De Laud. Angliæ, ch. 32, p. 67, etc., notes; and Hale de Port., part 2, ch. 7; Harg. Tracts, p. 88; Vattel, B. 1, ch. 33, § 279 et seq.; The Twee Gebræders, 3 Rob., 336. In United States v. Wiltberger, 5 Wheat., 76, 94 (§§ 1633-36, *supra*), Mr. Chief Justice Marshall, in delivering the opinion of the court, manifestly inclined to the same interpretation of the words "high seas," in our penal code. If (says he) "the words be taken according to the common understanding of mankind, if they be taken in their received and popular sense, the 'high seas,' if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide in the interior of a country." The other words descriptive of place in the present statute give great additional weight to this suggestion; for if "high seas" meant to include other waters, why should the supplemental words, "arm of the sea, river, creek, bay," etc., have been used? Lord Hale, following the exact definition given in the book of Assizes (22 Assiz., 93), says, "That is called an arm of the sea where the sea flows and reflows, and so far only as the sea flows and reflows." Harg. Tracts, part 1, ch. 4, p. 12; part 2, ch. 7, p. 88; 1 Hale, P. C., ch. 32, p. 424; 2 Hale, P. C., ch. 3, pp. 13, 14, 15, 16, 64; Com. Dig. Nav., B. Both he and Lord Coke constantly limit the "high seas" to those waters of the ocean which are without the boundary of any county at the common law; and we shall presently see that narrow arms of the sea are deemed to be within the boundary of some county of the realm. But the waters of the ocean upon the open sea-coast are admitted on all sides to be without the limits of any county, and are within the exclusive jurisdiction of the admiralty, up to high-water mark, when the tide is full; and are deemed by the crown writers, generally, as the high sea or main sea. 2 Hale, P. C., 13, 14, 15, 16, 54; 1 Hale, P. C., 424; 3 Inst., 57, 113; 2 East, P. C., 802; 1 Bac. Abridg., Coroner, B.; 2 Bac. Abr., Courts of Adm., A.; Com. Dig. Adm., E. 7, Nav., A.

From this view of the subject I am entirely satisfied, as well upon the language of the authorities as the descriptive words in the context, that the words "high seas" in this statute are used in contradistinction to arms of the sea, and

bays, creeks, etc., within the narrow headlands of the coast, and comprehend only the open ocean, which washes the sea-coast, or is not included within the body of any county in any particular state. And upon the facts admitted in the present case, the place where the offense was committed is not the "high seas," in this sense of the terms. It is, in my judgment, "an arm of the sea," in the proper definition of that phrase. But an arm of the sea may include various subordinate descriptions of waters, where the tide ebbs and flows. It may be a river, harbor, creek, basin or bay; and it is sometimes used to designate very extensive reaches of waters within the projecting capes or points of a country. My own opinion is, that arms of the sea, whether of the one description or the other, are within the admiralty and maritime jurisdiction of the United States. But if they are within the body of any county of a particular state, the state has also concurrent jurisdiction therein. See *Rex v. Bruce*, 2 Leach, C. C., 1093; *Russ. & Ry. C. C.*, 243. I do not now go over the grounds of this opinion, having upon other occasions gone into them somewhat at large. But to bring a case within the purview of the present statute, it is not sufficient that the place where the offense is committed is within the admiralty jurisdiction of the United States, whether it be an arm of the sea, creek or bay, etc.; but it must, by the very words of the statute, also be a place "out of the jurisdiction of any particular state." And it is out of the jurisdiction of the state, in the sense of this statute, if it be not within the body of some county within the state.

§ 1641. *All inlets of the sea which are so narrow that a man may discern an object from shore to shore are not properly the high seas, but waters that lie within the body of a county.*

This leads me to consider what is the proper boundary of counties bordering on the sea-coast, according to the established course of the common law; for to that I shall feel myself bound to conform on the present occasion, whatever might have been my doubts if I were called to decide upon original principles. The general rule, as it is often laid down in the books, is, that such parts of rivers, arms and creeks of the sea are deemed to be within the bodies of counties where persons can see from one side to the other. Lord Hale uses more guarded language, and says, in the passage already cited, that the arm or branch of the sea which lies within the *fauces terræ*, where a man may *reasonably* discern between shore and shore, is, *or at least may be*, within the body of a county. Hawkins (*Pl. Cr.*, b. 2, ch. 9, § 14) has expressed the rule in its true sense, and confines it to such parts of the sea where a man standing on the one side may see what is done on the other. And this is precisely the doctrine which is laid down by Stanton, J., in the passage in *Fitz. Abridg. Corone.*, 399, 8 Edw. 2, on which Lord Coke and the common lawyers have laid so much stress as furnishing conclusive authority in their favor. 4 *Inst.*, 140, ch. 22; *Staunf. P. C.*, lib. 1, p. 51 (*b.*); 2 *Gall.*, 409. It is there said, "It is no part of the sea where one may see what is done on the one part of the water and the other, as to see from one land to the other." And Mr. East, in his treatise on common law (2 *East, P. C.*, ch. 17, § 10, p. 804), manifestly considers this as the better opinion.

In applying the law to the state of facts presented in the present case, I confess that there does not seem to me any reason to doubt that the place where the offense was committed was within the county of Suffolk. It is not necessary to decide whether it be a bay, or haven, within the statute, though it might, perhaps, indifferently fall within each denomination, for it is a narrow

arm of the sea, and also a place of safe anchorage for vessels. See *Hale De Port. Maris* (Harg. Tracts, part 2, ch. 2, p. 46); *Com. Dig. Nav.*, B. C. D. E. It appears to me that where there are islands inclosing a harbor, in the manner in which Boston harbor is inclosed, with such narrow straits between them, the whole of the waters must be considered as included within the body of the county. It is certain that the islands themselves are within the county of Suffolk; and whether they are inhabited or not can make no difference in the principles of law. Islands so situated must be considered as the opposite shores, in the sense of the common law, where persons, standing on one side, may see what is done on the other. There can be no doubt, from the proximity of Gallop's, Lovell's and George's Islands to each other, that any person on either of their shores could see what was done on the other. I do not understand by this expression that it is necessary that the shores should be so near that all that is done on one shore could be discerned and testified to with certainty by persons standing on the opposite shore; but that objects on the opposite shore might be reasonably discerned, that is, might be distinctly seen with the naked eye, and clearly distinguished from each other. Indeed, upon the evidence before me, I incline strongly to the opinion that the limits of the county of Suffolk, in this direction, not only include the place in question, but all the waters down to a line running across from the light-house on the Great Brewster to Point Allerton. In the sense of the common law, these seem to me the true *fauces terræ* where the main ocean terminates.

Upon the whole, my opinion is, that the court upon the facts has no jurisdiction, and that a new trial ought to be granted. This renders it unnecessary to consider whether the other point, made in arrest of judgment, can be maintained. I allude to the objection, that, in the caption of the indictment, after the usual beginning, "United States of America, District of Massachusetts," the letters (*ss.*) are omitted. The point has, however, been argued; and, as at present advised, it strikes me to be clearly not maintainable as a valid objection. The district judge concurs in this opinion; and therefore a new trial must be granted. Notice must be given to the proper prosecuting officers of the state, that the prisoner may be dealt with according to law in the state courts.

§ 1642. In general.—The courts of the United States have no jurisdiction except such as is expressly conferred by statute or necessarily implied. *United States v. Ta-wan-ga-ca*,* *Hemp.*, 304; *United States v. Alberty*,* *Hemp.*, 444; *United States v. McKenzie*,* 1 *N. Y. Leg. Obs.*, 371; *United States v. Plumer*, 3 *Cliff.*, 54; *United States v. Hudson*,* 7 *Cr.*, 32; *United States v. Coolidge*,* 1 *Wheat.*, 415. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, and so far the federal courts possess powers not immediately derived from statute. *United States v. Hudson*,* 7 *Cr.*, 32. See §§ 14, 22, 32, 33.

§ 1643. The jurisdiction of a federal court depends upon three things: first, the nature of the offense; second, the *status* as to nationality of the party committing it; and third, the place where it was committed. This is so because the criminal jurisdiction of the courts of the United States is limited. *Ex parte Reynolds*, 5 *Dill.*, 305.

§ 1644. The jurisdiction of a court cannot be limited by an order of the president or direction of the attorney-general. Courts in determining the extent of their jurisdiction look to the law, and, within that jurisdiction, they are absolutely free from the control of any other department of the government. *United States v. Lawrence*, 13 *Blatch.*, 295 (§§ 3463-74).

§ 1645. The United States courts derive their only power to try, convict or punish from the constitution and the laws made in pursuance of it. The jurisdiction of offenses which are cognizable at common law resides in the state courts alone, even though the general government may be the party immediately aggrieved by the misdeed complained of. *United States v. Hutchison*,* 4 *Penn. L. J. Rep.*, 211.

§ 1646. In order to ascertain the jurisdiction of the federal courts in criminal cases resort must be had to the acts of congress providing for the punishment of crimes; for although such courts are unquestionably to look to the common law, in the absence of statutory provision, for rules of guidance in the exercise of their functions in criminal as well as in civil cases, it is to the acts of congress passed in pursuance of the constitution alone that they must have recourse to determine what constitutes an offense against the authority of the United States, it being the settled law that the United States has no unwritten code to which resort can be had as a source of jurisdiction. (Per CLIFFORD, J., dissenting.) *Tennessee v. Davis*, 10 Otto, 276 (CONST., §§ 2473-2500).

§ 1647. The federal courts of inferior jurisdiction cannot take cognizance of criminal offenses of any grade, without the express appointment or direction of positive law. To enable them to exercise the functions bestowed by the constitution over crimes and misdemeanors, there must be a designation, by positive law, both of the offense and the tribunal which shall take cognizance of it. Congress has, in its criminal legislation, sedulously evinced the intention to use the term *high seas* in its popular and natural sense, and in contradistinction to mere tide-waters flowing in ports, havens and basins. And hence, under the act of March 24, 1854, punishing with death "any one, not being the owner, who shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any ship or other vessel unto which he belongeth, being the property of a citizen of the United States," the district court has no jurisdiction of the offense when committed within the tide-waters, but not upon the high seas. *United States v. Wilson*, 3 Blatch., 435.

§ 1648. The courts of the United States have no jurisdiction on an indictment against a corporation for obstructing a navigable river by a bridge erected by state authority, unless by maintaining such structure the defendant has violated the constitution of the United States, an act of congress, or a treaty, because it is only within those limits that the courts of the United States can act. *United States v. New Bedford Bridge*, 1 Woodb. & M., 401.

§ 1649. The federal courts, having only a limited jurisdiction, cannot transcend these limits, though the parties make no objection. The court is bound to pause whenever, at any stage of the case, it finds itself to be without jurisdiction. *Ibid.*

§ 1650. Place of trial—Offenses within the United States.—If an offense against the United States be committed within the United States it must be tried in the state and district within which it is committed. *United States v. Bird*,* 1 Spr., 290.

§ 1651. The provisions of section 731, Revised Statutes, which provides that, when any offense is committed in one district and terminated in another, the trial may be had in either, and the offense may be deemed to have been committed in both, has no application to the case of a libel composed in one district and published in another. *In re Buell*, 3 Dill., 116 (§§ 3183-87).

§ 1652. The district court of the United States for the district in which a criminal is found or to which he is brought has jurisdiction to try the offense, nor will it deliver up the criminal that he may be tried in some other district. *United States v. Corrie*,* 28 Law Rep., 145.

§ 1653. On a charge of conspiracy under section 30 of the act of March 2, 1867, the defendants may be tried in the district where the overt act was committed. *United States v. Rindskopf*, 6 Biss., 259 (§§ 200-206).

§ 1654. — offenses out of a state.—Crimes against the laws of the United States, committed outside of the limits of a state, are not local, but may be tried at such place as congress shall designate by law; but if committed within a state they are local, and must be tried within the district where committed. *United States v. Jackalow*,* 1 Black, 484; *United States v. Dawson*,* 15 How., 467; *Hemp*, 466.

§ 1655. It is competent for congress to prescribe the punishment of offenses committed on the high seas, open roadsteads, in any haven, basin or bay, or in any river where the sea ebbs and flows, although it is within the limits of a state. But in such cases the offense must be tried in the state where it was committed. *United States v. Jackalow*,* 1 Black, 484.

§ 1656. — offenses out of the limits of the United States.—The statutes of 1790 and 1825, requiring that an offense committed without the limits of the United States, on the high seas or in a foreign port, must be tried in the district "where the offender is apprehended, or into which he may be first brought," contemplate two classes of cases, one in which the offender shall have been apprehended without the limits of the United States, and brought, in custody, into the same judicial district; the other, in which he shall not have been so apprehended and brought, but shall have been first taken into legal custody, after his arrival within some district of the United States, and provide in what district each of these classes shall be tried. They do not contemplate that the government shall have an election in which of two districts to proceed to trial. *United States v. Bird*,* 1 Spr., 290.

§ 1657. — offenses at sea.—For crimes committed on the high seas, the offender may be

prosecuted in the district where he is apprehended, or into which he shall first be brought. *United States v. Thompson*,* 1 Sumn., 170.

§ 1658. The act of March 3, 1825, declaring that "the trial of all offenses which shall be committed upon the high seas or elsewhere, out of the limits of any state or district, shall be in the district where the offender is apprehended, or into which he may be first brought," is in the alternative, and the jurisdiction may be exercised either in the district into which the prisoners are first brought, or in that in which they are apprehended under lawful authority, for trial for the offense. *United States v. Baker*,* 5 Blach., 6.

§ 1659. Though where a person is indicted for murder on the high seas it must be shown that he was first apprehended within the district in which the indictment is found, yet where no evidence of that fact was given, and the point was not made on the trial, it was held that evidence that the ship was bound for a town in which the indictment was found is sufficient proof of his first apprehension in that district. *United States v. Mingo*,* 2 Curt., 1.

§ 1660. The act of March 3, 1825, makes an assault committed with a dangerous weapon on board an American vessel, upon the high seas, a crime against the United States, cognizable "in the district where the offender is apprehended or into which he may first be brought." It is held that a person who, on the commission of the offense, has been placed in irons on board ship, and so kept until the vessel reaches the lower quarantine anchorage in New York harbor, within the eastern district of that state, and, after remaining there several days, is delivered to the harbor police of the state of New York, and by them, without process or warrant, carried to New York city and delivered over to the marshal of the southern district of New York, a warrant for his arrest being afterwards delivered to the marshal, may be tried and punished in the circuit court for the southern district. *United States v. Arwo*,* 19 Wall., 426.

§ 1661. Where the members of the crew of an American whaling vessel were indicted and convicted of endeavoring to make a mutiny and revolt on board the vessel while on a voyage on the high seas, and no objection was made at the trial that there was no proof to support the averment in the indictment that the southern district of New York in the second circuit was the district and circuit into which the defendants were first brought and apprehended, it was held to be too late to raise the objection on a motion in arrest of judgment. *United States v. Crawford*,* 1 N. Y. Leg. Obs., 388.

§ 1662. — *larceny in another state.*— It is held that one who steals goods in Maryland and brings them into the District of Columbia may be convicted and punished in the latter place. *United States v. Tolson*, 1 Cr. C. C., 269; *United States v. Hankey*, 2 Cr. C. C., 65.

§ 1663. — *forged check sent by mail.*— A forged check was placed in a letter in Baltimore, and put into the postoffice, directed to Washington. *Held*, not an uttering at Washington. *United States v. Pympton*,* 4 Cr. C. C., 309. It was also held that an indictment would not lie in Washington county for false pretenses made out of the county, although the money was obtained in the county. *Ibid*.

§ 1664. — *stroke in Alexandria, death in Maryland.*— Where the mortal stroke was given in Alexandria, and the death happened in Maryland, the circuit court for the District of Columbia has no jurisdiction of the offense of homicide. *United States v. Bladen*,* 1 Cr. C. C., 548. But see *United States v. Guiteau*, 1 Mackey, 498, 563.

§ 1665. — *stroke at sea, death on land.*— Section 11 of the crimes act of April 30, 1790, declaring that murder committed on the high seas shall be tried in the district court where the offender is apprehended, or into which he shall be first brought, does not give the circuit court jurisdiction where the stroke took place at sea and the death upon the land. *United States v. Magill*,* 1 Wash., 463.

§ 1666. — *treason in another state.*— Greiner was brought before the district judge of the United States in Pennsylvania in 1851, on a charge of treason committed in Georgia. It was admitted that the United States courts did not at that time sit in Georgia, nor did their process actually run there, on account of existing hostilities, and that the defendant could not have a "speedy trial by a jury of the state and district" where the crime was committed, as is secured by the constitution. These circumstances existing, and the district attorney not asking for a removal of the defendant to the district where the crime was committed, under the thirty-third section of the judiciary act of September 24, 1789, providing for a removal in such cases, but asking that the defendant be committed or held for trial at the next actual session of the United States court for the southern district of Georgia, the judge held that he could do nothing more than require the defendant to give security to keep the peace, and be of good behavior in all cases arising under the constitution and laws of the United States. *United States v. Greiner*,* 4 Phil., 396.

§ 1667. — *brought within district illegally.*— It cannot be pleaded to the jurisdiction of the circuit court of the United States, to take cognizance of an offense against the United States committed within the district for which the court is sitting, that the defendant was

brought within the jurisdiction from Canada, under a charge of committing a crime, the commission of which extradition is not provided for in our treaty with Great Britain *United States v. Caldwell*,* 8 Blatch., 131.

§ 1668. — **nuisance.**— It seems that an indictment for keeping and maintaining a nuisance can only be prosecuted in the state within which the nuisance is located, for only in that state is it a trespass and a crime. *Mississippi & Missouri R'y Co. v. Ward*, 2 Black, 494.

§ 1669. **Confined to the district.**— The jurisdiction of the circuit courts of the United States in criminal cases is confined to offenses committed within the district for which those courts respectively sit, where the offenses are committed on land. Hence, after the act of April 20, 1818, divided the district of Pennsylvania, created a district court for the western district, and vested this court with circuit court jurisdiction within the western district, except in cases of appeal, the circuit court for the district of Pennsylvania no longer had jurisdiction of crimes committed in the western district. Under such circumstances, an indictment in the circuit court which states that the crime was committed at the district of Pennsylvania does not show that the court has jurisdiction, since it might have been committed in either the eastern or the western district. *United States v. Woods*,* 2 Wheeler, 325.

§ 1670. **District to be previously ascertained.**— The sixth amendment to the constitution, providing that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," requires that the district shall have been ascertained previous to the commission of the crime. One who committed an offense in the southern district of New York, prior to February 23, 1865, at which date the eastern district was formed from the southern district, cannot, therefore, be tried for the offense in the eastern district. *United States v. Maxon*,* 5 Blatch., 360.

§ 1671. The provision in the sixth amendment, that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," applies only to offenses committed within the limits of a state. *United States v. Dawson*,* 15 How., 467.

§ 1672. On August 16, 1856, the territory of Washington then being divided into three judicial districts, and Pierce county being in the third district, congress passed an act declaring that the judges of the supreme court in each of the territories should fix and appoint the several times and places of holding the several courts in their respective districts. Pursuant to this act, the judges of the supreme court of this territory assembled at its capital on November 10, 1856, and proceeded to fix the times and places of holding the courts in the several districts. In the third district two terms were appointed, the term for that fall to commence in Pierce county on the third Monday in November. On the assembling of the legislature, Pierce county was transferred to the second judicial district. A term of the district court for Pierce county was held after the passage of the act of congress on August 16th, but prior to the action of the judges of the supreme court, or the transferring of Pierce county to the second district. At this term, held on the third Monday in November, 1856, the grand jury, inquiring for the body of the county of Pierce, found a bill of indictment against the prisoner for murder. At the same term the defendant was arraigned and tried on this indictment; the jury not being able to agree, the case was, on the transfer of Pierce county to the second district, passed into the second district, and the defendant was put on trial in the district court for the second district, in which was Pierce county, and a verdict of guilty found against him on the original indictment. It was held that the defendant was not deprived of any rights conferred on him by that clause of the constitution entitling him to a trial in the district in which the crime was committed, which district must have been previously ascertained by law; and it was further held that the district court for Pierce county, in the first instance, and the district court for the second judicial district in the second place, had full and complete jurisdiction in the premises. *Leschi v. Washington Territory*,* 1 Wash. T'y, 18.

§ 1673. **Offenses on the high seas.**— A crime committed on waters on the sea-coast, which are without the boundaries of low-water mark, is committed on the *high seas*, within the meaning of the act of April 30, 1790, giving to the circuit court jurisdiction of crimes committed on the high seas, although such waters may be in a bay or roadstead within the jurisdictional limits of a foreign government. *United States v. Ross*,* 1 Gall., 624.

§ 1674. At the time of the adoption of the constitution, the admiralty courts did not punish misdemeanors committed within the body of a county; and hence there must be an act of congress to punish such misdemeanors, or no jurisdiction over them exists in the circuit courts. *United States v. New Bedford Bridge*, 1 Woodb. & M., 470.

§ 1675. Locality is the chief test of admiralty jurisdiction over crimes as well as over torts, and a misdemeanor committed within the body of a county, though upon tide-water, is not within the criminal jurisdiction of courts of admiralty. *Ibid.*

§ 1676. The circuit court has jurisdiction of the crime of murder committed on the high seas, under the eighth section of the act of April 30, 1790, unless the defendant is a foreigner, and the offense be committed on board of a vessel which at the time, in point of fact as well as of right, is the property of subjects of a foreign state, who have at the time, in virtue of this property, the control of such vessel. An indictment, therefore, for murder, under this section, which alleges that the ship on which the offense was committed was the property of "a certain person or persons to the jurors unknown, being a citizen or citizens of the United States," excludes the case from that class of vessels over which the jurisdiction of the court does not attach, and is in this respect sufficient. *United States v. Demarchi*,* 5 Blatch., 84.

§ 1677. The civil jurisdiction of the courts of the United States, in maritime causes of contract or tort, embraces tide-waters within the bays, inlets of the sea and harbors along the sea-coast of the country, and in navigable rivers. *United States v. Wilson*,* 3 Blatch., 437.

§ 1678. But it is a fundamental doctrine, in respect to the federal courts of inferior jurisdiction, that they cannot take cognizance of criminal offenses of any grade without the express appointment or direction of positive law. *Ibid*.

§ 1679. The offense of wilfully destroying a vessel is not cognizable in the federal courts unless committed on the high seas. *Ibid*.

§ 1680. Congress, in its criminal legislation, has used the term *high seas* in its popular and natural sense, and in contradistinction to mere tide-waters flowing in ports, havens and basins. *Ibid*.

§ 1681. Where the defendant, a mariner, was indicted in the United States circuit court, for larceny alleged to have been committed on the *high seas*, the court instructed the jury that, if the offense was committed in the harbor of Vera Cruz, and within the Mexican territory, they had no jurisdiction to punish him, and that the act of 1790 did not authorize that court to try persons for crimes committed within a foreign territory, although upon the seas where the tide ebbs and flows. *United States v. Jackson*,* 2 N. Y. Leg. Obs., 3.

§ 1682. The courts of the United States have no jurisdiction to punish the stealing of a treasure from the bottom of the sea, within one hundred and fifty feet from the shore of Mexico, after the vessel which carried the treasure (being an American vessel) had gone to pieces and sunk to the bottom. Mexico has complete and exclusive jurisdiction of crimes committed within a marine league of its shore, not on a vessel of another nation; and when a vessel is destroyed and goes to the bottom, it is no longer constructive territory of the nation to whose citizens it belongs, and the jurisdiction of such nation over it ceases. *United States v. Smiley*,* 6 Saw., 640.

§ 1683. Where a shot was fired from an American vessel, and took effect and killed a man on board a schooner lying in a harbor of one of the Society Islands, held, that the act was committed on board the schooner, and jurisdiction belonged to the foreign government, and not to the courts of the United States. *United States v. Davis*,* 2 Sumn., 483.

§ 1684. An offense committed on board an American vessel lying at a place called Humaco, Porto Rico, for the purpose of taking in a cargo, is held to have been within the admiralty and maritime jurisdiction of the United States. *United States v. Turner*,* 2 N. Y. Leg. Obs., 236.

§ 1685. Under the twelfth section of the act of April 30, 1790, it is held that the circuit court has jurisdiction of a revolt committed on a vessel while lying in the river about one and a half miles below St. Ubes, and within the bar, the river being about a mile and a half wide at the mouth. *United States v. Smith*, 3 Wash., 78, n.

§ 1686. Section 5 of the act of March 3, 1825, enacting that, "if any offense shall be committed on board any ship or vessel belonging to any citizen or citizens of the United States while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of the said ship or any passenger, or any other person belonging to the company of said ship or any other passenger, the same offense shall be cognizable by the proper circuit court of the United States," restricts the jurisdiction given to offenses upon the person of an individual, and cannot, by any reasonable construction, be extended to offenses upon or against the property of another. *United States v. Morel*,* 13 Am. Jur., 279.

§ 1687. Under the act of March 3, 1835, punishing the crime of endeavoring to make a revolt and mutiny on board any American vessel, when committed on the high seas or in any other waters within the admiralty and maritime jurisdiction of the United States, it is held that the admiralty and maritime jurisdiction of the United States extends to all places where the tide ebbs and flows. By the former act of 1825, congress intended to exercise the power of the United States to punish its own citizens for the offenses therein specified, when committed on tide-waters in any part of the world. The United States circuit court has, therefore,

jurisdiction to punish an attempted revolt committed on an American vessel lying in an inclosed dock in the port of Havre, where the tide ebbs and flows. *United States v. Roberts*,* 2 N. Y. Leg. Obs., 99.

§ 1688. Under the act of March 8, 1835, punishing the offense of endeavoring to make a mutiny or revolt, if committed on an American ship "on the high seas or any other waters within the admiralty and maritime jurisdiction of the United States," the jurisdiction of the circuit court extends to all places and waters where the tide ebbs and flows. *United States v. Lynch*,* 2 N. Y. Leg. Obs., 51.

§ 1689. The United States circuit court has jurisdiction of an offense against the laws of the United States, committed upon an American vessel, in the mouth of a river on the coast of Africa, where the river is several miles broad and really an arm of the sea, and which was continuously and uninterruptedly committed until the capture of the vessel in the Atlantic Ocean several miles from land. *United States v. Gordon*, 5 Blatch., 18.

§ 1690. The federal district court has no jurisdiction to try an indictment for larceny on board a vessel, if the vessel at the time was lying in a port of the United States. *United States v. Davis*,* 2 N. Y. Leg. Obs., 35.

§ 1691. The words, "out of the jurisdiction of any particular state," used in the crimes act of April 30, 1790, to define the limits of the power of the government to punish piracy, means out of the jurisdiction of any one of the United States, and does not refer to foreign states. *United States v. Pirates*, 5 Wheat., 184 (§§ 512-531).

§ 1692. Murder committed by a foreigner upon a foreigner on board a foreign vessel on the high seas is not a crime within the cognizance of the courts of the United States under the crimes act of April 30, 1790. *Ibid*.

§ 1693. Under the act of congress of 80th April, 1790, the circuit court of the United States has no jurisdiction of an indictment for murder where the facts were that the stroke was given on the high seas and the death took place in a foreign land. *United States v. McGill*, 4 Dal., 429.

§ 1694. The plundering of property from a vessel stranded on the shore of the island of Sumatra, upon an arm or an inlet of the sea, is an offense cognizable by the courts of the United States. If the property had been taken from the shore, while separated from the wreck, our courts would still have jurisdiction. *United States v. Pitman*,* 1 Spr., 193.

§ 1695. An offense committed on board an American vessel, while lying within the waters of a foreign country, is within the jurisdiction of the courts of the United States, under section 5347 of the Revised Statutes. *United States v. Bennett*,* 3 Hughes, 466.

§ 1696. State and federal jurisdiction.—In cases of concurrent jurisdiction, the court which first acquires jurisdiction retains it; and this rule applies between federal and state courts in criminal as well as in civil cases. *United States v. Wells*,* 11 Am. L. Reg. (N. S.), 424; 15 Int. Rev. Rec., 56.

§ 1697. Where a marshal, charged with the arrest of a party, finds him in the custody of the sheriff for the same offense, he should make return of that fact, and proceed no further; but if he takes him from the custody of the sheriff, the federal court, on being apprised of the facts, will, while sustaining the indictment, remand him to the custody of the state authorities. *Ibid*.

§ 1698. Offenses committed upon tide-water in the body of a county are within the concurrent jurisdiction of the federal and state courts, and the one first obtaining jurisdiction retains it. *United States v. Durkee*, 1 McAl., 196 (§§ 559-562).

§ 1699. The jurisdiction of the federal courts, in case of a conspiracy to prevent a voter from the advocacy and support of his favorite candidate for congress, is not ousted by the fact that, in carrying out the conspiracy, a crime was committed against a state law of a higher grade than the conspiracy. *United States v. Goldman*, 8 Woods, 187 (§§ 2290-93).

§ 1700. State courts.—It seems that no part of the criminal jurisdiction of the United States can be delegated to the state courts. *Stearns v. United States*, 2 Paine, 303.

§ 1701. A state court has no jurisdiction to try a person for a homicide committed by him while engaged in the regular military service of the United States and acting under commands of his officers. *Petition of Hurst*, 2 Flip., 511.

§ 1702. The supreme court of a state cannot supervise and annul the proceedings of a commissioner of the United States, and discharge a prisoner who has been committed by the commissioner for an offense against the United States. Nor can it exercise jurisdiction over the proceedings and judgment of a district court of the United States, set aside and annul its judgment, and discharge a prisoner who has been tried and found guilty of an offense against the United States and sentenced to imprisonment by the district court. *Ableman v. Booth*, and *United States v. Booth*, 21 How., 506.

§ 1703. When a prisoner before a federal court has given bail and is subsequently arrested by state process and imprisoned, the federal court will not issue a *habeas corpus* to bring the

prisoner before its bar. Application should be made to the state court. *United States v. Rector*, 5 McL., 174.

§ 1704. Section 711 of the United States Revised Statutes enacts that the jurisdiction vested in the courts of the United States over crimes and offenses cognizable under the laws of the United States shall be exclusive of that of the state courts. Therefore where a state court arrested one on a charge of murder, and the killing was done in a navy yard, in which criminal jurisdiction had been ceded by the state, the district court released the prisoner on a writ of *habeas corpus*. *Ex parte Tatem*, 1 Hughes, 589.

§ 1705. On a petition for a writ of *habeas corpus* it appeared that the petitioner had been tried in the state court of Georgia and convicted of committing perjury before a United States commissioner, and confined in the penitentiary. *Held*, that the state court had no jurisdiction of the offense of perjury committed in the federal tribunals; and that a person imprisoned by a state court for such an offense could be set at liberty by a writ of *habeas corpus* under the act of February 5, 1867. *Ex parte Bridges*,* 2 Cent. L. J., 327.

§ 1706. *Over places within a state.*—The federal courts have no jurisdiction over a place within the limits of a state, which has been purchased and occupied by the United States, unless the state has surrendered her jurisdiction. So held in a prosecution for larceny committed on land in Virginia which had been purchased at tax sale by the United States during the civil war. *United States v. Penn*,* 4 Hughes, 491. Where a tract of land was ceded by the state of Massachusetts to the United States, for a navy yard, reserving in the state a concurrent jurisdiction with the United States, so far as that all civil, and such criminal process as might be issued under authority of the state against any person charged with crime committed without the said tract, might be executed therein, it was held that this tract was within the exclusive jurisdiction of the United States in such a sense as to give the circuit court jurisdiction of a murder committed there. *United States v. Travers*,* 2 Wheeler, 490.

§ 1707. By the act admitting Kansas into the Union, she was placed on an "equal footing with the original states in all respects." By the constitution congress is empowered to exercise authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, etc. Fort Harker was located on land occupied by the United States as a military post. The land, of course, was never purchased, and no consent was given by the legislature of Kansas to its use as a fort. *Held*, that the federal courts had no jurisdiction over a case of murder committed on said land after Kansas was admitted into the Union. *United States v. Stahl*, McCahon, 206 (§ 1634).

§ 1708. *In the Indian country.*—It seems that the federal courts have no jurisdiction over offenses committed within an Indian reservation situated within the territorial limits of a state. *United States v. Sa-coo-da-cot*, 1 Abb., 333; S. C., *United States v. Yellow Sun*, 1 Dill., 277. See §§ 1599, 1668.

§ 1709. In the absence of express authority the courts of the United States have no jurisdiction to punish offenses committed by Indians who reside upon a reservation, which are committed by them off the reservation, and within the limits of a state. *Ibid*.

§ 1710. Four Indians having been convicted of murder in a federal court, the court declined to sentence them, on its own motion, on the ground that it had no jurisdiction of the case, but ordered that they be turned over, on demand, to the state authorities, who had jurisdiction, or discharged if no demand was made. *Ibid*.

§ 1711. Section 5356 of the Revised Statutes, which provides for the punishment of larceny committed in a place within the exclusive jurisdiction of the United States, was made a part of the Indian intercourse act of June 30, 1834, by section 25 thereof, whenever the larceny was committed by a white man upon the goods of an Indian, and *vice versa*; and as such it was extended over Oregon by the act of June 5, 1850. The admission of the state into the Union did not work a repeal of this provision, since congress has power to legislate upon the subject of intercourse with the Indian tribes, irrespective of state lines. The federal courts for the district of Oregon, therefore, have jurisdiction of larceny committed by a white man upon the goods of an Indian within the "Indian country" in the state of Oregon. *United States v. Bridleman*,* 7 Saw., 243.

§ 1712. The treaty of June 9, 1855, establishing the Umatilla reservation, made that reservation "Indian country" within the meaning of the act of June 30, 1834; and section 5356, Revised Statutes, declaring that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country. The admission of Oregon into the Union, with this reservation established within its limits, could not abrogate or modify this treaty. All crimes committed within this reservation, by a white man upon an Indian, and *vice versa*, and made punishable by the laws of the United States, are within the jurisdiction of the federal courts for the district of Oregon. *Ibid*.

§ 1713. The state of Kansas was admitted into the Union on an equal footing with the

original states, and no exception was made as to jurisdiction over the reservation of the Kansas tribe of Indians. *Held*, the state courts had exclusive jurisdiction over a prosecution for the murder on said reservation of a white man by a white man. *United States v. Ward, McCahon*, 199 (§§ 1625-27).

§ 1714. From the time of the Louisiana purchase a tract of land was occupied as a military reservation by the United States in what is now Kansas. That state was admitted into the Union, but no jurisdiction over such reservation was reserved by the United States. Later the state of Kansas by legislative enactment ceded exclusive jurisdiction of the reservation to the United States. *Held*, that under the constitution the legislature had the power to make such cession, and that notwithstanding the fact that no acceptance of such cession was made by the United States, the United States acquired exclusive jurisdiction of crimes committed on such reservation. Where the *locus in quo* is under the control of the United States and is used for a purpose mentioned in the constitution, the laws of the United States become the laws of such places on the cession of jurisdiction by the state. *Ex parte Hebard*,* 4 Dill., 380.

§ 1715. The federal courts for the district of Arkansas had no jurisdiction over offenses committed in the Indian country until conferred by the act of June 17, 1814. *United States v. Starr*,* *Hemp.*, 469; *United States v. Ivy*,* *Hemp.*, 562.

§ 1716. At the time when the state of Arkansas composed but one judicial district in which the federal courts were held, the Indian country lying west of the state was annexed to it for the trial of crimes committed therein by persons other than Indians. In this condition of the jurisdiction of these courts the crime of murder was committed in the Indian country by one white man upon another, and the indictment for the offense was found in the circuit court while sitting at Little Rock, the place of holding the court. Subsequent to this the state was divided into two judicial districts, and the Indian country was attached to the western district. It was held that the circuit court sitting for the eastern district, at Little Rock, had jurisdiction to try the indictment. (McLEAN, J., dissented.) *United States v. Dawson*,* 15 How., 467; *Hemp.*, 649.

§ 1717. The courts of the territory of Arkansas had jurisdiction over offenses committed in the Indian country, but the jurisdiction did not extend to the courts for the district of Arkansas after the state was admitted into the Union. *United States v. Alberty*,* *Hemp.*, 444; *United States v. Ta-wan-ga-ca*,* *Hemp.*, 804.

§ 1718. Under the law of 1834 the circuit court for Arkansas had no jurisdiction over offenses in the Indian country by one Indian against the person or property of another Indian. The accused, a Cherokee Indian, was indicted for killing a white boy. He denied the jurisdiction of the court on the ground that the boy was an Indian, and the court left it to the jury to find whether the boy was an Indian, charging that he was an Indian if his mother was an Indian, although the father was a white man; that the child follows the condition of the mother. *United States v. Sanders*,* *Hemp.*, 483.

§ 1719. A white man who settles among a tribe of Indians, and procures adoption among them, becoming a member of the tribe, is not thereby free from the jurisdiction of the United States for crimes committed in the Indian territory. *United States v. Rogers*, 4 How., 572.

§ 1720. The land now constituting the Moapa Indian reservation, having been made a part of the state of Nevada, without any reservation of jurisdiction in favor of the United States, and exclusive jurisdiction of such place not having been ceded to the United States by the state, the circuit court of the United States has no jurisdiction of the crime of murder committed there, although the fee of such land is in the federal government. *Ex parte Sloan*,* 4 Saw., 330.

§ 1721. *Conferred after commission of offense.*—It seems that jurisdiction to punish an offense cannot be conferred after the commission of the offense. *United States v. Starr*,* *Hemp.*, 469.

§ 1722. *Circuit courts.*—The twelfth section of the judiciary act of 1789, which declared that the circuit courts should have concurrent jurisdiction with the district courts of crimes and offenses cognizable therein, included offenses afterwards defined by statute to be punished in the district courts. And hence, under the act of February 13, 1852, making it criminal to sell liquor to an Indian, and giving to the district court jurisdiction of the crime, the circuit courts also have jurisdiction of the offense. *United States v. Holliday*, 8 Wall., 407.

§ 1723. Circuit courts of the United States have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where the acts of congress otherwise provide, and concurrent jurisdiction with the district courts of crimes and offenses cognizable by those courts. Such courts possess no jurisdiction over crimes and offenses committed against the authority of the United States, except what is given them by the power that created them, nor can they be invested with any such jurisdiction beyond

what the power ceded to the United States by the constitution authorizes congress to confer. So, before an offense can be cognizable by the circuit court, congress must first define or recognize it as such, and affix a punishment to it, and confer upon some court jurisdiction to try the offender. *United States v. Hall*, 8 Otto, 345.

§ 1724. **Consent of the parties** can no more give jurisdiction in criminal than in civil cases. *Wolcott v. Wyoming Territory*, * 1 Wyom. T'y, 67.

§ 1725. **After conviction and sentence.**—The jurisdiction in criminal cases conferred upon the federal courts by the judiciary act is complete when the defendant has been indicted, tried, convicted, sentenced and remanded to prison to wait the execution of the sentence, and the case has passed from the docket of the court. *United States v. Plumer*, 3 Cliff., 61.

§ 1726. **Public ministers.**—An indictment, under an act of congress, for committing an assault upon a public minister, is not a case affecting an ambassador or other public minister within the meaning of the second section of the third article of the constitution of the United States, and hence the circuit court has jurisdiction of the offense. *United States v. Ortega*, 11 Wheat., 457. See §§ 1286, 1287, 1299, 2631.

§ 1727. **Indictment for assault and battery against the servant of a foreign minister dismissed for want of jurisdiction.** *United States v. Lafontaine*, * 4 Cr. C. C., 173.

§ 1728. Although the constitution vests in the supreme court original jurisdiction in all cases affecting ambassadors and other public ministers and consuls, it does not preclude the legislature from vesting concurrent jurisdiction of such cases in the inferior courts; and hence, by the eleventh section of the judicial act, declaring that "the circuit court shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States," the circuit court has jurisdiction of an indictment against a consul. *United States v. Ravara*, 2 Dal., 207.

§ 1729. **Murder.**—The circuit courts of the United States have jurisdiction of the crime of murder, if committed in any place under the exclusive authority of the United States. *United States v. Cornell*, 2 Mason, 91.

§ 1730. **Larceny—Robbery.**—Although a federal court has jurisdiction of cases of larceny, yet if robbery is not within its jurisdiction by express legislation, it can take no cognizance thereof. *United States v. Terrel*, * Hemp., 411.

§ 1731. **Assault.**—The courts of the United States have no cognizance of assaults with intent to kill, or of an assault and battery committed on land. *Ibid*, p. 422.

§ 1732. The organic act of Montana territory, conferring "common law jurisdiction" on the district court, vests that court with jurisdiction of the offense of assault and battery, although the punishment prescribed for that offense by the statutes of the territory brings it within the jurisdiction of the probate court, and although the statutes of the territory declare that "the district court shall have jurisdiction of all offenses not cognizable in the probate or justice of the peace courts, and although, by the organic act, the probate court has also cognizance of the offense. *Territory v. Flowers*, * 2 Mont. T'y, 531.

§ 1733. **Manslaughter** is no offense against the laws of the United States, unless it is committed on the high seas or in some place under the sole and exclusive jurisdiction of the United States, or on board of a vessel belonging to a citizen or citizens of the United States, on some water within a foreign jurisdiction, by one or more of the ship's company, or a passenger upon some other passenger or member of the ship's company. If the offense is committed within a foreign jurisdiction, it is essential to prove that the vessel on which it was committed belonged to a citizen or citizens of the United States. *United States v. Imbert*, * 4 Wash., 702.

§ 1734. **Remanding to foreign government.**—In the absence of treaty stipulations or statutory provisions, the courts have no authority to remand a prisoner to a foreign government for trial. *United States v. Davis*, * 2 Sumn., 486.

§ 1735. **Offenses in Alaska.**—Alaska being a place without the jurisdiction of any particular state or district, within the meaning of the act of 1825 (R. S., § 730), a defendant accused of committing a crime there, and first brought into the district of Oregon, may be tried in the latter place by the district court. *United States v. Carr*, * 8 Saw., 303.

§ 1736. The jurisdiction of the United States district court for the district of Oregon, over offenses committed in Alaska, being conferred by section 7 of the act of July 27, 1868, and by such section confined to violations of that act and of the laws "relating to customs, commerce and navigation," thereby extended over the territory, the crime of distilling spirits in Alaska without paying the special tax, is not cognizable in that court. *United States v. Sevelloff*, * 2 Saw., 811.

§ 1737. **Attempt to bribe.**—The court was divided in opinion whether the federal courts had jurisdiction of an indictment of one for attempting to bribe a United States official. *United States v. Worrall*, 2 Dal., 384.

§ 1738. **Territorial courts.**—The federal courts of a territory have no jurisdiction to proceed in a criminal case upon information. There must be an indictment by grand jury, which the courts are empowered by congress to arrange. *United States v. Jos*,* 15 Int. Rev. Rec., 57.

§ 1739. **Military reservation.**—The proper federal court has jurisdiction of an indictment for a murder committed on a military reservation of the United States. *Scott v. United States*,* 1 Wyom. T'y, 40.

§ 1740. **In District of Columbia.**—The circuit court of the District of Columbia has jurisdiction of any common law offense committed in the county of Washington, by an officer of the United States, of which it would have jurisdiction if committed by a person not an officer of the government, although such offense is committed by such officer by means consisting, in part, of acts done by virtue or by color of his office. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 1741. Justices of the peace in the city of Washington have jurisdiction of actions for the recovery of fines, penalties and forfeitures, under the by-laws of the corporation. *Ex parte Reed*,* 4 Cr. C. C., 592.

§ 1742. Where the fourth auditor of the treasury is charged with obtaining money belonging to the United States, by fraud, by means of drafts drawn on a navy agent of the United States, and by means of a requisition from the navy department upon the treasury of the United States, and he is not charged with having done any act in his official character, or by color of his office, nor charged with the violation of any official duty, nor with having made use of his office or official character to perpetrate the fraud, there is nothing in the character of the parties, or in the circumstances of the transaction, which would make it a case of exclusive federal jurisdiction. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 1743. The fraud having been perpetrated in that part of the District of Columbia ceded by Maryland, and the common law of Maryland being in force in that part of the District, the circuit court of the District of Columbia has jurisdiction of the offense as a crime at common law. *Ibid*.

§ 1744. The police court of the District of Columbia has no jurisdiction of cases of criminal libel. *United States v. Buell*,* 1 MacArth., 503.

§ 1745. In the District of Columbia, an indictment of a slave for larceny is wholly within the jurisdiction of a justice of the peace. *United States v. Simms*, 4 Cr. C. C., 618.

§ 1746. A justice of the peace in the District of Columbia alone has jurisdiction of an indictment of a slave for assault and battery upon a white man. *United States v. Ellick*, 2 Cr. C. C., 412.

§ 1747. By act of assembly of Maryland, a case of larceny by a slave is cognizable only by a justice of the peace. The federal circuit court cannot take jurisdiction of it. *United States v. Jack*, 1 Cr. C. C., 44; *United States v. Louder*, id., 103. *Contra*, *United States v. Wright*, id., 123.

§ 1748. Offenses committed in that district which is now the District of Columbia, before the same was ceded by Virginia to the federal government, might have been punished by the Virginia courts. If not, however, the federal courts, sitting in the District of Columbia, have power to punish such offenses. *United States v. Heinegan*, 1 Cr. C. C., 50.

§ 1749. **Offenses in the army and navy.**—Congress has power, under the constitution, to provide for the punishment of offenses committed in the army and in the navy, without a trial in the courts of law. The act of April 23, 1800, establishing rules for the government and regulation of the navy, is an execution of that power in respect to the naval forces. Where persons are accused of manslaughter in taking the life of a seaman belonging to a ship of war, in doing what they claim to be the exercise of their rightful authority to command on board of a vessel of war, a court-martial of the navy has jurisdiction of the offense, and not the district court, since no statute of the United States gives the latter court jurisdiction. *United States v. McKenzie*,* 1 N. Y. Leg. Obs., 371.

§ 1750. **Under Civil Rights Bill.**—The act of congress of April 9, 1866, sometimes called "The Civil Rights Bill," after declaring among other things that citizens of every race or color should have the same right to sue, be parties, give evidence, and should have full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, provided that the circuit court of the United States should have jurisdiction "of all causes, civil or criminal, affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any of the rights secured to them by the first section of the act." It is held that, under this act, the circuit court has not jurisdiction of the crime of murder committed in the district of Kentucky, merely because two persons who witnessed the murder were citizens of the African race, and for that reason incompetent by the law of Kentucky to testify in the courts of that state. They are not persons affected by the cause. *Blyew v. United States*, 13 Wall., 581.

§ 1751. **Justice of the peace.**—The organic act of Wyoming territory declares that the jurisdiction of justices of the peace shall be limited by law, provided that they shall not have jurisdiction of cases involving the title to lands, or where the sum claimed exceeds \$100. A statute of the territory provides that justices of the peace shall have jurisdiction of "all public offenses less than felony, except as otherwise provided by law, in which the punishment prescribed by law does not exceed a fine of \$100, or imprisonment for six months." Assault and battery not being included in those offenses referred to as not otherwise provided by law, and no limit being fixed to its punishment, it is not within the jurisdiction of a justice of the peace. *Walcott v. Wyoming Territory*,* 1 Wyom. T'y, 67.

§ 1752. **Military commission.**—Where one, not a resident of any of the rebellious states, or a prisoner of war, but a citizen of Indiana, where the federal authority was unopposed, and never in the military or naval service, was, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the district of Indiana, it was held that the commission had no power to punish him, and that he could not be tried except by the ordinary courts of law, such courts having been open and in the exercise of their judicial functions in that state at the time. *Ex parte Milligan*, 4 Wall., 2.

§ 1753. Under the act of March 3, 1863 (12 Statutes at Large, 731), for the enrolling and calling out the national forces, the courts of the loyal states were not divested of authority to try offenses committed within their jurisdiction by persons in the military service of the government. But while in the insurgent states the authority of the military tribunal was exclusive. Officers and soldiers of the armies of the Union were not subject, during the war, to the laws of the enemy, or amenable to his tribunals for offenses committed by them. *Coleman v. Tennessee*, 7 Otto, 513.

§ 1754. On the invasion of a state by a hostile army, laws for the punishment of crime continue in force only for the protection and benefit of its own people. As to them the same acts which constituted offenses before the military occupation constitute offenses afterwards, and the same tribunals execute the punishments, unless superseded by tribunals prescribed by the military occupants; yet they have no jurisdiction over persons in the military service of the invaders. *Ibid.*

§ 1755. Though, on an indictment in a state court for an offense committed while the defendant was in the military service of the government, a plea of former conviction by a military tribunal is not a good plea, still the supreme court of the United States, on a writ of error to the supreme court of the state, considered it as raising the question of the jurisdiction of the state court, and decided that the court had no jurisdiction of the offense. *Ibid.*

§ 1756. A military court had no jurisdiction to try and sentence a person in St. Louis in 1865 for an offense committed in 1863 at Mobile, where the grand jury meeting next after his arrest, and after a list, including his name, had been furnished to the judges of the federal courts, failed to find an indictment against him. *In re Murphy*,* Woolw., 141.

§ 1757. **Under embargo laws.**—The circuit court having exclusive cognizance of all crimes and offenses cognizable under the laws of the United States, with few exceptions, is vested with cognizance of violations of the embargo enforcing act of January 9, 1809, declaring that the offenders "shall, upon conviction, be adjudged guilty of a high misdemeanor, and fined a sum by the court before which the conviction is had, equal to four times the value," etc. *United States v. Mann*,* 1 Gall., 177. The offender may be proceeded against by information. *United States v. Mann*,* 1 Gall., 2.

§ 1758. **Review by supreme court.**—While the supreme court has no general power of review over the judgments of the inferior courts in criminal cases, yet it has the power to issue writs of *habeas corpus* and *certiorari* to examine the proceedings of an inferior court, so far as to determine whether the prisoner is detained by action of the court in which it exceeded its powers. *Ex parte Lange*, 18 Wall., 163 (§§ 1767-74).

XXIII. TWICE IN JEOPARDY.

SUMMARY—*Sentence contrary to law; modification*, § 1759.—*Law protects accused from being twice punished*, § 1760.—*Criminal prosecution not barred by civil suit*, § 1761.—*Power to discharge the jury before verdict*, §§ 1762-1765.—*Acquittal by a court-martial*, § 1766.

§ 1759. Where the law, under which a conviction is had, authorizes imprisonment not exceeding one year or a fine not exceeding \$200; and the court, through inadvertence, imposes both punishments, when it can rightfully impose but one; and the fine is paid and has passed

into the treasury; and the prisoner has undergone five days' imprisonment under the sentence, the court cannot vacate the judgment entirely, and, without reference to what has already been done under it, sentence the prisoner to one year's imprisonment from that date. * To do so would be to punish him twice for the same offense, which is contrary to the constitution. The prisoner cannot be held under the second judgment and must be discharged. (CHAFFORD, J., dissents.) *Ex parte Lange*, §§ 1767-74.

§ 1760. The constitutional provision that no person shall be subject to be twice put in jeopardy of life or limb for the same offense was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it. *Ibid*.

§ 1761. Where a statute provides that for a given offense the offender shall pay a certain penalty, and shall, on conviction, be fined and imprisoned, the punishment thus provided is one punishment, and the fact that the penalty has been collected by civil suit is no bar to a criminal prosecution for the same offense. *In re Leszynsky*, §§ 1775-77. See § 1788.

§ 1762. A court of the United States has authority in a criminal case to discharge a jury from giving a verdict, whenever, in its opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or when the ends of public justice would be defeated; and it may do this without the consent of the defendant; but the court is to exercise a sound discretion on the subject, and to use the power with the greatest caution, under urgent circumstances and for very plain and obvious causes. It seems that the court may exercise this power in a case of less than manifest necessity if the defendant consents. *United States v. Watson*, §§ 1778-82. See §§ 1791, 1793.

§ 1763. If the record does not show that the defendant consented to the withdrawal of a juror, it will be presumed that he did not. *Ibid*.

§ 1764. The illness of the district attorney, it not appearing that it occurred after the jury was sworn, or that his assistant, who made the motion to continue the case, could not try it, or the absence of witnesses, where it did not appear that their absence was first known after the jury was sworn, or that it occurred under such circumstances as to create a plain and manifest necessity therefor, does not justify the withdrawal of a juror without the defendant's consent. *Ibid*.

§ 1765. When the trial of an indictment has been commenced by the swearing of the jury, the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is, for any reason, not made out against him, unless he consents to the discharge of the jury without giving a verdict, or unless there is such a legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper. *Ibid*.

§ 1766. It is held that a previous trial and acquittal before a court-martial for a violation of the fifty-seventh section of the article of war, declaring that "whosoever shall be convicted of holding correspondence with or giving intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as shall be ordered by the sentence of the court-martial," is not, by virtue of the constitutional provision, a bar to a trial and punishment for the same act as constituting the offense of giving aid and comfort to those in rebellion, prohibited by section 2 of the act of July 17, 1862. *United States v. Cashiel*, §§ 1783-84.

[NOTES.—See §§ 1785-1809.]

EX PARTE LANGE.

(18 Wallace, 163-205. 1873.)

PETITION for writs of Habeas Corpus and Certiorari.

STATEMENT OF FACTS.—Lange had been convicted of stealing mail bags, and was sentenced to punishment by fine and imprisonment. He was in custody of the marshal for the southern district of New York under this sentence, and applied to this court for writs of *habeas corpus* and *certiorari*. His petition showed that he had been sentenced to a fine and imprisonment for one year; that the fine had been paid and the imprisonment begun, when the court vacated its judgment during the same term and sentenced him anew to one year's imprisonment. It was under this last sentence that the prisoner was held when these writs were applied for. The law provided a punishment by fine or imprisonment.

§ 1767. *Jurisdiction of this court under section 14 of the judiciary act of 1789.*

Opinion by MR. JUSTICE MILLER.

On consideration of the petition which was filed in this case at a former day, the court was of opinion that the facts therein recited very fairly raised the question whether the circuit court, in the sentence which it had pronounced, and under which the prisoner was held, had not exceeded its powers. It therefore directed the writ to issue, accompanied also by a writ of *certiorari*, to bring before this court the proceedings in the circuit court under which the petitioner was restrained of his liberty. The authority of this court in such cases, under the constitution of the United States, and the fourteenth section of the judiciary act of 1789, to issue this writ, and to examine the proceedings in the inferior court, so far as may be necessary to ascertain whether that court has exceeded its authority, is no longer open to question. The cases cited in the note below (a) will, when examined, establish this proposition as far as judicial decision can establish it.

§ 1768. *The powers of a court of record over its own judgments during the term at which they are rendered.*

Disclaiming any assertion of a general power of review over the judgments of the inferior courts in criminal cases, by the use of the writ of *habeas corpus* or otherwise, we proceed to examine the case as disclosed by the record of the circuit court and the return of the marshal, in whose custody the prisoner is found, to ascertain whether it shows that the court below had any power to render the judgment by which the prisoner is held. The first inquiry which presents itself is as to the nature and extent of the power of the circuit court over its own judgments in reversing, vacating or modifying them.

We are furnished by counsel with a very full review of the cases in the English and American courts on the question of the power of courts over their judgments once rendered in criminal cases. Many of these decisions in the English courts are on writs of error and have but little bearing on the question before us. Others, which seem to present cases of judgments vacated or modified during the term at which they were rendered, are based upon the doctrines of the English courts, that there is no judgment or decree until the decree in chancery is enrolled or the judgment has been signed by the judge of the court of law, and become technically a part of the judgment roll. Archb. Cr. Pl., 176. These decisions, some of which go to the extent of denying all right to amend or change the judgment after it becomes a part of the roll, are inapplicable to our system, where a judgment roll, strictly speaking, is no part, or, at least, not a necessary part of our system of judicial proceedings. In most, if not all, our courts a minute-book, or a record of the proceedings of the court, is kept, and is the appropriate repository of all the orders and judgments of the court; and this book with all its entries is, *as a general rule*, under the complete control of the court during the term to which such entries relate.

The general power of the court over its own judgments, orders and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable. And this is the extent of the proposition intended to be decided in the case of *Basset v. United States*, 9 Wall., 38. That was a

(a) *United States v. Hamilton*, 3 Dal., 17; *Ex parte Burford*, 3 Cranch, 418; *Ex parte Bollman*, 4 id., 75; *Ex parte Watkins*, 3 Pet., 198; S. C., 7 id., 508; *In re Metzger*, 5 How., 176; *In re Kaizer*, 14 id., 108; *Ex parte Wells*, 19 id., 837 (§§ 8252-56, *infra*); *Ex parte Milligan*, 4 Wall., 2; *Ex parte McCordle*, 6 id., 318; S. C., 7 id., 506; *Ex parte Yerger*, 8 id., 85.

case like this, in which, in a prosecution for misdemeanor, the prisoner had been sentenced to imprisonment. But it was by a judgment rendered on confession. He was afterwards, during the same term, brought into court and the judgment vacated, his plea of guilty withdrawn, and leave given to plead anew; and then he gave bail and his case was continued. It was in an action on the bail bond which he had forfeited, that the sureties raised the question of the right of the court to vacate the former judgment. In general terms, without much consideration, for no counsel appeared for the sureties, this court sustained the right. If it was intended in that case to raise the question of the right of the court to inflict a new and larger punishment on the prisoner, without reference to the time of his imprisonment on the one set aside, that point was not presented so as to receive the attention of the court, and certainly was not considered or decided. It would seem that there must, in the nature of the power thus exercised by the court, be in criminal cases some limit to it.

§ 1769. *In criminal cases the power of courts over their judgments during the term at which they are rendered does not extend to cases where punishment has already been inflicted.*

The judgment of the courts in this class of cases extends to life, liberty and property. The terms of many of them extend through considerable periods of time, often many months, with adjournments and vacations in the same term, at the discretion of the judge. A criminal may be sentenced to a disgraceful punishment, as whipping, or, as in the old English law, to have his ears cut off, or to be branded in the hand or forehead. The judgment of the court to this effect being rendered and carried into execution before the expiration of the term, can the judge vacate that sentence and substitute fine or imprisonment, and cause the latter sentence also to be executed? Or if the judgment of the court is that the convict be imprisoned for four months, and he enters immediately upon the period of punishment, can the court, after it has been fully completed, because it is still in session of the same term, vacate that judgment and render another, for three or six months' imprisonment, or for a fine? Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal, is manifest.

If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense. The principle finds expression in more than one form in the maxims of the common law. In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et eadem causa.* It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.

In the criminal law the same principle, more directly applicable to the case before us, is expressed in the Latin, "*Nemo bis punitur pro eodem delicto*" (2 Hawk. Pl. Cr., 377), or, as Coke has it, "*Nemo debet bis puniri pro uno delicto.*" 4 Reports, 43, *a*; 11 id., 95, *b*. No one can be twice punished for the same crime or misdemeanor is the translation of the maxim by Sergeant Hawkins.

Blackstone in his Commentaries (vol. 4, 315, Sharswood's ed.) cites the same maxim as the reason why, if a person has been found guilty of manslaughter on an indictment, and has had benefit of clergy, *and suffered the judgment of the law*, he cannot afterwards be appealed. Of course, if there had been no punishment the appeal would lie, and the party would be subject to the danger of another form of trial. But by reason of this universal principle, that no person shall be twice *punished* for the same offense, that ancient right of appeal was gone when the punishment had once been suffered. The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial.

§ 1770. *Not only a second punishment but a second trial for the same offense is forbidden by the common law.*

The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted. Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defense.

In the case of *Crenshaw v. Tennessee*, 1 Mart. & Yerg., 122, it was held by the supreme court of that state that the common law principle went still further, namely, that an indictment, conviction and punishment in a case of felony not capital was a bar to a prosecution for all other felonies not capital committed before such conviction, judgment and execution. If, in civil cases, says Drake, J., in *State v. Cooper*, 1 Green (N. J.), 375, the law abhors a multiplicity of suits, it is yet more watchful in criminal cases that the crown shall not oppress the subject, or the government the citizen, by unreasonable prosecutions.

These salutary principles of the common law have, to some extent, been embodied in the constitutions of the several states and of the United States. By article VII of the amendments to the latter instrument it is declared that no fact once tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law; and by article V, that no person shall for the same offense be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty or property without due process of law. It is not necessary in this case to insist that other cases besides those involving life or limb are *positively* covered by the *language* of this amendment; or that when a party has had a fair trial before a competent court and jury and has been convicted, that any excess of punishment deprives him of liberty or property without due course of law. On the other hand it would seem to be equally difficult to maintain, after what we have said of the inflexible rules of the common law against a person being twice punished for the same offense, that such second punishment as is pronounced in this case is not a violation of that provision of the constitution.

It is very clearly the *spirit* of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection. In the case of *Commonwealth v. Olds*, 5 Litt., 137, one of the best common law judges that ever sat on the bench of the court of appeals of Kentucky remarked, "that every person acquainted with the history of governments must know that state trials have been employed as a formidable engine

in the hands of a dominant administration. . . . To prevent this mischief the ancient common law, as well as Magna Charta itself, provided that one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict*. To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our constitution the clause in question."

In the case of *State v. Cooper*, 1 Green (N. J.), 361, in the supreme court of New Jersey, the prisoner had been indicted, tried and convicted for arson. While still in custody under this proceeding he was arraigned on an indictment for the murder of two persons who were in the house when it was burned. To this he pleaded the former conviction in bar, and the supreme court held it a good plea. It is to be observed that the punishment for arson could not technically extend either to life or limb; but the supreme court founded its argument on the provision of the constitution of New Jersey, which embodies the precise language of the federal constitution. After referring to the common law maxim the court says: "The constitution of New Jersey declares this important principle in this form: 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. But the framers of our constitution have thought it worthy of especial notice. And all who are conversant with courts of justice must be satisfied that this great principle forms one of the strong bulwarks of liberty. . . . Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict*."

And Hawkins in his *Pleas of the Crown*, pp. 515, 526, says that both the pleas of *autrefois acquit* and *autrefois convict* are grounded on the maxim that a man shall . . . not be brought into danger of his life for one and the same offense more than once. In *Moore v. People of Illinois*, 14 How., 13, the defendant was fined \$400 under the criminal code of that state for harboring and secreting a negro slave. The case came to this court under the twenty-fifth section of the judiciary act, on the ground that the right to legislate on that subject was exclusively in congress. The court did not concur in that view of the question. But it was also urged that the party might be subjected twice to punishment for the same offense if liable to be prosecuted under statutes of both state and national legislatures. In regard to this Judge McLean said, in a dissenting opinion, that "the exercise of such a power by the state would, in effect, be a violation of the constitution of the United States and of the respective states. They all provide against a second punishment for the same act." "It is contrary," said he, "to the nature and genius of our government to permit an individual to be twice punished for the same act."

Mr. Bishop, in the latest edition of his work on criminal law, secs. 990, 991, 5th ed., speaking of this constitutional provision, says the construction of these words is that properly the rule extends to treason and all felonies, not to misdemeanors. Yet practically and wisely the courts have applied it to misdemeanors, and that in view of the liberal construction of statutes and constitutions in favor of persons charged with crime he cannot well see how courts can refuse to apply this constitutional guaranty in cases of misdemeanor. Chitty, 1 Cr. L., 452-462, also drops the words life and limb in speaking of the pleas of *autrefois acquit* and *autrefois convict*, and declares that they both de-

pend on the principle that no man shall more than once be placed in peril of legal penalties upon the same accusation.

§ 1771. *The constitution forbids as effectually a second punishment as a second trial for the same offense.*

If we reflect that at the time this maxim came into existence almost every offense was punished with death or other punishment touching the person, and that these pleas are now held valid in felonies, minor crimes, and misdemeanors alike, and on the difficulty of deciding when a statute under modern systems does or does not describe a felony when it defines and punishes an offense, we shall see ample reason for holding that the principle intended to be asserted by the constitutional provision must be applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence. For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?

The argument seems to us irresistible, and we do not doubt that the constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it. But there is a class of cases in which a second trial is had without violating this principle. As when the jury fail to agree and no verdict has been rendered (*United States v. Perez*, 9 Wheat., 579), or the verdict set aside on motion of the accused, or on writ of error prosecuted by him (*People v. Casborus*, 13 Johns., 351), or the indictment was found to describe no offense known to the law.

§ 1772. *A judgment inflicting two punishments when the court had power to inflict only one, though erroneous, is not void.*

And so it is said that the judgment first rendered in the present case being erroneous must be treated as no judgment, and, therefore, presenting no bar to the rendition of a valid judgment. The argument is plausible but unsound. The power of the court over that judgment was just the same, whether it was void or valid. If the court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated that judgment during the term and rendered a judgment for one year's imprisonment; or, if no part of the sentence had been executed, it could have rendered a judgment for \$200 fine after vacating the first. Nor are we prepared to say, if a case could be found where the first sentence was wholly and absolutely void, as where a judgment was rendered when no court was in session, and at a time when no term was held — so void that the officer who held the prisoner under it would be liable, or the prisoner at perfect liberty to assert his freedom by force — whether the payment of money or imprisonment under such an order would be a bar to another judgment on the same conviction. On this we have nothing to say, for we have no such case before us. The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a

court which had jurisdiction of the party and of the offense, on a valid verdict. The error of the court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void. *Miller v. Finkle*, 1 Park. Cr. Rep., 374, is directly in point. But we think that no one will contend that the first sentence was so absolutely void that an action could be maintained against the marshal for trespass in holding the prisoner under it.

The petitioner then having paid into court the fine imposed upon him of \$200, and that money having passed into the treasury of the United States, and beyond the legal control of the court, or of any one else but the congress of the United States, and he having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and, without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him *twice* for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing. The force of this proposition cannot be better illustrated than by what occurs in the present case if the second judgment is carried into effect. The law authorizes imprisonment not exceeding one year or a fine not exceeding \$200. The court, through inadvertence, imposed both punishments, when it could rightfully impose but one. After the fine was paid and passed into the treasury, and the petitioner had suffered five days of his one year's imprisonment, the court changed its judgment by sentencing him to one year's imprisonment from that time. If this latter sentence is enforced it follows that the prisoner in the end pays his \$200 fine and is imprisoned one year and five days, being all that the first judgment imposed on him, and five days' imprisonment in addition. And this is done because the first judgment was confessedly in excess of the authority of the court.

But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous, but not void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void. But we do not concede the major premise in this argument. A judgment may be erroneous and not void, and it may be erroneous *because* it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes.

§ 1773. *After one of two alternative punishments has been inflicted, the power of the court (even at the same term) over the judgment is gone.*

We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was

prohibited. It was error, but it was error because the power to render any further judgment did not exist.

It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if on an indictment for treason the court should render a judgment of attain, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the state, it would be void as to the attainder, because in excess of the authority of the court, and forbidden by the constitution.

§ 1774. *Distinction between void and erroneous judgments.*

A case directly in point is that of *Bigelow v. Forrest*, 9 Wall., 339. In that case, under the confiscation acts of congress, certain lands of French Forrest had been condemned and sold, and Bigelow became the holder of the title conveyed by those proceedings. After Forrest's death his son and heir brought suit to recover the lands, and contended that under the joint resolution of congress, which declared that condemnation under that act should not be held to work a forfeiture of the real estate of the offender beyond his natural life, the title of Bigelow terminated with the death of the elder Forrest.

In opposition to this it was argued that the decree of the court confiscating the property in terms ordered *all* the estate of the said Forrest to be sold, and that though this part of the decree might be erroneous, it was not void. Here was a case of a proceeding *in rem* where the property was within the power of the court, and its authority to confiscate and sell under the statute beyond question; but the extent of that power was limited by the statute. The analogy to the case before us seems almost perfect. In that case the court said: "It is argued, however, on behalf of the plaintiff in error that the decree of confiscation of the district court of the United States is conclusive, that the entire right, title and interest of French Forrest was condemned and ordered to be sold; and that as his interest was a fee-simple that entire fee was confiscated and sold. Doubtless, a decree of a court having jurisdiction to make the decree cannot be impeached collaterally, but under the act of congress the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have transcended its jurisdiction." The doctrine of that case is reaffirmed in the case of *Day v. Micou* at the present term (18 Wall., 156), where it is said that in *Bigelow v. Forrest* "we also determined that nothing more was within the jurisdiction or judicial power of the district court (than the life estate), and that consequently a decree condemning the fee could have no greater effect than to subject the life estate to sale."

But why could it not? Not because it wanted jurisdiction of the property or of the offense, or to render a judgment of confiscation, but because in the very act of rendering a judgment of confiscation it condemned more than it had authority to condemn. In other words, in a case where it had full jurisdiction to render one kind of judgment, operative upon the same property, it rendered

one which included that which it had a right to render, and something more, and this excess was held simply void. The case before us is stronger than that, for unless our reasoning has been entirely at fault, the court in the present case could render no second judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the constitution, and by the dearest principles of personal rights, which both of them are supposed to maintain.

There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the constitution of the United States, or the well-settled principles of the common law, we have come to the conclusion that the sentence of the circuit court under which the petitioner is held a prisoner was pronounced without authority, and he should therefore be discharged.

Discharged accordingly.

JUSTICES CLIFFORD and STRONG dissented.

IN RE LESZYNSKY.

(Circuit Court for New York: 16 Blatchford, 9-20. 1879.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—Section 3318 of the Revised Statutes is in these words: "Every rectifier and wholesale liquor dealer shall provide a book, to be prepared and kept in such form as may be prescribed by the commissioner of internal revenue, and shall, on the same day on which he receives any foreign or domestic spirits, and before he draws off any part thereof, or adds water or anything thereto, or in any respect alters the same, enter in such book, and in the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place whence, the spirits were received, by whom distilled, rectified or compounded, and when and by whom inspected, and if in the original package, the serial number of each package, the number of wine gallons and proof gallons, the kind of spirit, and the number and kind of adhesive stamps thereon. And every such rectifier and wholesale dealer shall, at the time of sending out of his stock or possession any spirits, and before the same are removed from his premises, enter in like manner, in the said book, the day when, and the name and place of business of the person or firm to whom, such spirits are to be sent, the quantity and kind or quality of such spirits, the number of gallons and fractions of a gallon at proof, and if in the original packages in which they were received, the name of the distiller and the serial number of the package. Every such book shall be at all times kept in some public or open place on the premises of such rectifier or wholesale dealer for inspection, and any revenue officer may examine it and take an abstract therefrom; and when it has been filled up as aforesaid, it shall be preserved by such rectifier or wholesale liquor dealer for a period not less than two years; and during such time it shall be produced by him to every revenue officer demanding it. And whenever any rectifier or wholesale liquor dealer refuses or neglects to provide such book, or to make entries therein as aforesaid, or cancels, alters, obliterates or destroys any part of such book, or any entry therein, or makes any false entry therein, or hinders or obstructs any

revenue officer from examining such book, or making any entry therein, or taking any abstract therefrom, or whenever such book is not preserved or is not produced by any rectifier or wholesale liquor dealer as hereinbefore directed, he shall pay a penalty of \$100, and shall, on conviction, be fined not less than \$100 nor more than \$5,000, and imprisoned not less than three months nor more than three years." This section is, in all material respects, a re-enactment of section 45 of the act of July 20, 1868 (15 U. S. Stat. at Large, 143). In the first edition of the Revised Statutes, the words "on conviction," found in said section 45, were omitted from said section 3318, but by the act of February 27, 1877 (19 id., 248), said section 3318 was amended by inserting said words "on conviction," that act stating that such amendment, with others, was made "for the purpose of correcting errors and supplying omissions" in the Revised Statutes, "so as to make the same truly express" the statutes of the United States in force on the 1st of December, 1873. Said section 3318, as above quoted, is quoted as it is printed in the second edition of the Revised Statutes, except that the word "quality" is printed "quantity," by mistake, in the second edition, the word being "quality" in the first edition and in said section 45.

The United States, on the 13th of January, 1879, brought a civil action, in the district court of the United States for this district, against Samuel H. Leszynsky and Charles A. Troup, the complaint in which set forth "that, at the time hereinafter mentioned, the defendants were partners in business, under the firm name of Leszynsky & Troup, at No. 26 Beaver street, in the city of New York, and then and there carried on the business of wholesale liquor dealers and rectifiers; that, in and during the year 1878, the defendants, at the city of New York, received certain distilled spirits which they failed and neglected to enter in the book required by law to be kept by them as such wholesale liquor dealers and rectifiers, and, therefore, by virtue of the premises, and by force of the statute of the United States in such case provided, the defendants became liable to pay to these plaintiffs the sum of one hundred dollars (\$100), which said sum remains due and unpaid; wherefore plaintiffs demand judgment against the defendants for the sum of one hundred dollars, besides the cost of this action." The defendants appeared by attorney in said action, and put in an answer which stated that the defendants, "for answer to the complaint, say nothing in bar or preclusion of the suit of the said plaintiffs." On the 20th of January, 1879, an order was made by said district court "that the plaintiffs have judgment for their claim, together with costs and disbursements of this action, to wit, the sum of one hundred and fifteen dollars," and "that the clerk enter judgment for said amount." On the same day a judgment in said action was entered, "that the plaintiffs have judgment for their claim, together with costs and disbursements of this action, to wit, the sum of one hundred dollars, and that they have execution therefor." On the same day an order was made by said district court, reciting that a judgment had been entered in said action for \$115, and that the defendants' attorney had paid into the registry of said court the sum of \$115 in satisfaction of said judgment, and ordering that said judgment be satisfied and canceled of record. Afterwards, on the same day, a United States commissioner issued a warrant to the marshal, setting forth that complaint on oath had been made to him, "charging that Samuel H. Leszynsky and Charles A. Troup were, at the times hereinafter mentioned, rectifiers and wholesale liquor dealers, doing business at No. 26 Beaver street, New York city, did, on or about the 29th of October and

18th day of November, in the year one thousand eight hundred and seventy-eight, at the southern district of New York, unlawfully neglect to make any entry whatever in the book kept by them, the form whereof had theretofore been prescribed by the commissioner of internal revenue, of spirit; then and there sent out by them of their stock and possession, before the said spirits were removed from their premises; and, further, they did, as such wholesale liquor dealers and rectifiers, on or about the 18th day of November, 1878, in said district, unlawfully neglect to make any entry in their said book of spirits then and there sent out by them of their stock, before the said spirits were removed from their premises, and the spirits here mentioned are not those stated hereinbefore, and for similar offenses on the 30th of October and 15th day of December, 1878," and commanding the marshal to apprehend the said Leszynsky and Troup. Under this warrant Leszynsky was arrested and brought before the commissioner, and an examination was had, and, on the 23d of January, the commissioner committed him to the custody of the marshal for trial, in default of \$1,000 bail. He has now been brought before this court on a writ of *habeas corpus* issued by it, and the proceedings which took place before the commissioner are before this court on a writ of *certiorari*. At the examination before the commissioner the defendant put in evidence the said proceedings in said civil action, and, while admitting that there was probable cause to hold him under said warrant, but for said proceedings, contended, and here contends, that, in consequence of such proceedings, he is not liable to be again arrested, held, detained, tried, convicted or punished for the same cause, and that an arrest and detention under said warrant is for the same cause for which he was punished by the payment of said judgment.

It is contended, for the relator, that if he shall be convicted and fined and imprisoned for the offenses alleged in the warrant, he will be punished twice for the same statutory offense; and that he was completely punished for the offenses alleged in said warrant by the payment of said judgment.

§ 1775. *Section 3318, Revised Statutes, which imposes a penalty and a fine and imprisonment, inflicts but one punishment.*

It is to be noted that section 3318 provides distinctly that whenever any rectifier or wholesale liquor dealer does what is specified therein, he shall pay a penalty of \$100 and shall, on conviction, be fined and imprisoned. No more distinct form of expression could have been adopted to indicate the intention of congress to provide cumulative penalties or punishments, three in number, each in addition to the other two — a penalty of \$100 to be recovered by a civil action, and fine and imprisonment to follow conviction on a criminal prosecution. But, in the eye of the law, the three punishments are only one punishment for the same offense, although the penalty of \$100 may be recovered in a civil action, and the fine and imprisonment are inflicted by a criminal prosecution. The statute book has many like provisions for punishment of offenses, where a penalty to be recovered by a civil action is given, and a fine and imprisonment, or one of them, on a criminal conviction, is prescribed in addition and cumulatively by the use of the word "and." Provisions for punishment by the forfeiture of property, which must be enforced in a civil action, and, cumulatively and in addition, by fine and imprisonment, or one of them, on a criminal conviction of the same offense for which the forfeiture of property is prescribed, are of the same character. Where the same section of the statute contains the description of the offense, and the prescription of the penalty by civil suit, and of the punishment on a criminal conviction, the two connected by the copula-

ve "and," no other construction is proper than that the whole is one punishment, and that the whole cannot be satisfied by a part. Reference, for provisions of the above descriptions, in the same title in which section 3318 is found, may be had to sections 3257, 3258, 3259, 3260, 3279, 3292, 3296, 3326, 3340, 3342, 3360, 3370, 3380, and 3401. Penalties and forfeitures given by statute are to be enforced by civil suits. R. S., § 563, subd. 3; id., § 919. Fine and imprisonment are to be inflicted as the result of a conviction on a criminal prosecution. Different methods are to be resorted to to enforce the different parts of what is one and the same punishment. But the fact that the two methods may be progressing simultaneously and one be completed before the other, or that one may be fully completed before the other is commenced, cannot have the effect to annul the provision of law in regard to the uncompleted part. The views above expressed are in harmony with those of the supreme court in the recent case of *United States v. Claflin*, 97 U. S., 546, where the provisions of section 3082 of the Revised Statutes were under consideration, as section 4 of the act of July 18, 1866 (14 U. S. Stat. at Large, 179). That section provides, as a punishment for the fraudulent importation of merchandise, a forfeiture of the merchandise, and a fine or imprisonment, or both. The court construe the section as having in view not only punishment of the offense described but indemnity to the government for loss sustained in consequence of the criminal conduct of those guilty of the offense, and say that the forfeiture of the goods was designed to secure indemnity to the government for the wrong done, and that the fine and imprisonment "were superadded as a vindication of public justice."

§ 1776. *Cases cited.*

The case of *United States v. Gates*, 5 Law Rep., 465, in the district court of the United States for this district, before Judge Betts, in 1845, is cited on the part of the relator. In that case Gates had been indicted and convicted, under section 19 of the act of August 30, 1842 (5 U. S. Stat. at Large, 565), for smuggling and clandestinely introducing into the United States certain goods, with a view to defraud the revenue of the United States, and had thereon been sentenced to pay a fine of \$2,000 and to be imprisoned thirty days. That specific offense was made punishable by that statute and the sentence was a lawful one. Gates had paid the fine and suffered the imprisonment. Afterwards a civil suit was brought by the United States against Gates, under section 50 of the act of March 2, 1866 (1 U. S. Stat. at Large, 665), to recover the penalty thereby imposed, of \$400, for landing the same goods without a permit. The defendant pleaded in bar the conviction and sentence and punishment aforesaid. The plea was demurred to and was held good by the court on two grounds: (1) that, as the United States had obtained judgment and inflicted punishment on the defendant for an offense, they were prohibited, by general principles of law, from prosecuting him again for acts constituting the same offense, or, in other words, which, if proved, would call for his conviction of that offense; and (2) because the punishment provided by the act of 1842 was not cumulative, and to be imposed in addition to that prescribed by the act of 1799. The present is a different case. The fine and imprisonment provided by section 3318 are cumulative to the penalty of \$100, and are to be imposed in addition; and the United States are not prosecuting the relator a second time for the same offense.

The case of *United States v. McKee*, 4 Dill., 128, also relied on by the relator, is like the *Gates* case, and different from the present one. McKee had

been indicted and convicted under section 5440 of the Revised Statutes, for taking part in a conspiracy to defraud the United States of taxes due on distilled spirits, in pursuance of which conspiracy his co-conspirators unlawfully removed such spirits. He was sentenced to pay a fine and be imprisoned. Afterwards, under section 3296, he was sued in a civil action by the United States to recover a penalty of double the amount of the taxes on certain distilled spirits, out of which the government alleged it was defrauded by means of a conspiracy entered into for that purpose by McKee and certain distillers, for the unlawful removal, by the distillers, of said spirits, without the payment of taxes. It was alleged that McKee aided and abetted in such removals. The defendant pleaded in bar such indictment, conviction and sentence. The overt acts charged in the indictment were alleged to be the unlawful removal of the same distilled spirits without the payment of taxes, for which the penalty sought to be recovered in the civil suit was denounced by section 3296. The defendant also pleaded in bar a pardon by the president. The United States demurred to the pleas, and the pleas were held good.

There is nothing in the decision in *Ex parte Lange*, 18 Wall., 164, 168 (§§ 1767-74, *supra*), considered with reference to the facts of that case, which sustains the claim of the relator in this case. As was said by the court in *The People v. Stevens*, 13 Wend., 341: "It is undoubtedly competent for the legislature to subject any particular offense both to a penalty and a criminal prosecution; it is not punishing the same offense twice. They are but parts of one punishment; they both constitute *the* punishment which the law inflicts upon the offense. That they are enforced in different modes of proceeding, and at different times, does not affect the principle. It might as well be contended that a man was punished twice when he was both fined and imprisoned, which he may be in most misdemeanors."

It is urged that the word "and" after the words "penalty of one hundred dollars," in section 3318, should be read "or." As congress unquestionably had the power to prescribe the entire punishment provided by section 3318 quite as much as they have to prescribe fine and imprisonment in any case, it must be held that the word "and" has its natural and cumulative meaning. The fifth amendment to the constitution of the United States provides that no person shall "be subject, for the same offense, to be twice put in jeopardy of life or limb." It is contended, for the United States, that the judgment in the civil suit, and the payment of it, did not subject the relator to be put in jeopardy of his life or limb. But, even though the spirit of this amendment be to prevent a second punishment, under judicial proceedings, for the same crime, so far as the common law gave that protection (*Ex parte Lange*, 18 Wall., 163, 170), yet the criminal proceeding now instituted against the relator will not produce a second punishment for the same offense, but will only complete, on conviction, the punishment intended by congress. The fifth amendment was proposed by congress on the 25th of September, 1789, and was ratified by eleven states in that year and the following two years. But that amendment has not been regarded by congress as preventing legislation such as that found in the statute now in question. Thus, by the act of July 31, 1789 (1 U. S. Stat. at Large, 46), it was provided that, if goods entitled to drawback were entered for exportation and were afterwards landed, they and the vessel from which they were landed, and the boats used in landing them, should be forfeited, and all persons concerned therein should, on conviction, be imprisoned. This same provision was re-enacted as section 60 of the act of August 4, 1790 (1 U. S.

Stat. at Large, 174), and as section 82 of the act of March 2, 1799 (*id.*, 692), and is now found in section 3049 of the Revised Statutes. It would necessarily sometimes happen that the owner of the forfeitable goods would be concerned in landing them, and thus he would be punishable both by having his goods forfeited and by being imprisoned on conviction, the forfeiture of goods being enforced in a civil suit and the conviction taking place in a criminal proceeding. So, in section 24 of the act of March 2, 1799 (1 U. S. Stat. at Large, 646), it was provided that, if goods should be imported in violation of the statute as to a manifest, the master in command of the vessel should forfeit and pay a sum of money equal to the value of such goods not included in the manifest, and all such goods, not included in the manifest, belonging to him, should be forfeited. It was made the duty of the master in command to make and sign and have the manifest, and thus, in respect to goods not manifested, which belonged to him, he would be punished by losing the goods in a suit *in rem*, and also by paying their value again, as the result of a suit *in personam*. This provision is re-enacted in section 2809 of the Revised Statutes. In section 46 of the act of March 2, 1799 (1 U. S. Stat. at Large, 662), it was provided that, when any articles subject to duty are found in the baggage of any person arriving in the United States, which shall not, at the time of making entry for such baggage, be mentioned to the collector before whom such entry is made, by the person making the same, all such articles so found shall be forfeited, and the person in whose baggage they shall be found shall, moreover, forfeit and pay treble the value of such articles. Under this provision, if the person in whose baggage the articles were found was the owner of them, and if he made the entry, he would forfeit the articles in a suit *in rem* and pay treble their value in a suit *in personam*, as one punishment for the offense. This provision is re-enacted in section 2802 of the Revised Statutes.

Provisions are found in the statutes, where, when congress has intended that a person who would otherwise be subject to two distinct provisions of the same section should be exempt from one, if subject to the other, it has said so distinctly. Thus in section 34 of the act of September 1, 1789 (1 U. S. Stat. at Large, 64, 65), it was provided that, on conviction of any of certain neglects or offenses against the act for registering vessels, the offender should forfeit \$1,000 and be rendered incapable of serving in any office of trust or profit under the United States; and, further, that, if any person required by the act to perform anything should wilfully neglect or refuse to do so, he should, on conviction, "if not subject to the penalty and disqualification aforesaid," forfeit \$500 for the first offense, and a like sum for the second offense, and should, from thenceforward, be rendered incapable of holding any office of trust or profit under the United States. This provision was re-enacted in section 26 of the act of December 31, 1792 (1 U. S. Stat. at Large, 298), and a like provision is found in section 29 of the act of February 18, 1793 (*id.*, 315). These provisions are now found in sections 4187, 4188, 4373 and 4374 of the Revised Statutes. The restriction found in them is a recognition of the principle of the fifth amendment and of the doctrine of the case of *United States v. McKee*. But the fact of such restriction, and the punishment of the offenses named by a pecuniary forfeiture or penalty and by a disqualification to hold any office of trust or profit under the United States, shows that congress did not regard the punishment by a pecuniary forfeiture or penalty, and by a disqualification in addition, as within the inhibition of the fifth amendment. The imposition of the forfeiture or penalty is a punishment. Indeed, sections 4187

and 4188 use the words "punishable by a fine," instead of the word "forfeit," found in the act of 1792, while sections 4373 and 4374 use the words "liable to a penalty," instead of the word "forfeit," found in the act of 1793, and section 4188 refers to the punishment by a fine, prescribed by section 4187, as a "penalty." The disqualification to hold office is a punishment, under the decisions of the supreme court in *Cummings v. State of Missouri*, 4 Wall., 277, (CONST., §§ 608-618), and *Ex parte Garland*, id., 333 (CONST., §§ 619-637).

§ 1777. *Construction of penal laws.*

The proper conclusion from these considerations is, that congress had power to prescribe the punishment by the penalty and the fine and the imprisonment, prescribed by section 3318, as a punishment the whole of which may be imposed; and that the language is such as to indicate an intention that the whole shall be imposed. The language of Chief Justice Marshall, in *United States v. Wiltberger*, 5 Wheat., 76, 95 (§§ 1633-36, *supra*), is applicable to this case: "Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute, to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest."

It follows that the relator is not, by what took place in the civil action, exempted from criminal prosecution, under section 3318, in respect to the matter covered by the complaint in such civil action; and that he is not entitled to be discharged on *habeas corpus*.

UNITED STATES v. WATSON.

(District Court, Southern District of New York: 3 Benedict, 1-7. 1868.)

STATEMENT OF FACTS.—Indictment for aiding and abetting in the concealment of distilled spirits. The record showed that on the 10th of June, 1868, the jury was sworn and the case continued till the next day. On that day there was a further continuance, and on the 23d of June the illness of the district attorney, which had been the cause of the continuance, still existing, a juror was withdrawn by order of the court, and the case was postponed for the term. When the case came on again for trial the defendants objected to any further trial, on the ground that the proceedings above stated amounted to an acquittal.

§ 1778. *A court of the United States may discharge a jury whenever manifest necessity requires it, without the consent of the accused.*

Opinion by BLATCHFORD, J.

There can be no doubt that a court of the United States has authority, in a criminal case, to discharge a jury from giving a verdict whenever, in its opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or when the ends of public justice would otherwise be defeated, and it may do this without the consent of the defendants; but the court is to exercise a sound discretion on the subject, and to use the power with the greatest caution, under urgent circumstances, and for very plain and obvious causes.

United States v. Perez, 9 Wheat., 579. If the court may exercise this authority in a criminal case, without the consent of the defendant, in a case of manifest necessity, it may do so with the consent of the defendant, in a case which falls short of being one of manifest necessity. In the present case, the minutes of the court show that the reason for postponing the case from the 11th to the 19th of June was the same as that for postponing the case indefinitely on the 23d of June, and for directing a juror to be withdrawn—to wit, the illness of the district attorney and the absence of witnesses for the United States. The minutes do not show any assent by the defendants to the withdrawal of the juror or any dissent from that course. I am satisfied that I must have understood the defendants, by their counsel, as consenting to the course that was pursued. Otherwise, the question of the effect of their not consenting would have been presented at the time; and they would have insisted then and there upon their right to a verdict of acquittal. No such verdict was asked for, nor was the question presented to the court as to what effect the want of consent by the defendants to the withdrawing of a juror would have as to a future trial. Although the counsel for the defendants may have urged their desire to proceed with the trial, and have dwelt on the hardship of the postponement, still I regarded them, and doubtless the district attorney did, in the absence of any motion on their part for the entry at the time of a verdict of acquittal, as in effect consenting to the withdrawal of a juror. If the district attorney did not choose to proceed with the trial after the jury were sworn and impaneled, the defendants had a right then and there to ask for a verdict of acquittal. If they had asked for such a verdict, the district attorney might, in preference, have gone on with the trial. Still the defendants were not bound to ask at the time for such a verdict. They have a right now to claim that what took place was in effect such a verdict.

§ 1779. *The minutes of the court settle the question as to what took place at a previous hearing of the cause.*

The fact that the court and the district attorney regarded the defendants as consenting to the course that was taken ought not, in the absence from the minutes of the court of any statement that they consented, to conclude them. If the court, acting at the time on its understanding that the defendants in effect consented, had proposed to make in the minutes of the court an entry of such consent, it may very well be that the counsel for the defendants would have at once insisted on the right of the defendants to a verdict of acquittal. Then the court would have been called upon to pass on the sufficiency of the reasons assigned in the minutes for withdrawing a juror—the illness of the district attorney and the absence of witnesses for the prosecution. The court must be governed as to the facts in this matter by its minutes. They were made by the clerk in the usual course of the business of the court, without the special attention of the court having been called to them, and without any motion having been made by the district attorney, at the time, to enter as a part of them that the defendants consented to the withdrawal of the juror. It would be very unsafe, and lead to endless disputes and probable injustice, for the court, in matters of this kind, to act on its own recollection, or on the affidavits of witnesses, especially after a lapse of time.

§ 1780. *If it does not appear by the record that defendants did consent to withdrawing a juror, it must be presumed that they did not consent.*

If the parties to any suit or proceeding find that the minutes of the proceedings of the court kept by the clerk, and which are always open to inspection,

are erroneous, the proper way is to move to correct them promptly, to comport with the facts. It must, therefore, be assumed, for the purposes of the present application, that there was no consent by the defendants to the withdrawal of the juror. The question then recurs whether the reasons assigned in the minutes of the court for withdrawing a juror show a manifest necessity for doing so, or that the ends of public justice would otherwise have been defeated. The question must be disposed of now as it would have been disposed of at the time the motion was made that the trial go off for the term, if the defendants had then expressed their dissent from such action.

§ 1781. *The illness of the district attorney and the absence of witnesses do not create a manifest necessity for withdrawing a juror.*

The illness of the district attorney, it not appearing by the minutes that such illness occurred after the jury was sworn, or that it was impossible for the assistant district attorney to conduct the trial, and the motion to put off the case for the term being made by such assistant, cannot be regarded as creating a manifest necessity for withdrawing a juror. So, too, as to the absence of witnesses for the prosecution, it does not appear by the minutes that such absence was first made known to the law officers of the government after the jury was sworn, or that it occurred under such circumstances as to create a plain and manifest necessity justifying the withdrawing of a juror. The mere illness of the district attorney, or the mere absence of witnesses for the prosecution, under the circumstances disclosed by the record in this case, is no ground upon which, in the exercise of a sound discretion, a court can, on the trial of an indictment, properly discharge a jury without the consent of the defendant, after the jury has been sworn and the trial has thus commenced. To admit the propriety of the exercise of the discretion on such grounds would be to throw open the door for the indulgence of caprice and partiality by the court, to the possible and probable prejudice of the defendants.

§ 1782. *The discharge of the jury after they have been sworn, without the consent, of record, of the defendant, operates as an acquittal.*

When the trial of an indictment has been commenced by the swearing of the jury, the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is, for any reason, not made out against him, unless he consents to the discharging of the jury without giving a verdict, or unless there is such a legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper. Whart. Cr. L., ed. 1852, p. 213. It is impossible, within this definition, to lay down any inflexible rule as to what causes would, and what causes would not, be sufficient to warrant the exercise of the discretion which the court possesses. It is sufficient to say that in no case to be found in the books has any such reason as is spread upon the record in this case been admitted, in the absence of the consent of the defendant, to be a proper ground for discharging a jury after they have been sworn and impaneled to try an indictment. To hold now that the record of the proceedings of the court on the former trial amounts to a verdict of acquittal is to do just what the court would have done at that time on the facts stated in the record. If I had any doubt as to the propriety of this course, I should resolve it in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion. But the weight of all the authorities on the subject is, that the position of this case, as it stood when the juror was withdrawn, entitled the defendants, in the absence of their express consent to any other course, to a

verdict of acquittal, and therefore entitles them to the action of the court, at this time, on their application to the same effect. An order will, therefore, be entered, declaring that the proceedings on the former trial are held to be equivalent to a verdict of not guilty, and discharging the defendants and their bail from further liability in respect of the indictment.

UNITED STATES *v.* CASHIEL.

(Circuit Court for Maryland: 1 Hughes, 552-560. 1863.)

STATEMENT OF FACTS.—Defendant was indicted for giving information to the public enemy. He had been previously tried by a court-martial upon charges based on the same fact (telling a Confederate officer in what direction a herd of cattle had been driven), and had been acquitted (in effect), and pleaded that acquittal in bar of the indictment. The prosecution demurred.

Opinion by GILES, J.

The second section of the act of 17th of July, 1862, under which the traverser stands indicted, is as follows: "That if any person shall hereafter incite, set on foot, assist or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid or comfort thereto, or shall engage in or give aid and comfort to any existing rebellion or insurrection, and be convicted thereof, he shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding \$10,000, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court."

The trial and conviction which forms the subject-matter of the plea filed in this case was had before a general court-martial, held in the city of Washington, in pursuance of orders from the war department. The charge against the traverser before that court was for violation of the fifty-seventh section of the article of war, which article is as follows: "Whoever shall be convicted of holding correspondence with or giving intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as shall be ordered by the sentence of the court-martial." See Act of 1806, 2d volume Statutes, 366.

§ 1783. *An acquittal by a court-martial is no bar to an indictment in a court of law.*

Two questions have been presented in the argument of this case: 1st. Had the court-martial, whose record is referred to in the plea filed in this case, jurisdiction of the offense there charged and over the person of the traverser? And if so, 2d. Is the said charge the *same offense* (within the meaning of the fifth amendment to the constitution of the United States) for which the traverser now stands indicted?

I shall discuss the second question, for if that be answered in the negative it overrules the plea filed in this case; and it becomes unnecessary to consider and decide the first. They have both been argued with great ability, and the first question, touching the jurisdiction of courts-martial, presents at the present time a painful interest. It is a question with which our previous reading had not made us familiar, for, until the present widespread insurrection, the administration of our general government had been known to us only by the exercise of its peaceful civil powers, and by its laws executed and enforced by the national judiciary. But our constitution was made for all time—a time of war as well as a time of peace; and what is the extent and limit of the war power it im-

parted to the government presents a problem of no easy solution, but one which is now engaging the attention and careful consideration of the statesmen and jurists of the land. As the view I take of this case relieves me from the consideration at present of so grave a question, I will only add, before I pass from it, that the more I study the constitution of our country the more am I impressed with the wisdom, the forethought and the experience of the great men who framed it. And my firm conviction is, that our only pathway of safety and hope for the future lies in a strict observance of all its provisions. Now, what is meant by the word "*offense*," as used in the fifth amendment to the constitution? This is settled by the supreme court in the case of *Moore v. People of Illinois*, reported in 14 How., 17, where Justice Grier says, in delivering the opinion of the court, "An offense in its legal signification means *the transgression of a law*."

In this case we have *two laws* — the articles of war, as contained in the act of 1806, and the law of 1862, which I have before cited — and their provisions are different. The fifty-seventh article of war punishes the holding of any *correspondence* or the *giving of any intelligence* to the enemy. For in a time of war (when alone this article operates) it might be prejudicial to the discipline and good order of the army that any correspondence should be held by any of its members with the enemy, although the intelligence given might be in no manner in furtherance of that enemy's views and designs. Whereas, no conviction could be had under the act of 1862, unless the intelligence given was of such a character as to give aid and comfort to those engaged in the insurrection. It might very well be, then, that facts which would warrant a conviction under the fifty-seventh article of war could produce no such result in an indictment under the second section of the act of 1862. And many facts would warrant a conviction under the law of 1862 which are not punishable under the fifty-seventh article of war. These are laws to be administered by different tribunals, and they create distinct offenses. And there was no law of the United States punishing by indictment corresponding with the enemy or giving them intelligence (unless it amounted to treason under the act of 1790, or as giving aid and comfort to the rebellion under the act of 1862) until the act of the 25th of February, 1863, and that only punishes correspondence, either written or verbal, where it is carried on with "intent to defeat the measures of the government, or to weaken, in any way, their efficacy." When congress, in 1806, was framing the articles of war, they provided, by the thirty-third article, that whenever an officer or soldier should be accused of a capital crime, or of having committed any offense against the person or property of any citizen, such as is punishable by the known laws of the land, he should be delivered over to the civil magistrate for punishment. And although by article 9 they provided a punishment for an officer or soldier striking or drawing a weapon upon, or offering any violence to, his superior officer, it could not be contended that this provision debarred the civil courts from punishing the offense as an assault and battery. And although the act of 1806 does not contain the provision to be found in the mutiny acts of Great Britain, "That nothing in it shall be construed to exempt any officer or soldier whatsoever from being proceeded against by due course of law," yet it appears to me that that is its true construction; that the military law, as it exists in the United States, is an exceptional code, applicable to a class of persons in given relations, but not abrogating or derogating from the general law of the land, but that the latter is left in full force and virtue. Tytler, in his *Treatise on Military Law*, says: "The

martial or military law, as contained in the military law and articles of war, does, in no respect, either supersede or interfere with the civil and municipal law of the realm." He is an Englishman, and treating of the laws of that country. But what say the two most approved writers on military law in this country? Benet, on page 100 of his treatise, says: "A former acquittal or conviction of an act by a civil court is not a good plea in bar before a court-martial on charges and specifications covering the same act." And De Hart, on page 140, says: "A former acquittal or conviction pleaded must have reference to a trial by a court-martial. The same acts, as they may offend against the rights of private persons, may also violate the proprieties of military discipline, and as such may be investigated by both civil and military courts. This is a principle perfectly well established in the military service, and has been acted upon and approved by the highest authority."

And both these accomplished writers cite the case of Captain Howe. In May, 1842, Captain Howe, of the Second Dragoons, was tried upon a charge for "conduct prejudicial to good order and military discipline," in having beaten or caused to be beaten, in a cruel and inhuman manner, a private of his company. Upon arraignment, Captain Howe pleaded, in bar of trial, that he had been tried and acquitted for the said act upon an indictment for manslaughter in the civil court. But the court would not admit the validity of such plea, and proceeded to trial. Captain Howe was convicted upon the charge and sentenced to be suspended from rank, pay and emoluments for twelve months. The proceedings and decision of the court were approved and confirmed by the war department by general order No. 34 in 1842. John C. Spencer, of New York, was then secretary of war, himself a lawyer of considerable reputation in his day. Now the civil court before whom Captain Howe had been tried and acquitted was not, as the learned counselor for the traverser supposed, a court of a different sovereignty, a court of a state; but Florida was then a territory, and the trial took place before the superior court for the territory of East Florida, a court established by congress by the act of May 20, 1824. The judge, district attorney and marshal of said court were appointed by the president by and with the advice and consent of the senate, and their salaries were paid out of the treasury of the United States. It was a court whose only power was derived from the authority of the United States, and which possessed the usual jurisdiction belonging to the district and circuit courts of the United States, in addition to a jurisdiction to administer the local laws of the territory of Florida. And the opinion of Mr. Legare, the then attorney-general (one of the most accomplished lawyers of the day), sustained the course of the court-martial in this case. It is therefore an authority entitled to great respect. It was not until 1845 that Florida was admitted into the Union. If this be a sound law, then it must follow that an acquittal before the court-martial could not be pleaded to an indictment before the civil court. And, as the supreme court say in the case in 14 How., 17: "It cannot be truly averred that the offender has been twice punished for the same offense, but only that by one act he has committed two offenses, for each of which he is justly punishable."

§ 1784. *The defense of former acquittal or conviction considered and authorities cited.*

The great principle that in the administration of criminal justice no person should be twice put in jeopardy of life or limb for the same offense is much older than our constitution. It existed as a fundamental rule of the common

law from a very early period, and is recognized by all English writers on common law. But it is limited to forbid a second trial *for one and the same offense*. Blackstone (4th vol., page 336) says, "that the pleas of *autrefois acquit* and *autrefois convict* must be upon a prosecution for the same identical act and crime." And although an acquittal on an appeal was a good bar to an indictment, yet he informs us on page 313 that an appeal was a prosecution for some heinous crime, demanding punishment on account of the particular injury suffered, rather than to vindicate the public justice. The view I take of the provision in the fifth amendment to the constitution does not, therefore, conflict with this humane principle of the common law. Under each, a former trial, to be a bar, must be a trial for the same identical offense, or, in other words, for the transgression of the same law. As opposed to this view, I have found but two authorities, a *dictum* of Justice Woodbury, in the case of *Wilkes v. Dinsman*, 7 How., 123, and a note on page 341, first volume of the ninth edition of *Kent's Commentaries*. The case in 7th Howard was an action of trespass, brought by a marine against Commodore Wilkes, for some punishment inflicted on plaintiff while on board one of the vessels of the exploring expedition. A court-martial which was convened after the return of the expedition had acquitted the defendant of this charge. On the trial of this case in the court below the record of the proceedings of the court-martial had been offered as evidence, but rejected by the court. The propriety of this rejection having been considered by the supreme court, Justice Woodbury, in delivering the opinion of the court, says: "We think that such proceedings were not conclusive on the plaintiff here, though a bar to subsequent indictments in courts of common law for the same offense." Now no such point was presented in the case, and no contingency could ever arise as to crimes committed on a ship-of-war, for the reason I shall state in reviewing the other authority. I have very great respect for the memory of Judge Woodbury, whose judicial life was illustrated by great legal learning and patient, untiring industry, but the language I have quoted was an *obiter dictum*, and is overruled, I think, by the subsequent decision of the supreme court to which I have referred. The commentator in *Kent's Commentaries* discusses the proposition that the district and circuit courts of the United States have no criminal jurisdiction but what is expressly conferred upon them by statute, and have not, therefore, any jurisdiction over offenses committed on board of one of our national ships-of-war, as no such jurisdiction is given by any statute. Judge Betts so held in the case of *Captain Mackenzie*, and that the jurisdiction of the naval court-martial in his case was exclusive, he being then on his trial before a naval court-martial for murder on board the United States sloop-of-war *Somers*. The commentator goes on to say, "if they (the civil courts) had jurisdiction, an acquittal by a court-martial would be a bar to any criminal proceeding in any other court." But he cites no authority to sustain this position; and as no notice is made of the decision in 14 How., I think the note must have been written before that decision was made by the supreme court. As instances in which a man may be punished twice for the same act where it constitutes two offenses, I cite the case of General Houston, who, having assaulted a member of the house of representatives, was punished by the house for the contempt, and was subsequently indicted and convicted for the same assault in the criminal court in the District of Columbia. The opinion of Mr. Benjamin F. Butler, the then attorney-general, was taken upon the subject, and he held the subsequent trial and conviction legal. In his opinion he says: "The act committed by General

Houston was one and the same, and it constituted but one indictable offense, and he was liable, therefore, to only one conviction on indictment." But it was not the same offense for which he was punished by the house of representatives.

I also cite the case of *State v. Yancey*, reported in 1 N. C. Law Repos., 519. In this case it was decided that for an assault committed in the presence of the court, and for which contempt the court punished by a fine, the party could be afterwards tried for the assault and battery. It appears to me, therefore, that before I can decide a charge to be "*the same offense*," within the meaning of the fifth amendment to the constitution, it must appear that the offense was the same in law and in fact. In the case at bar, the traverser is charged with a violation of the act of 1862 by giving aid and comfort to those in rebellion. The charge on which he was tried before the court-martial was for giving intelligence to the enemy, in violation of the articles of war. I consider that identity wanting which would make his trial on this indictment a violation of the constitution of the United States. The demurrer is sustained, and the traverser's plea of *autrefois convict* is overruled, with leave to him to plead over.

§ 1785. In general.—The "jeopardy" spoken of in the constitution is the acquittal or conviction of the prisoner and the judgment of the court thereon. *United States v. Haskell*,* 4 Wash., 402.

§ 1786. Must be pleaded.—In order that the defense of a former acquittal may avail the defendant it must be pleaded, and well pleaded. (Per CLIFFORD, J., dissenting.) *Coleman v. Tennessee*, 7 Otto, 525.

§ 1787. Pleading and proof.—The pleas of *autrefois acquit* and *autrefois convict* must allege, and it must be proved by the former record, that the conviction or acquittal was legal, and that it was based on the verdict of a jury duly impaneled and sworn, or else the plea will be subject to demurrer. The plea must allege the jurisdiction of the court by which the trial was had, that the person and offense are the same, and must set forth the substance of the former record. Where the plea is *autrefois convict* it must appear that the prisoner received sentence as required by law; and if the plea is *autrefois acquit*, that the court gave the order that he go without day. The accused is required to show not only the nature of the former prosecution and conviction or acquittal with certainty, but also to show the record, or its substance, to the court. *Ibid*.

§ 1788. When a bar to a civil action.—A plea that the defendant has been indicted under section 3169, Revised Statutes, tried and convicted, is not a bar to an action on his official bond for the offense for which he was indicted, unless it appears that the sentence has been satisfied by payment, if it was a fine, or by serving out the term, if it was by imprisonment. But it seems that an acquittal in such a case would bar a prosecution on the official bond for the offense charged. *United States v. Cullerton*, 8 Biss., 167. See § 1761.

§ 1789. A party was indicted, tried and punished for conspiring with certain distillers to remove certain whiskeys from their distilleries in fraud of the revenue laws. Held, that conviction on this charge was a bar to a civil action by the government against him to recover, as a penalty, double the amount of the taxes out of which the government was defrauded. The transaction being the same, he was protected by our laws from a second punishment for the same offense. *United States v. McKee*, 4 Dill., 129.

§ 1790. Irregularity in the trial.—It was held that it could not be objected that the defendant had been twice put in jeopardy, where the jury was impaneled and sworn, by inadvertence, before the prisoner had been arraigned, or had in any manner answered to the indictment, and after the defendant had been arraigned and pleaded to the indictment, the court directed the jury to be impaneled in the regular order. *United States v. Riley*,* 5 Blatch., 204.

§ 1791. Discharge of jury — New trial.—The constitutional provision that no person shall be twice put in jeopardy for the same offense was intended as a safeguard to the citizen against the repetition of a criminal prosecution in all cases where the accused has been once regularly tried for the same offense and legally convicted or acquitted. But it does not mean that he shall not be tried for the offense a second time, if the jury in the first trial were discharged without giving any verdict, or if, having given a verdict, the judgment was arrested or a new trial was granted at the request of the accused, for in such a case the accused cannot be said to be in jeopardy. (Per CLIFFORD, J., dissenting.) *Coleman v. Tennessee*, 7 Otto, 520. See §§ 1762-65.

§ 1792. **Jurisdiction — Defective indictment — Discharge of jury.**— Legal jeopardy does not arise if the court in which the defendant is put to trial had not jurisdiction of the offense, or if the first indictment was clearly insufficient and invalid, or if, by any overruling necessity, the jury are discharged without a verdict, or if the term of court, as fixed by law, comes to an end before the trial is finished, or if the jury are discharged before verdict with the express or implied assent of the defendant, or if the verdict is set aside on motion of the defendant, or on writ of error sued out in his behalf, or if the judgment is arrested on his motion. *Ibid.*

§ 1793. **Discharge of jury.**— The fact that a jury in a capital case were discharged as being unable to agree, without the consent of the defendant, is no bar to a new trial. *United States v. Perez,* 9 Wheat., 579. See §§ 1762-65.*

§ 1794. A court may discharge a jury in a capital case without the consent of the prisoner, whenever, in its opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of justice would otherwise be defeated. It is a matter resting in the sound discretion of the court. *Ibid.*

§ 1795. The defendant in a criminal case cannot avoid being estopped from objecting that the discharge of a jury during the trial was without necessity, by alleging that the act of discharge was an unnecessary discharge. He does not thereby avoid admitting the fact of discharge. *United States v. Morris,* 1 Curt., 23.*

§ 1796. The discharge of a jury without the consent of the prisoner, on account of the health or condition of a jurymen, is a matter resting within the sound discretion of the court, and is not pleadable in bar of a new trial. *United States v. Haskell,* 4 Wash., 402.*

§ 1797. **Waiver — New trial.**— The provision in the constitution that no person shall be subject for the same offense to be twice put in jeopardy of life or limb may be waived by an accused convicted of a crime involving jeopardy of life, and does not prevent him from having a new trial. *United States v. Harding,* 1 Wall. Jr., 127.*

§ 1798. **Nolle prosequi — Discharge of jury.**— A *nolle prosequi* and a discharge of the jury after they have been sworn, without the consent of the defendant, may be pleaded as an acquittal. *United States v. Farring, 4 Cr. C. C., 465.* The prosecuting attorney has no right to enter a *nolle prosequi* after the jury has been sworn to try the issue. And if he enters such a formal abandonment of the proceedings without the consent of the defendant, it is equivalent to a verdict of acquittal, and, as such, with the judgment of the court thereon, is a bar to a subsequent indictment. It is not material that the offense would not subject the defendant, if convicted, to loss of either life or limb, so as to bring it within the constitutional provision; the rights of the defendant are equally guarded by established principles. *United States v. Shoemaker,* 2 McL., 114. See §§ 1762-65.*

§ 1799. **Assault and battery and riot.**— One tried and acquitted or convicted of an assault and battery committed in a riot may still be tried and punished for the riot, although the commission of the assault and battery is the only evidence of his being engaged in the riot. He is jointly guilty with the rest of the rioters of all the other outrages committed by them in the riot. *United States v. Peaco,* 4 Cr. C. C., 601.*

§ 1800. **Single offense.**— The keeping of a disorderly house is a single offense, and one conviction is a bar to a prosecution for keeping a disorderly house at any time prior to the finding of the indictment. *United States v. Burch,* 1-Cr. C. C., 36.*

§ 1801. It is no bar to an indictment at common law for keeping a disorderly house, that the defendant has been convicted of keeping a faro-bank under an ordinance of the city, though both offenses are one act and supported by the same evidence. *United States v. Hood, 2 Cr. C. C., 133.*

§ 1802. **Same offense.**— It is not a good plea in bar to an indictment for passing a counterfeit bank-note of the denomination of \$10, that the note described in the indictment had been given in evidence on the trial of the defendant upon a former indictment found against him for passing another counterfeit ten-dollar note, upon which indictment he had been acquitted. The plea does not show that he had ever been before indicted for passing the same counterfeit note, or that he had ever before been put in jeopardy for the same offense. *United States v. Randenbush,* 8 Pet., 288.*

§ 1803. Defendant was acquitted on the charge of having in his possession a counterfeit plate; he was subsequently indicted for having possession of another counterfeit plate, and pleaded the former acquittal. It appeared that the possession of the two plates was one act, and that the evidence in the first case would be relied upon in the second case, and the court held that a *nolle prosequi* ought to be entered, whether the plea of former acquittal was sustainable or not. *United States v. Miner,* 11 Blatch., 511.*

§ 1804. The defendant was charged with perjury in an indictment alleging that, in order to obtain the allowance of bounty money, on account of the employment of a vessel in the cod fishery, of which vessel he was the agent, he made an oath before the collector of the

district in which the vessel was enrolled and licensed, that a certain paper, produced by him to the collector, was the original agreement made with the fishermen employed on board the vessel; that three-fourths of the crew so employed were citizens of the United States or not subjects or citizens of any foreign prince or state; and that these statements were false, and known to the defendant to be so when he made the oath. The defendant was acquitted on this indictment. He was again indicted, and to this he pleaded the former acquittal in bar. A demurrer to this plea raised the question whether the same evidence which was competent and essential to support the second indictment might have been admitted to support the former indictment. This plea was held to be good on the ground (1) that the act of July 29, 1813, by which the oath was alleged to be required, required an oath as to the verity of the agreement; and (2) that, it not being necessary for the indictment to aver what acts of congress required the oath, the act of March 1, 1817, could be relied on as requiring the oath as to the citizenship of the crew. *United States v. Nickerson*,* 17 How., 204.

§ 1805. A plea of *autrefois acquit* cannot be sustained where, under the earlier indictment, the defendant could not have been convicted of the offense charged in the later, or where the evidence necessary to support the latter would not be sufficient for a conviction on the former. *United States v. Flecke*,* 2 Ben., 456.

§ 1806. Acquittal on indictment for attempting to defraud John L., not a bar to indictment for attempting to defraud William L. *United States v. Book*,* 2 Cr. C. C., 294.

§ 1807. A conviction for stealing a pocket-book is a bar to a subsequent indictment for stealing the contents of the pocket-book. *United States v. Negro John*,* 4 Cr. C. C., 336; *United States v. Lee*,* 4 Cr. C. C., 446.

§ 1808. **Offense against two jurisdictions.**—It is held that an offender may be punished under the act of the legislature of the territory of Oregon of January 28, 1854, for selling liquor to Indians contrary to that act, and that he may be punished for the same act under the act of congress of June 30, 1834, prohibiting the sale of liquor to Indians, and that an indictment and punishment under one of these acts would not be a bar to indictment and punishment for the same act under the other. *Territory v. Coleman*,* 1 Or., 191.

§ 1809. **Punishment by congress.**—Conviction and judgment by the house of representatives, upon a charge of a violation of its privileges in assaulting and beating one of its members for words spoken in debate, is no bar to a criminal prosecution of the defendant, not being a member of congress, for the same act. The house of representatives, upon a charge of violating its privileges, could not, whether it found the defendant guilty or not guilty of violating its privileges, adjudge him guilty of a simple assault and battery, and punish him for that offense. Upon a plea of *autrefois acquit*, or *autrefois convict*, the criterion of the identity of the crimes is, whether the facts charged in one indictment would have been sufficient to justify a conviction and judgment upon the other, by the court in which the first conviction was had. *United States v. Houston*,* 4 Cr. C. C., 261. The same act may be an offense against both the state and federal governments. *Moore v. People of Illinois*, 14 How., 13.

XXIV. GRAND JURY.

SUMMARY—*Want of qualifications may be pleaded in abatement*, §§ 1810, 1824.—*Qualifications required by act of 1840*, § 1811.—*Prosecuting witness a member*, § 1812.—*Practice on plea in abatement*, §§ 1813, 1814, 1816, 1818.—*Disqualification of single juror*, § 1815.—*Disqualification by participation in the rebellion*, §§ 1817, 1818.—*Duty of court to control proceedings of grand jury*, § 1819.—*Disclosing proceedings*, § 1820.—*Jury moved by prejudice and undue zeal*, § 1821.—*Challenges*, §§ 1822-1825.—*Persons not to be summoned as jurors more than once in two years*, § 1823.—*Objections should be made at time jury is sworn*, § 1825.

§ 1810. The defendant in a criminal case who has not recognized to answer may plead in abatement, if done seasonably, the want of statutory qualifications, such as citizenship, etc., in the grand jurors who found the indictment against him. But the disqualification, in order to be sufficient, must be one pronounced by statute, and which disqualifies absolutely, and not a disqualification arising from interest, bias, or the like. *United States v. Williams*, §§ 1826-31. See § 1830.

§ 1811. The word "qualification," in the act of July 20, 1840, by which jurors in federal courts are required to have the like qualifications as jurors in state courts, refers to disqualifications which would exclude a juror from the panel, and not to a disqualification to sit in a particular case. *Ibid*.

§ 1812. Although an indictment was found by a grand jury of which the prosecuting witness was a member, yet if he was drawn as such grand juror without any agency or intervention of his own, that fact does not affect or vitiate the indictment. *Ibid.*

§ 1813. After a verdict of a jury on a plea in abatement to an indictment against the defendant, judgment will be entered overruling the plea, and the defendant will be allowed to plead not guilty. *Ibid.*

§ 1814. A plea in abatement to an indictment, that some of the grand jurors who found it were disqualified to serve as grand jurors, need not be verified. *United States v. Hammond*, §§ 1832-41.

§ 1815. The disqualification of a single grand juror who joins in the finding of an indictment vitiates the indictment. *Ibid.*

§ 1816. A plea in abatement to an indictment, that some of the grand jury finding it were disqualified, may be taken at the time of pleading to the indictment. *Ibid.*

§ 1817. The disqualification of a grand juror mentioned in section 820, Revised Statutes, of having taken part in the rebellion, is absolute, and does not rest in the discretion of the court and prosecuting officer. *Ibid.*

§ 1818. A plea in abatement to an indictment which alleges that the indictment is bad because certain of the grand jurors which found it had been engaged in insurrection is bad if it fails to state the time and place of the commission of the act relied upon. *Ibid.*

§ 1819. It is the duty of the court to control the proceedings of the grand jury, to see that no person shall be subjected to the expense, vexation and contumely of a trial for a criminal offense, unless the charge has been investigated and a reasonable foundation shown for an indictment or information. The government should also require, before the trial of an accused person, a fair preliminary investigation of the charges against him. *United States v. Farrington*, §§ 1842-44. See § 1862.

§ 1820. Whenever it becomes essential to the purposes of justice to ascertain what has transpired before a grand jury, it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted or what they said during their investigations. *Ibid.* See § 1862.

§ 1821. Where the grand jury permitted themselves to be influenced by the appeals and arguments of a zealous advocate who appeared as a witness before them, by hearsay testimony, and testimony prohibited by law, although they were advised to the contrary by the district attorney; and it was probable that they were led to their conclusions by prejudice and undue zeal rather than by calm and fair deliberation, the court quashed the indictment. *Ibid.*

§ 1822. The provisions of the Revised Statutes of the state of New York (2 R. S., 724, §§ 27, 28), prescribing the objections that may be taken to the organization of grand juries, are by the act of congress of July 20, 1840, made applicable to the federal courts; and, therefore, no challenge to the array of grand jurors, or to any person summoned to appear as a grand juror, shall be allowed in any other cases than such as are specified in section 27 of the state statute. Section 27 declares that "a person held to answer any criminal charge may object to the competency of any one summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been subpoenaed, or been bound in a recognizance, as such; and if such objection shall be established, the person so summoned shall be set aside." The next section declares that "no challenge to the array of grand jurors, or to any person summoned to serve as a grand juror, shall be allowed in any other cases than such as are specified in the last section." Causes of challenge to the array which might have been urged if the state statute had not been applied to the federal courts are no longer available. Irregularities in the summoning of grand jurors do not entitle the person indicted, as a matter of law, to avoid the indictment. For such causes the challenge to the array is wholly abolished. An indictment will not be quashed, therefore, on the ground that the state statute has not been complied with in designating and selecting grand jurors, where there is no allegation or claim that in selecting, summoning and impaneling the grand jury the clerks of the court did not act in good faith, and in obedience to an express rule of the court, according to their interpretation of its purport and intention, and it is not claimed that any irregularity has resulted to the prejudice of the accused. It is also held that a literal conformity to the state law is not required by the act of congress; a substantial conformity, and only so far as that is practicable, being all that is necessary to strict technical regularity. *United States v. Tallman*, §§ 1845-48. See § 1888.

§ 1823. Under section 812 of the Revised Statutes, which provides that no person shall be summoned as a juror more than once in two years, and that if a person shall be so summoned it shall be sufficient cause for challenge, it is not necessary that the full term of twenty-four months should elapse between the close of the term at which the juror was summoned and

served and the beginning of the term at which he is again summoned. So a juror is not liable to a challenge who was summoned for the November term, 1876, and was sworn December 11, 1876, and again summoned for the November term, 1878, and sworn December 14, 1878, notwithstanding the fact that the November term, 1876, did not end till April, 1877. *United States v. Reeves*, §§ 1849-53.

§ 1824. Defendants who have not before had an opportunity to object to the composition of the grand jury by which they were indicted may take advantage of any disqualification of a juror by a plea in abatement. *Ibid.*

§ 1825. Although a ground for challenge to a grand juror existed at the time he was sworn, still an indictment will not be quashed where such objection was not made at the time the grand juror was sworn. *Ibid.*

[NOTES.—See §§ 1854-1911.]

UNITED STATES *v.* WILLIAMS.

(Circuit Court for Minnesota: 1 Dillon, 485-497. 1871.)

STATEMENT OF FACTS.—The defendant, a deputy collector of internal revenue, was indicted for the embezzlement of public money. After plea in abatement, and replication thereto, the case was transferred to this court. The plea in abatement was to the effect that three of the grand jurors, to wit, Senserbox, How and Hall, were incompetent; that How was a surety for the defendant; that Hall was the collector under whom defendant acted as deputy; that How was the prosecuting witness along with the said Hall, and that the three persons became grand jurors at the instance and denomination of How. On special issues submitted, the jury found that the three persons named did serve on the grand jury; that Hall was the collector, and that How was a surety for defendant; that neither Hall nor How was the prosecutor in the case; that they testified before the grand jury, but that they did not become grand jurors at the instance of How.

There was a motion for a new trial, upon the grounds, (1) that the finding of the jury that neither Hall nor How was the prosecutor was against the evidence. (2) Upon the ground of newly discovered evidence, in the shape of a letter from How to defendant, telling him that if he did not make good the embezzlement, he would institute criminal proceedings against him. The letter was written before the indictment was found. Defendant also filed an affidavit showing that the letter had been mislaid and was only accidentally found after the trial. It is this motion for a new trial which is now before the court for determination.

Opinion by DILLON, J.

It is essential to a proper disposition of the motion for a new trial to determine the nature of the plea in abatement. The language of the plea appears above. After carefully considering it, our opinion is that the gravamen of the plea is that the parties named (sustaining the relation to the defendant described therein) "became members of the grand jury which found the bill at the instance and denomination of the said D. L. How." All that precedes this averment is introductory, and intended to show why it was improper, and prejudicial to the rights of the defendant, that these parties should have served on the grand jury which indicted him. It is not believed that it was the purpose of the pleader improperly to set forth in one plea three distinct matters in abatement, to wit: 1. That How was the prosecutor. 2. That he was the prosecuting witness along with Hall. 3. That the three parties named became grand jurors at the instance of How; but rather that it was the purpose to set forth the one ground above stated.

§ 1826. *Dilatory pleas should be pleaded with strict exactness.*

Pleas of this character are dilatory, and, not being favored, the law requires that they shall contain all essential averments, pleaded with strict exactness. *O'Connell v. Reg.*, 11 Cl. & F., 155; 9 Jur., 25; *Commonwealth v. Thompson*, 4 Leigh, 667; *State v. Newer*, 7 Blackf., 307; *Wilburn v. State*, 21 Ark., 198; *Hardin v. State*, 22 Ind., 347; *Lewis v. State*, 1 Head (Tenn.), 329. The plea in abatement seems to be drawn as if founded upon the celebrated and ancient state of 11 Henry 4, cap. 9, passed in 1410, and which may be found set out in Bacon's Abridgment, Juries, A., 233. This statute, after reciting the abuses which led to its enactment, declares: "Henceforth no indictment shall be made by any such [improper] persons, but only by inquests of the king's lawful liege people . . . returned by the sheriff . . . without any denomination to the sheriff by any person of the names which by him should be impaneled, except it be by officers sworn and known to make the same; . . . and if any indictments be hereafter made in any point to the contrary, that the same indictment be also void, revoked, and forever holden for none."

The plea, then, in this case, is to be taken as setting forth that the indictment should not be prosecuted, because the persons mentioned in the plea were, by an interested party, viz., Mr. D. L. How, caused to be placed on the grand jury which found the bill. The question is not now directly before us whether such a plea is good in the federal courts. Undoubtedly such an objection is good if taken by a person under prosecution, or who has been held to answer, by way of challenge, before the jury is sworn or the indictment found. Whether in the case of a person not previously bound over it may be taken after a bill found by plea in abatement or motion to quash, the authorities are not entirely agreed. As tending to show that it must be taken before indictment is found, see Bacon's Abr., Juries, A., 233; *The People v. Jewett*, 3 Wend., 314; S. C., 6 id., 386; *Commonwealth v. Smith*, 9 Mass., 107. Compare *Commonwealth v. Parker*, 2 Pick., 563; *State v. Rickey*, 5 Halst., 83; *Thayer v. People*, 2 Doug. (Mich.), 417; *Baldwin's Case*, 2 Tyler (Vt.), 473; *Rex v. Sheppard*, 1 Leach C. C., 101.

§ 1827. *Statutory qualifications, such as citizenship, etc., may be the subject of a plea in abatement before answer filed.*

But in many, indeed, from an examination of the authorities, I may say that in most of American states it is held that where a party has not been recognized to answer he may plead in abatement, if done seasonably, the want of statutory qualifications, such as want of citizenship, etc., in grand jurors who found the bill. *Hardin v. State*, 22 Ind., 347; *Wilburn v. State*, 21 Ark., 198; *State v. Cole*, 17 Wis., 674; *Kitrol v. State*, 9 Fla., 9; *Stanley v. State*, 16 Tex., 557, and other cases cited; Whart. Cr. L. (2d ed.), pp. 172, 173; and in *State v. Ostrander*, 18 Ia., 435, note. In the federal courts the sufficiency of pleas in abatement, in the absence of legislation by congress touching the question or authorized rules of court, must be tested by the principles of the common law. And by the common law it is undoubtedly true, as stated by Mr. Wharton, that, "if a disqualified person is returned as a grand juror, it is good cause of challenge." Whart. Cr. L. (2d ed.), 170; 1 Chitt. Cr. L., 309. Mr. Chitty at the place just cited states the doctrine thus: "If a disqualified juror be returned he may be challenged by the prisoner before bill presented; if the disqualification is discovered afterwards, the defendant may plead it in avoidance and answer over to the felony." And see, also, *Hawkins*, P. C., B. 2, C. 25, sec. 16.

§ 1828. *Distinction to be drawn between disqualifications that absolutely disqualify, and such as are merely causes of disqualification.*

But the disqualification thus referred to is such as is pronounced by statute, and which absolutely disqualifies, such as alienage, non-residence, want of freehold qualification, where that is required, etc., and which would constitute cause of principal challenge as distinguished from challenge to the favor arising from bias, interest, and the like. See on this point *State v. Rickey* and *People v. Jewett*, before cited. But it is not necessary further to pursue the discussion of the subject in this place, for if the gravamen of the plea in the case at bar be such as we have above indicated, the fifth special finding of the jury is the material one, and by that the jury have negatived the truth of the plea by saying that neither Hall nor How became members of the grand jury which found the bill, at the instance or on the nomination of How. The finding of the jury on this point is not questioned by counsel, no motion for a new trial is made with respect to it, and it is to be taken as conclusively correct. Thus taken, it is to be presumed that both Hall and How were properly selected to serve on the grand jury, and that they did not become members of it at the instance or by the procurement of How. In this view of the case, the third finding, concerning which the motion for a new trial is made, is, *under the plea*, immaterial; and if so, a new trial should not be granted thereon, even though the court should be, as it is, of opinion that the verdict of the jury on this issue was against the evidence.

The foregoing view is based upon the construction above given to the plea in abatement. But suppose, as the jury might have found from the evidence, or might yet find if a new trial should be granted as asked in the motion under consideration, that How was *the prosecutor* or *prosecuting witness* against the defendant, and suppose the plea be taken as intended to set this forth as the ground of abatement of the indictment, would the plea then be sufficient in law to work this result? This question must, in my opinion, for the reasons which I proceed to state, be also answered in the negative. By the act of congress referred to in the statement, jurors in the federal courts are required to "have the like *qualifications*, and are entitled to like exemptions, as jurors" in the highest courts of the state; by the statute of Minnesota it is provided that "all persons who are qualified electors of this state are liable to be drawn as grand jurors, except as hereinafter provided." R. S. 1866, p. 636, sec. 3. The exemptions consist of certain public officers, followers of certain professions and avocations, persons over a specified age, infirm persons and such as have been convicted of an infamous crime. The grand jury is directed to be selected by lot from a jury box containing names procured in a designated manner. Then follow the provisions referred to in the statement of the case authorizing *any person held to answer* for a public offense to challenge for the causes specified in the panel of the grand jury any individual juror.

Among the grounds of challenge to an individual grand juror is, "that he is a *prosecutor* upon a charge against the defendant;" and also, "that he is a *witness* on the part of the prosecution, and has been served with process, or bound by a recognizance as such." The statute provides that, "If a challenge to the panel is allowed, the grand jury are prohibited from inquiring into the charges against the defendant by whom the challenge was interposed; if they should, notwithstanding, do so, and find an indictment against him, the court shall direct it to be set aside." R. S. 1866, p. 638, sec. 18. The next section enacts that, "If a challenge to an individual juror is allowed he cannot be

present at, or take part in, the consideration of the charge against the defendant who interposed the challenge, or the deliberation of the grand jury thereon. The grand jury shall inform the court of a violation of this provision, and it is punishable by the court as a contempt." *Id.*, secs. 19, 20.

The only other section of the Minnesota statute bearing upon the present inquiry is the one which provides that a grand juror shall not be questioned for his acts as such, "except for a perjury, of which he *may be guilty in making an accusation, or giving testimony to his fellow-jurors.*" *Id.*, 640, sec. 42. Now we have seen, by the act of congress of July 20, 1840, that whoever is *qualified* to serve as a grand juror in the state courts is qualified to serve as such in the courts of the United States. The argument on behalf of the defendant, based upon the act of congress just cited, and the above-mentioned provisions of the Minnesota statute, is, that by the state statute a prosecutor or prosecuting witness is not *qualified* to serve as a grand juror in the state courts, and hence not *qualified* to serve in the courts of the United States.

§ 1829. *The act of congress of July 20, 1840, applies to absolute disqualifications only.*

Now what does the word "*qualification*" mean in the act of July 20, 1840, by which jurors in the federal courts are required to have the like *qualification*, and are entitled to like exemptions, as jurors in the state courts? In my opinion, the word refers to the general qualifications as to age, citizenship, etc., not to special reasons which, at the instance of a party accused and bound over, may at his election amount to a disqualification to sit in his case, but which, if they exist, do not exclude the juror from the panel, but only preclude him from acting in the particular case. He is, nevertheless, if the challenge be sustained, a member of the grand jury (see *State v. Ostrander*, 18 Ia., 435, 441), the only effect being that he shall not "take part in consideration of the charge against the defendant who interposed the challenge." I am aware that a different view on this point seems to have been taken by a most distinguished judge (Nelson, J., in *United States v. Reed*, 2 Blatch., 435), from whose opinion I differ with the most unaffected distrust of the correctness of my own judgment. But suppose I am mistaken on this point, yet I think it clear that when all the provisions of the Minnesota statute are considered, it is manifest that where there has been no previous holding of the party to answer, the statute as to challenging jurors does not apply, and that the statute itself contemplates that a grand juror "may make an accusation, or give testimony to his fellow-jurors."

§ 1830. *As long as the prosecutor did not cause himself to be put upon the panel, the fact that he is such does not disqualify him from performing the functions of a grand juror on such panel.*

The jury in the case under consideration have found that How (who in the view we are now taking of the question may be admitted to be the prosecutor or prosecuting witness) did not procure himself to be placed upon the panel. He is to be regarded as having been legally selected and summoned to serve on the grand jury. Being thus properly on the grand jury, without any agency or intervention of his own, suppose he knows of a public offense having been committed within the jurisdiction of the court, and of a nature cognizable by the jury of which he is a member; can he not disclose it to his fellow-jurors? Is it not, indeed, his duty to do so? If he knows any material fact may he not be sworn as a witness before the jury? Indeed, is it not his duty, in such a case, to be sworn, especially if required to do so by the jury? These questions

must all, I think, be answered affirmatively. And in my opinion it does not alter the matter, or vitiate the indictment, if the juror should happen to be the party injured, and hence the prosecutor or prosecuting witness, always assuming that he was selected and put upon the jury without any improper act or influence of his own.

That such a grand juror is not *disqualified* within the contemplation of the statute is a fair if not necessary inference from the provision before cited, exempting a grand juror from liability for his acts as such, "except for a perjury, of which he may be guilty in *making an accusation, or giving testimony to his fellow-jurors.*" This language clearly presupposes that a juror may make an accusation, and may testify as a witness concerning it. In England it is said that a grand jury may find a bill on their own knowledge (*Reg. v. Russell*, 1 Car. & M., 247); how much better to find it upon the sworn evidence of one or more of their own number. Other considerations fortify the above views. At common law the grand jury may consist of any number between twelve and twenty-three; but to find a bill there must at least twelve of the jury agree. 4 Black, Com., 302, 306; and cases and authorities cited, 18 Ia., 442.

By the act of congress of March 3, 1865 (13 Stats. at Large, 500), it is provided that grand juries in the courts of the United States "shall consist of not less than sixteen and not exceeding twenty-three persons," . . . "and that no indictment shall be found without the concurrence of at least twelve grand jurors." The earlier authorities show that the accusing body now called the grand jury originally consisted of twelve persons, and all were required to concur. The number was subsequently enlarged to twenty-three, which was the maximum. See authorities cited, 18 Ia., 442. Undoubtedly one reason why both at common law and by act of congress more jurors are required to be summoned, and by the act of congress to be impaneled, than are necessary to find a bill, is to prevent, on the one hand, the course of justice from being defeated if the accused should have one or more friends on the jury; and on the other hand, the better to protect persons against the influence of unfriendly jurors upon the panel.

§ 1831. *After verdict by the jury against the plea in abatement, the defendant may withdraw it and plead not guilty.*

In any view which I have been able to take of the case the motion for a new trial must be denied; and on the verdict of the jury a judgment will be entered overruling the plea in abatement, and allowing the defendant to enter a plea of not guilty. Nelson, District Judge, concurs in the view taken of the construction of the plea in abatement; but is of opinion that if a prosecutor, who is a member of the grand jury, should take part in the finding of the indictment, it would vitiate it.

Motion denied.

UNITED STATES v. HAMMOND.

(Circuit Court for Louisiana: 2 Woods, 197-203. 1875.)

STATEMENT OF FACTS.—Indictment for conspiracy to defraud under section 5440, Revised Statutes. Plea that two grand jurors were disqualified to act as such. Demurrer to the plea.

§ 1832. *The presence of a disqualified person on the grand jury vitiates the indictment.*

Opinion by Woods, J.

The plea is based on section 820 of the Revised Statutes. This declares: "The following shall be cause of disqualification and challenge of grand and petit

jurors in the courts of the United States, in addition to the causes existing by virtue of section 812, namely: without duress and coercion to have taken up arms, or to have joined any insurrection against the United States; to have adhered to any insurrection, giving it aid and comfort," etc. This is an absolute disqualification imposed by statute. That such a disqualification of a single grand juror vitiates the indictment was the doctrine of the common law.

"If any one of the grand jury who find an indictment be within any one of the exceptions of the statute, he vitiates the whole, though never so many unexceptionable persons joined with him in finding it." Hawk. Pl. Cr., b. 2, ch. 25, secs. 16, 26 and 28; Whart. Cr. L., 170, sec. 463 (6th ed.); 1 Chit. Cr. L., 309; *United States v. Blodgett*, 35 Ga., 336 (per Erskine, U. S. Judge); *United States v. Wilson*, 6 McL., 604; *United States v. Williams*, 1 Dill., 485 (§§ 1826-31, *supra*); *United States v. Collins*, 1 Woods, 521. Such has also been the doctrine of most of the state courts of America. See *Doyle v. State*, 17 Ohio, 222; *State v. Middleton*, 5 Port., 484; *Commonwealth v. Parker*, 2 Pick., 559; *Barney v. State*, 12 Smedes & M., 68; *Vanhook v. State*, 12 Tex., 252; *Commonwealth v. St. Clair*, 1 Gratt., 556; *Hardin v. State*, 22 Ind., 347; *State v. Duncan*, 7 Yerg. (Tenn.), 271; *State v. Rockafellow*, 1 Halst., 405; *State v. Ligon*, 7 Port., 167; *Wilburn v. State*, 21 Ark., 198; *State v. Cole*, 17 Wis., 695; *Kitrol v. State*, 9 Fla., 9; *Vattier v. State*, 4 Blackf., 73; *State v. Symonds*, 36 Me., 128; *State v. Martin*, 2 Ired., 101.

§ 1833. *Federal courts, in matters of criminal law, are governed by the common law.*

As the federal courts, in questions of criminal jurisprudence not regulated by statute, must be governed by the common law, and as the rule of common law, as stated by Hawkins, *supra*, seems to be well settled, I must hold that the plea of the defendants under consideration is good in substance.

§ 1834. *A disqualification of jurors may be pleaded in abatement.*

It is next objected to this plea that it comes too late; that the grand jurors subject to the disqualification should have been challenged at the time the grand jury was impaneled. This objection is clearly untenable. It does not appear that the accused ever had an opportunity to present a challenge. On the contrary, the court knows, from its own records, that the accused were not under arrest or recognizance when the grand jury was impaneled. The first charge of offense against the criminal laws of the United States committed by them was made in the indictment to which they have pleaded. They were not supposed to have knowledge of what was going on in the grand jury room. On the contrary, the grand jury was sworn to secrecy, in order that they might not be advised. Their first chance to object to the qualifications of any members of the grand jury was when they were called upon to plead to the indictment. If they have the right to object at all, it seems clear they have not lost it by failure to exercise it at an earlier time, for they have objected at the very first opportunity. That a disqualification enacted by statute may be pleaded in abatement, if done reasonably, has been held in the following cases: *United States v. Blodgett*, 35 Ga., 336; *Doyle v. State*, 17 Ohio, 222; *United States v. Wilson*, 6 McL., 604; *Commonwealth v. Parker*, 2 Pick., 559; *Barney v. State*, 12 Smedes & M., 68; *Hardin v. State*, 22 Ind., 347; *Wilburn v. State*, 21 Ark., 198; *State v. Cole*, 17 Wis., 674; *Kitrol v. State*, 9 Fla., 9; *Stanley v. State*, 16 Tex., 557; *State v. Ostrander*, 18 Ia., 435; *State v. Rickey*, 5 Halst., 83; *People v. Jewett*, 3 Wend., 314. And it was the same at common law. Hawk. Pl. Cr., b. 2, ch. 25, secs. 16 and 28; 1 Chit. Cr. L., 309. When the

courts have held that the objection to a grand juror must be taken before indictment, the ground of exception has usually been to the juror, and has not been a statutory disqualification. *United States v. White*, 5 Cranch., C. C., 457; *The People v. Jewett*, 3 Wend., 314.

§ 1835. *The disqualification mentioned in section 820, Revised Statutes, is absolute and does not rest in discretion.*

It is next objected that the disqualification mentioned in section 820, R. S., is one which it rests within the discretion of the court and of the prosecuting officer of the government to insist on, and that the accused have no right to challenge for such cause. The theory on which this objection is founded is based on section 821, R. S., which declares that at every term of any court of the United States, the district attorney, or other person acting in behalf of the United States in said court, may move, and the court in its discretion may require the clerk to tender to every person summoned to serve as a grand or petit juror, venireman or talesman in said court, the following oath or affirmation, namely; then follows the form of an oath to the effect that the affiant has not, without duress and constraint, taken up arms or joined any insurrection or rebellion against the United States, etc., and the section concludes as follows: "And every person declining to take said oath shall be discharged by the court from serving on the grand or petit jury, or venire to which he may have been summoned."

This section does not affect the positive enactment of the preceding section, which declares that engaging voluntarily in insurrection or rebellion against the United States shall be a cause of disqualification and challenge. Without the oath prescribed by section 821, a juror might be sworn on his *voir dire*, and, if found subject to the disqualification prescribed by section 820, he could be challenged. Section 821 seems designed to provide a method by which, in advance, the court in its discretion could purge the venire of both grand and petit jurors of any persons who could not take the oath therein prescribed. To hold, however, that the right of any person interested to challenge a grand or petit juror disqualified under section 820 is left discretionary with the United States attorney and the court, is to blot out that section altogether. There stands its positive enactment that engaging in any insurrection or rebellion against the United States shall be cause of disqualification and challenge of grand and petit jurors. This provision inures to the benefit of all parties in all cases, whether civil or criminal, and is entirely unaffected by the following section, which provides additional means of enforcing, but surely does not restrict, the provisions of section 820. I am of opinion, therefore, that the plea is not only good in substance, but that it has been seasonably pleaded.

It is further objected to the plea that it is insufficient in matter of form. The defects alleged are:

1. That the plea does not tender a clear and distinct issue of fact, but is vague, uncertain and insufficient. 2. That it does not conclude as required by the rules of pleading; and 3. That it is not verified.

§ 1836. *Pleas in abatement are not favored, and all essentials must be strictly set forth.*

1. Pleas like the present are not favored, and the law requires that they shall contain all essential averments pleaded with strict exactness. *United States v. Williams*, 1 Dill., 485 (§§ 1826-31, *supra*); *O'Connell v. Regina*, 11 Cl. & F., 155; *Commonwealth v. Thompson*, 4 Leigh, 667; *Hardin v. State*, 22 Ind., 347; *Lewis v. State*, 1 Head (Tenn.), 329. This plea alleges, as cause of disqualifica-

tion, that one of the grand jurors (naming him) "did take up arms and join the insurrection or rebellion against the United States, and adhered to said insurrection or rebellion, giving it aid and comfort, prior to the present term of this honorable court, having been captain of Company O, in the Crescent regiment from New Orleans, in the service of the so-called Confederate States of America during the late civil war between the United States and the said Confederate States." The averment as to the other grand jurors is in similar terms.

§ 1837. *A plea in abatement not setting forth time and place of the alleged disqualification is bad.*

These averments tender the only issues of fact to be found in the plea. It is obvious that the plea fails of the required certainty. There is no averment of time or place. The "insurrection or rebellion against the United States" extended over a period of five years and over a vast territory. The prosecution is entitled to be informed by the plea when and where the juror took up arms and joined the rebellion and insurrection against the United States. The plea gives no information upon these points. It lacks the precision and certainty required in all criminal pleading, and is in this respect fatally defective.

§ 1838. *A plea in abatement to an indictment should conclude with a prayer that it be quashed.*

2. The plea concludes as follows: "and this they are ready to verify; wherefore they pray judgment, and that by the court they may be dismissed and discharged from the said premises in the said indictment above specified." The prosecution claims that this is not the proper conclusion. There seems to be some confusion in the adjudicated cases upon the conclusion proper to a plea in abatement. See *The King v. Shakspeare*, 10 East, 83, where Lord Ellenborough held that a plea of misnomer, by which the defendant prayed judgment of the said indictment, and that he might not be compelled to answer, the same was well pleaded, "although," he said, "if it had not been for the precedent cited of *The King v. Westby*, I should have been much inclined to think this plea bad in respect to its conclusion."

§ 1839. *A plea in abatement that concludes with a prayer for relief that the court cannot give on such a plea is defective and bad.*

The conclusion adopted by the pleader in this case is the one appropriate for and used in pleas in bar, as the plea of *autrefois acquit* or *autrefois convict*. See form 1154, 2 Whart. Prec. By the same authority the proper conclusion for a plea in abatement, or plea that the defendant has no addition, or plea of misnomer, or plea of wrong addition, is a prayer that the indictment may be quashed. See 2 Whart. Prec., forms 1141, 1142 and 1144; Stark. C. P., 473; Whart. Cr. L., sec. 536; *State v. Middleton*, 5 Port., 484. The judgment prayed for by this plea is one only proper to be pronounced upon a plea in bar. "In a plea in abatement the court will give no other than the proper judgment prayed for by the party." *The King v. Shakspeare*, 10 East, *supra*. As the judgment prayed for in this plea is one the court cannot give upon a plea in abatement, the plea is defective and bad.

§ 1840. *A plea that one of the grand jurors is disqualified need not be verified.*

3. As to the objection that the plea is not verified, I simply remark that, so far as I have been able to look into the authorities, only pleas of misnomer or wrong addition are required to be verified, and the plea should expose the defendant's proper name and addition. Whart. Am. Cr. L., sec. 537. The reason

of the rule as applied to such pleas is obvious, and the reason does not apply to the plea under consideration. The result of my investigation is that the plea is uncertain and insufficient and does not pray the proper judgment of the court, but that the facts referred to, if properly pleaded, would have justified a judgment that the indictment be quashed. The demurrer to the plea is sustained.

§ 1841. *Section 820 of the Revised Statutes has been re-enacted and is a part of the law of the land.*

Since the argument of the demurrer it has been suggested that section 820 of the Revised Statutes was improperly included by the compilers in their revision of the statutes, that section not having been in force on the 1st day of December, 1873. This appears to be true. The section referred to was section 1 of the act approved June 17, 1862, entitled "An act defining additional causes of challenge, and prescribing an additional oath for grand and petit jurors in the United States courts" (12 Stat., 430). This section was repealed by the fifth section of the act approved April 20, 1871, "to enforce the provisions of the fourteenth amendment to the constitution of the United States, and for other purposes" (17 Stat., 15).

But the conclusion which the prosecutor seeks to draw from these facts, namely, that section 820 of the Revised Statutes is not now a part of the statute law, does not, in my opinion, follow. The work of the compilers, including section 820, was submitted to congress, and the whole re-enacted by the adoption of the Revised Statutes. The compilers may have exceeded their authority, congress may not have designed to re-enact section 820, but it has done so, and we cannot go behind the law and cure the mistakes and inaccuracies of congress. "We are bound," says Mr. Justice Buller in *Jones v. Smart*, 1 Term R., 44, "to take the act of parliament as they have made it;" and Mr. Justice Story, in *Smith v. Rines*, 2 Sumn., 354, observes: "It is not for courts of justice *proprio Marte* to provide for all the defects or mischiefs of imperfect legislation." That must be done by congress itself, and until it is so done we must take the law as we find it.

UNITED STATES v. FARRINGTON.

(District Court, Northern District of New York: 5 Federal Reporter, 343-348. 1881.)

Opinion by WALLACE, D. J.

STATEMENT OF FACTS.—The motions to quash these indictments may properly be considered together. The defendants are indicted severally for offenses under section 5209 of the Revised Statutes of the United States. The defendants Leake and Farrington are charged with abstracting, embezzling and misappropriating funds of the First National Bank of Saratoga, and making false entries on the books of the bank, they being officers of the bank. The defendant Richards is charged with similar offenses as to the funds and books of the Commercial National Bank of Saratoga. The three cases were heard and considered at the same time by the grand jury. The indictments are voluminous, one containing thirty counts, one twenty-two counts, and one seventeen counts. They were not prepared by the law officers of the government, but by an attorney who is presumed to represent creditors of the banks. This attorney instituted proceedings before a commissioner against two of the defendants, and an examination was pending, but not concluded, when he was permitted to present the cases to the grand jury. This attorney appeared as a witness before

the grand jury with a number of the bank books, with various exhibits, originals and copies, and read from these such selections as he chose. He also read to the grand jury the minutes of testimony taken by the commissioner, including the testimony of the defendant Leake, who was examined before the commissioner, compulsorily, as a witness against the defendant Farrington. His testimony was interspersed with comments upon the force and effect of the testimony, entries and exhibits, in the nature of an argument, which was, in the language of the district attorney, "animated, spirited and excited." All the cases were heard and considered together, and the grand jury were told that, unless indictments were then found, the offenses would be barred by the statute of limitations. The district attorney advised the jury that the minutes of testimony taken before the commissioner were not competent evidence, and that the testimony of the defendant Leake was not admissible against himself, because he was protected against it by statute. He was thereupon asked by the jury whether, if improper testimony was used to obtain an indictment, that would preclude the use of competent evidence upon the trial. The indictments were not read to the jury, or the substance of the various counts explained; but indictments were found as to all the persons implicated. No officer, stockholder, or employee or depositor of the First National Bank was a witness. The president of the Commercial National Bank was a witness, but no other person connected with that bank was produced. It is not claimed that he testified to any acts of embezzlement, but he identified books and vouchers of his bank, and his testimony tended to show irregularities which might be imputed to the defendant Richards. If the case against Richards stood alone, it could not be said that, as to him, there was not sufficient evidence to authorize an indictment.

§ 1842. *Duty of the court to see that no one is subjected to a criminal trial except on a reasonable foundation for an indictment.*

This summary of the proceedings before the grand jury is sufficient to indicate that they were such as to seriously endanger, if not to preclude, an intelligent and fair consideration of the charges preferred against the accused. It is the duty of the court, in the control of its proceedings, to see to it that no person shall be subjected to the expense, vexation and contumely of a trial for a criminal offense unless the charge has been investigated and a reasonable foundation shown for an indictment or information. It is due also to the government to require, before the trial of an accused person, a fair preliminary investigation of the charges against him. The cases are frequent when, after all these precautions have been observed, it appears upon the trial that the government has been subjected to discredit and expense which might have been avoided if there had been a more careful preliminary investigation. Notwithstanding the reasons which exist for insisting upon a rigid adherence to this practice, in the interests of decorum, economy and justice, it has been zealously maintained that so confidential and sacred should the proceedings of a grand jury be considered that every avenue should be closed which may lead to a scrutiny of their transactions. Accordingly, ancient precedents have been enforced, and even extended, in modern cases, for the purpose of preventing any inquiry into the proceedings of the grand jury, and many authorities are cited to the effect that not only is it not permissible to show any irregularity or misconduct in their proceedings, by the testimony of any juror, but also that the lips of witnesses who appeared before them are to be sealed, and that no person

whose duty it may have been to be present shall be heard to impeach or impugn the propriety and regularity of their proceedings.

In one of these cases it was held by a court entitled to great respect that when a grand jury had caused several persons accused of crime to be summoned before them and examined as witnesses, and had thereupon found indictments against them, and a motion was made to quash the indictments, the affidavits of the accused would not be received to show the facts, because public policy would not permit the transaction before a grand jury to be disclosed (*United States v. Brown*, 1 Saw., 531); and thus, although the grand jury had trampled upon the constitutional right of the accused not to be compelled to be a witness against himself, the court refused to entertain an inquiry to ascertain whether, without this flagrant violation of privilege, there was any evidence to warrant the finding an indictment.

§ 1843. *Power of the court to supervise the proceedings of the grand jury.*

Other authorities, however, are found which have adopted more liberal and as it seems to me more sensible views, and assert the right and duty of the court to exercise a salutary supervision over the proceedings of a grand jury. It is only practicable to do this by removing the veil of secrecy whenever evidence of what has transpired before them becomes necessary to protect public or private rights. Thus, in *Low's Case*, 4 Greenl., 439, the grand jurors were permitted to testify that they acted under the mistaken impression that it was sufficient if a majority of the jurors concurred in finding a bill and twelve had not concurred. In *United States v. Coolidge*, 2 Gall., 363, Judge Story received the affidavit of a witness to prove that he was not in fact sworn when examined before the grand jury, saying: "It is of the highest importance that the institution be preserved in its purity, and that no citizen be tried until he has been regularly accused by the proper tribunal." These cases arose upon motion to quash the indictment. In *Burdick v. Hunt*, 43 Ind., 381, it is said there is no sufficient reason why the prosecuting attorney may not be called upon in a court of justice to disclose any evidence given or proceedings had before a grand jury. And the following authorities are to the effect that generally the evidence of grand jurors is competent whenever it is necessary to ascertain who was the prosecutor: *Sikes v. Dunbar*, 2 Wheat. Sel. N. P., 1091; *Hindekoper v. Cotton*, 3 Watts, 56; or what was the issue and what the testimony of witnesses before a grand jury in a given case: *Thomas v. Commonwealth*, 2 Rob. (Va.), 795; *State v. Offutt*, 4 Blatch., 355; *State v. Fassett*, 16 Conn., 457; *Commonwealth v. Hill*, 11 Cush., 137; *State v. Broughton*, 7 Ired., 96; *Way v. Butterworth*, 106 Mass., 75; *Burdick v. Hunt*, 43 Ind., 381.

§ 1844. *What may and what may not be proved of the proceedings of the grand jury.*

The rule which may be adduced from the authorities, and which seems most consistent with the policy of the law, is that whenever it becomes essential to ascertain what has transpired before a grand jury it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted or what they said during their investigations (*The People v. Shattuck*, 6 Abb. N. C., 34; *Commonwealth v. Mead*, 12 Gray, 167), because this cannot serve any of the purposes of justice. It would be difficult to find a case which more forcibly illustrates the good sense and justice of the rule which permits a free disclosure than the present. It is patent that the grand jury permitted themselves to be influenced by the appeals and arguments of a

zealous advocate, by hearsay testimony, and by testimony which the law prohibits, although they were advised to the contrary by the district attorney; and it seems much more probable that they were led to their conclusions by prejudice and undue zeal than by calm and fair deliberation. If there was evidence which authorized an indictment, it was so blended with and obscured by the mass of hearsay and otherwise incompetent testimony that it was impossible for the jury to distinguish it; and it would be expecting too much of a body, untrained in judicial investigation, to believe that they could discriminate intelligently between the competent and the incompetent evidence, so as to accord due weight to the former and be uninfluenced by the latter.

It is not intended to suggest that whenever incompetent testimony is received by a grand jury its reception is such error or irregularity as to vitiate their finding, nor to hold that the evidence upon which an indictment is found shall be such as the court would regard as making out a *prima facie* case against the accused. It is not the province of the court to sit in review of the investigations of a grand jury as upon the review of a trial when error is alleged; but in extreme cases, when the court can see that the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence, as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused, the court should interfere and quash the indictment. Very respectable authorities intimate that an indictment should be quashed when it appears that it was found by the grand jury without adequate evidence to support it, or when the grand jury permitted the rules of evidence to be violated (Dodd's Case, 1 Leach, C. L., 184; People v. Ristenblatt, 1 Abb. Pr., 268); but if this were permitted it would result that the court would become the tribunal to indict as well as the tribunal to try the accused.

In *State v. Froiseth*, 16 Minn., 298, it was conceded by the attorney-general, and the court concurred, that where the grand jury required an accused person to be brought before them and testify touching the accusation the indictment should be set aside, although in that case the indictment was not found solely upon the testimony of the accused. In *The People v. Briggs*, Albany County, Oyer and Terminer, Osborne, J. (MS.), held that an indictment should be quashed where the defendant's wife was called as a witness against him by the grand jury, for the reason that this was a substantial error, and it was doubtful whether the grand jury would have found an indictment without the wife's testimony. These authorities are in point here. The motions to quash the indictments are granted.

UNITED STATES v. TALLMAN.

(Circuit Court for New York: 10 Blatchford, 21-28. 1872.)

STATEMENT OF FACTS.—Motion to quash the indictment on the ground that in selecting the grand jury the mode prescribed by statute in the state of New York was not adopted.

§ 1845. *Case cited and approved. No challenge to the array of grand jurors is permissible.*

Opinion by WOODRUFF, J.

We are of opinion that the decision of Justices Nelson and Hall, in this circuit, at a term held for the northern district of New York (*United States v. Reed*, 2 Blatch., 435), disposes of the questions raised by the motion to quash the indictments in these cases; and in that decision we fully concur. It was

there distinctly held that the provisions of the Revised Statutes of the state of New York (2 R. S., 724, §§ 27, 28), prescribing the objections that may be taken to the organization of grand juries, are, by the act of congress of July 20, 1840 (5 U. S. Stat. at Large, 394), made applicable to the federal courts; and, therefore, that "no challenge to the array of grand jurors, or to any person summoned to serve as a grand juror, shall be allowed in any other cases than such as are specified" in the twenty-seventh section of the state statute. Those provisions are as follows: "Sec. 27. A person held to answer to any criminal charge may object to the competency of any one summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been subpoenaed, or been bound in a recognizance, as such; and, if such objection be established, the person so summoned shall be set aside. Sec. 28. No challenge to the array of grand jurors, or to any person summoned to serve as a grand juror, shall be allowed in any other cases than such as are specified in the last section." There is no allegation or claim, in the present cases, that the objections which may be made to grand jurors, under the twenty-eighth section, are or can be urged against the grand jurors by whom these indictments were found.

§ 1846. *Irregularities in summoning grand jurors do not entitle a defendant as a matter of law to avoid the indictment. When the accused has been prejudiced he has his remedy.*

It was further held, in the case cited, that causes of challenge to the array, which might have been urged if the statute of the state had not applied to the federal court, no longer sustained such a challenge; that irregularities in the summoning of grand jurors do not entitle the party indicted, as matter of law, to avoid the indictment; that, for such causes, the challenge to the array is wholly abolished; and that something more than irregularity must exist, to entitle the party to avoid the indictment. What that must be is plainly indicated as follows: "It by no means follows that the accused has no remedy in a case where there has been any improper conduct on the part of the public officers employed in the designating, summoning and returning of the grand jury. If there has been any improper conduct on the part of those officers in performing that service, or if any fraud had been committed through their instrumentality in the drawing, summoning or organization of the grand jury, of course the accused, who may be prejudiced thereby, has his remedy, by motion to the court, for relief, in consequence of such irregularity or fraud. Because the selecting, summoning and returning of grand jurors are proceedings which are always under the general supervision and control of the court, and the court will guard them, and will see to it that no one shall be prejudiced thereby. The court has general power to preserve the pure administration of justice, and its sound discretion will always be exercised freely for the purpose of securing that end." . . . "It will, therefore, look into the facts presented, on which a charge is made against the regularity of the proceedings in the selection and summoning of grand jurors in a given case, and will hear the explanations on the other side, and its judgment will be determined accordingly. If it sees that there has been improper conduct in the public officers, which has resulted prejudicially to the party accused, it is bound to set aside all the proceedings. On the contrary, although there may be technical objections to the proceedings, in point of strict regularity, yet, unless the court is satisfied that they have resulted, or may result, to the prejudice of the party

accused, it will not set them aside, because its interposition in the case will not be required on the ground of justice either to the accused or to the public." These views are reiterated by Mr. Justice Nelson, in the opinion of the court in the case referred to, and are applied where no order for a venire, except a verbal one, was made, and where, in fact, a grand jury was convened without a venire having been issued at all. That this was an irregularity was not doubted.

We have heard the argument of the question here upon a motion to quash, founded upon an agreed statement of facts, at the solicitation of counsel for all the parties, without putting the accused to plead the matters alleged. Where there is no conflict respecting the facts, it is, doubtless, in the power of the court to dispose of the subject in this form.

§ 1847. *The rule of the court relative to the selection of jurors, made November 11, 1867, is a proper provision on that subject.*

Applying the opinion of Mr. Justice Nelson to the facts agreed upon in these cases, it is clear that the motion should be denied. There is no allegation or claim that, in the selecting, summoning and impaneling of the grand jury, the clerks of the courts did not act in the utmost good faith, and in obedience to an express rule of this court, imposing upon them the duty, which they performed according to their interpretation of its purport and intention. That rule was made November 11, 1867, and is in these words: "It having been found impracticable to obtain jurors for the courts of the United States in this district from the jury boxes used by the authorities of the state of New York, in the city and county of New York, for the procuring of juries for the courts of said state, in said city and county, it is now ordered that the clerk of this court and the clerk of the district court of the United States for this district make out and file in the office of the clerk of this court a list of persons to serve as jurors in the courts of the United States for this district, and that such list be made out in the same manner as, by the laws of the state of New York, the public officers charged with the duty of making out the list of jurors to serve as jurymen in the courts of said state, in and for said city and county, are required to make out such list; and it is further ordered that the said clerks, from time to time, correct and revise such list as they may deem it necessary so to do, to the end that such list may be made and kept, so far as practicable, in conformity with the laws of the state of New York; and it is further ordered that, from the list so made and filed, grand and petit jurors shall be selected, and shall be drawn by lot, in accordance, so far as practicable, with the laws of the state of New York, by the said clerks, as, from time to time, the same may be ordered by the courts of the United States in this district, and a list of the persons so drawn, certified by said clerks, shall be attached to the writ of venire issued to the marshal for the summoning of such jurors; and it is further ordered that, as to all matters relating to the selecting, drawing and summoning of jurors for said courts, the said clerks follow, so far as practicable, the provisions in respect thereto contained in the laws of the state of New York." There is no allegation or claim of fraud in the matter, or on the part of any officer concerned therein; and, finally, it is not alleged or claimed that the accused have been prejudiced by any supposed want of conformity to the laws of the state in the proceeding, or that, whether strictly regular or irregular, any irregularity has resulted prejudicially to the accused. This being the case, if we deemed the manner of selecting and drawing the grand jury to be liable to the objection of want of due conformity

to the state laws, we must, nevertheless, say, in the language of the opinion cited, that "the interposition of the court is not required on the ground of justice either to the accused or to the public."

§ 1848. *Substantial conformity to the mode of selecting jurors prescribed by state laws is all that is required by the act of congress.*

We do not, however, mean to be understood as deciding that the grand jury was irregularly or illegally selected, drawn or impaneled. It is sufficient to rest the decision upon the ground above stated. But we desire further to say, that the objections urged upon us seem to overlook, in a large degree, that literal conformity to the mode of selecting and drawing jurors prescribed by state laws is not required by the act of congress. Substantial conformity, and only so far as that is practicable, is, in any view, necessary to strict technical regularity. If this court were permitted to draw petit jurors and grand jurors from the boxes containing the names of persons selected by the state officers under the state laws, a near approximation to the mode of proceeding in the state courts might be made; and, no doubt, the adoption of the selections made by the state officers authorized to inquire into the qualifications of jurors and make selection of grand jurors would be competent. Formerly the federal courts in this district were permitted to do this. Courtesy to the federal tribunals and respect for the requirement of the act of congress designed, as nearly as might be, to conform, in this respect, to the state laws, and mainly for the benefit of citizens of this state, and enacted out of deference to state policy, was then deemed to warrant the permission. But other counsels have prevailed, and the federal courts have no longer, in this city, any such aid in procuring suitable and qualified jurors for service therein.

The rule of this court under which the grand jury now in question was drawn is founded upon and declares the impracticability of obtaining jurors selected under the state laws; and the question was one of interest, and was anxiously considered, when the rule was adopted, which, on the argument of this motion, was more than once suggested by us to counsel urging that the motion should be granted for want of conformity to the state laws—"What should the court do to conform more nearly to the state laws, and how can they do it?" The law, at most, requires substantial conformity, and only what is practicable. What is practicable must be, 1st. What congress have furnished the court with the means of effecting; 2d. What the court has the power to effect; 3d. What can reasonably be done in consistency with the due discharge of the other duties imposed upon the court and its officers. The United States have no commissioner of jurors, in form nor in substance. The court has no power to create such an officer, or to invest any one with the authority which the laws of New York confer upon that officer. The court has no power to call the citizens before itself, or before any other person or officer, for examination, to test these qualifications, preparatory to the making a list of jurors. There is no board, nor can the court create one, which, when a list is made, shall select therefrom some who shall serve as grand jurors. The duties involved in such a mode of selecting jurors, grand and petit, the court cannot compel any person to perform; and, if it was competent to authorize such performance, no one could be found to perform them gratuitously, and this court has no fund from which to pay therefor. Doubtless, we may require the assistance of the clerk of the court, and reasonably expect that he will devote all the time which is possible to the service, but we could not confer on the clerk the powers, or impose on him the duties, of the state commissioner of jurors; and if it was

attempted, it is not clear that his acts would derive any efficiency therefrom. Doubtless, the list of jurors could, as a physical act, be divided into two lists. But there is no board in existence, and we can create none, to make such separate list, in the exercise of discretion, from among those designated in the other list. Doubtless, it would sometimes be possible for a judge to be present at a drawing of grand jurors, but, in general, that would be impossible. Absence from the city, in other districts, and actual engagement in the duties of the court, would, in general, prevent; and, sometimes, jurors may properly be drawn from the several other counties in the district. This impracticability has been adjudged by this court, by its enactment of successive rules, for more than thirty years past, and similar considerations have led to dispensing with publication of the notice of drawing.

We might pursue this still further, and we should return to the inquiry — “With the means which the court has at command, with the power that is vested in the court or its officers, in view of the fact that jurors are not necessarily drawn from one county only, in short, in all the circumstances under which the court is acting, what is practicable, in the reasonable sense in which that term is used in the act of congress, that the rule of court does not provide for, to effect a substantial conformity to the state laws? So long as the court maintains the control over the subject stated in the opinion of Mr. Justice Nelson, so long as even irregularity is not permitted when it operates to the prejudice of an accused, we think that the requirement of the state laws themselves, as well as duty both to the accused and to the public, forbids the interposition of the court which is invoked in these motions.

UNITED STATES *v.* REEVES.

(Circuit Court for Louisiana: 3 Woods, 193-204. 1873.)

Opinion by Woods, J.

STATEMENT OF FACTS.—The pleas in abatement are based on section 812 of the Revised Statutes, which declares: “No person shall be summoned as a juror in any circuit or district court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of said challenge.” One plea alleges, in substance, that P. E. Bechtel was summoned as a juror at the November term, 1876, of this court, and was impaneled and sworn as a grand juror on December 11, 1876, and continued to serve as such grand juror until April 27, 1877; and that the same P. E. Bechtel was summoned as a juror at the November term, 1878, of this court, and was impaneled and sworn as a grand juror on December 14, 1878, and continued to serve as said grand juror until March 1, 1879, and until the indictment in this case was found and returned, and was of the panel by which said indictment was found and returned.

The other plea alleges that J. B. Glandin was summoned to serve as a juror in this court for the November term, 1877, and was sworn and impaneled as a petit juror in November, 1877, and served as such until January 22, 1878, and that said Glandin was summoned as a juror for the November term, 1878, of this court, and on December 14, 1878, was impaneled and sworn as a grand juror in this court, and continued to serve as such up to March 1, 1879, and was of the panel by which said indictment was found. To these pleas the

United States attorney has filed a demurrer on the ground that the same were bad in law.

§ 1849. *Construction of section 812 of Revised Statutes.*

As to the first plea, it is obvious to remark that the facts stated do not bring it within the terms of the section on which it is predicated. It does not appear from this plea that Bechtel was summoned "more than once in two years," nor does it appear that the juror has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge." It does not appear from the plea precisely when the juror named was summoned, but it is stated that, in the first instance, he was summoned to the November term, 1876, and in the second to the November term, 1878. The period of two full years had elapsed between the beginnings of these two terms.

§ 1850. *Where more than two years elapse between the beginning of two terms of the court to which a person has been summoned as a juror, he is not an unlawful juror.*

According to the plea under consideration, the juror was impaneled and sworn on the grand jury, on December 11, 1876, and was not again impaneled and sworn until December 14, 1878, a period of more than two years. Even supposing he had been challenged on the day he was sworn, the challenge would have been ineffectual, for the juror had not been summoned and attended as a juror within two years, for at least a part of the term at which he last attended was held more than two years previously.

I do not think that the fair construction of this section is that twenty-four months must elapse between the close of the term at which a juror is summoned and serves and the beginning of the next term at which he is competent to serve. In this district this construction would render a juror incompetent for nearly two years and six months, for the November term of the court invariably lasts until the third Monday of April following. But the law in effect is, that he may be summoned as often as once in two years. It cannot be that the law allows a juror to be summoned as often as once in two years and at the same time forbids him to serve oftener than once in two years and six months. The juror named in this plea has not been summoned oftener than that. This has, so far as I know, been invariably the construction put in this circuit upon the section under consideration. This plea is, therefore, bad, because the case of the juror named therein does not fall within the terms of section 812.

§ 1851. *Defendants may object to jurors by plea in abatement, if there has been no opportunity afforded to object otherwise.*

So far as the lapse of time is concerned, the second plea is not open to this objection. The grand juror named in this plea served on the grand jury by which the bill was found and also served on the grand jury impaneled in November, 1877. As the defendants have not before now had an opportunity to object to the composition of the grand jury by which they were indicted, they may take advantage of any disqualification of any of the grand jurors by plea in abatement. *United States v. Hammond*, 2 Woods, 197 (§§ 1832-41, *supra*), and cases there cited. The question is, therefore, squarely presented whether the facts set out in this plea render the indictment bad and liable to be quashed. That depends on whether section 812 imposes a disqualification to serve as grand jurors upon persons who fall within its terms. It seems doubtful whether section 812 applies at all to grand jurors, especially the sec-

ond clause of the section, which declares: "It shall be sufficient cause of challenge to any juror called to be sworn in any cause, that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of said challenge." Grand jurors are not called to be sworn in any cause. They are sworn to investigate offenses against the criminal law generally, and causes which they institute where there has been no previous arrest are not in existence until their duty in reference thereto is fully completed and ended. The clause just quoted would not, therefore, seem to apply to them. It appears rather to be aimed at jurors taken *de talibus circumstantibus*—persons not regularly summoned as jurors, but called in as talesmen from the by-standers.

§ 1852. *The fact that a grand juror has been summoned and served as a juror twice within two years does not invalidate an indictment.*

But conceding that the entire section applies to grand as well as petit jurors, the question is, does the section impose such a disqualification on a grand juror as would render an indictment found by a jury of which he was a member bad? It is easy to perceive that it was the object of congress, by the enactment of section 812, to secure the selection of jurors who were from the body of the district, and they should not be professionally or habitually called into the courts of the United States. To effectuate this object they made two provisions, the first of which is a direction to those who select the array that they shall not summon any person who has been summoned within two years; and, second, that if, through ignorance of the facts, any person should be twice summoned within two years, and should have attended within that period, he might, when called to be sworn in any cause, be challenged. Congress has not seen fit to impose any consequence of invalidity upon verdicts, either by direct language or by necessary implication, when jurors were not challenged for this cause, who might have been.

The language of this section is guarded with great precision, and is in marked contrast with that of section 820. There is a distinction to be observed between a positive disqualification and a cause of challenge. Thus section 820 declares certain acts done by a person summoned as a juror to be a cause of disqualification and challenge. The use of the word "disqualification" has some purpose, and implies that there may be causes of challenge which are not positive disqualifications.

In *United States v. Hammond*, 2 Woods, 197 (§§ 1832-41, *supra*), I have held that section 820, by its very terms, rendered a juror disqualified, and thereby necessarily invalidated the finding of the jury in cases where there could be no waiver. But the language of the section now under consideration leaves the juror competent, not disqualified, though liable to challenge when called to be sworn, as manifestly as section 820 affects him with absolute disqualification. In *Monroe v. Brigham*, 19 Pick., 368, Chief Justice Shaw makes this distinction, and held in effect that the fact that a juror was over the age of sixty-five years, which, by the law of Massachusetts, was not only a ground of exemption from jury duty, but also a ground of challenge by either party to the suit, did not absolutely disqualify the juror from sitting in the case, or furnish ground for setting aside the verdict returned by the jury of which he was a member. I think the distinction rests on solid grounds. Pleas in abatement, being dilatory, are not favored. *O'Connell v. Regina*, 11 Cl. & Fin., 155; *Commonwealth v. Thompson*, 4 Leigh, 667; *State v. Newer*, 7 Blackf., 307.

In the case of *The People v. Jewett*, 3 Wend., 321, the defendant and one

Burrage Smith were indicted for having, with others, conspired without legal authority or justifiable cause to carry off and transport one William Morgan to a place unknown. Objection was taken to the indictment that one Benjamin Wood, one of the grand jurors, had, before the finding of the bill of indictment, in repeated conversations declared that the defendant was concerned in the abduction of Morgan, aided in carrying him off, was guilty thereof, and ought to be punished therefor; and it was alleged that the defendant had not been apprised of any criminal proceeding against him, not having been arrested or required to enter into recognizance. In reply to this objection, Savage, chief justice, said: "The books are silent on the subject of such exception after indictment found, and in the absence of authority I am inclined to say, in consideration of the inconvenience and delay which would ensue in the administration of criminal justice were a challenge to a grand juror permitted to be made after he was sworn and impaneled, that the objection comes too late."

In the same case Marcy, justice, said: "As the defendant was not recognized to appear at the sessions when the indictment was found, he did not know that any charge would be laid before the grand jury against him, and consequently he had no opportunity to object to the jurors before they were sworn and had presented their indictment. . . . Though I feel the force of the argument that the defendant should be allowed the benefit of an exception to a partial grand juror, I cannot turn my view from the consideration of the great delays and embarrassments which would attend the administration of criminal justice if it was to be obtained in the way now proposed. No authority for adopting this course was shown on the argument, and I have not since been able to find any." And in *Monroe v. Brigham*, *supra*, Chief Justice Shaw remarks: "Upon general grounds, unless presumptively required by statute, it would be inconsistent with the purposes of justice to allow such an exception to a juror. . . . Where no other incapacity exists, and no injustice is done, nothing but a positive rule of law would seem to require that a verdict should on that account be set aside."

§ 1853. *A ground for challenge is not necessarily such as will vitiate an indictment found by the jury.*

This authority is cited merely to show how reluctant the courts are to interfere with the indictments of a grand jury by reason of the unfitness of one or more of the grand jurors. Nevertheless, courts will interfere where there has been a positive disqualification imposed by statute. But as, in my judgment, the fact that the juror has served within two years as a juror in the court is not made by section 812 a positive disqualification, but only a ground of challenge, I do not think that it can be urged as a reason for quashing the indictment. Demurrer to pleas in abatement sustained.

§ 1854. *Selecting.*—Where, in drawing a grand jury under the provisions of the act of June 30, 1879, § 2, the name of one of the grand jurors named in the venire, and who assisted in finding the indictment, was not put into the box by any competent authority, and not drawn, and there was no imputation that his name was put into the venire in bad faith, the court held it to be a mere irregularity, which did not vitiate the action of the grand jury. *United States v. Ambrose*,* 3 Fed. R., 283.

§ 1855. Under a law requiring that the grand jury shall consist of fifteen members, it is error to draw additional jurors after the term, when the requisite fifteen have been obtained. *United States v. Reynolds*,* 1 Utah Ty. 226.

§ 1856. Section 459 of the Revised Statutes of Utah, which declares that "when necessary the court shall issue an order requiring an officer to summon fifteen judicious men, residents of the county, for a grand jury, who shall be sworn to inquire faithfully into offenses, and present indictments by the agreement of at least twelve of their number against offenders

who should be prosecuted," etc., is held to apply to the county courts, and not the federal or district courts. These latter courts may select their grand jurors from the body of their territorial jurisdictions. *The People v. Green*,* 1 Utah T'y, 11.

§ 1857. The provision of the second section of the act of congress of June 30, 1879, that the clerk, and a gentleman of different politics and established character, etc., shall put into the jury box certain names, and that there shall be drawn therefrom, in a certain manner, a certain number to compose the grand jury, is mandatory; yet all that is required is an honest intention to conform to the statute, and to carry out its provisions in good faith. *United States v. Ambrose*,* 3 Fed. R., 283.

§ 1858. Where an officer in drawing a grand jury is obliged by statute to use the state jury box and ballots, no objection can be taken to the construction of the box or that the ballots were not folded as required by state laws, but the names might be seen by the officer drawing the ballots. *United States v. Reed*,* 2 Blatch., 435. Under the act of congress of July 20, 1840, the federal courts are governed, in the matter of drawing and impaneling grand and petit juries, by the laws and regulations of the state in which the court is sitting, where such court has by rule adopted them. *Ibid.*

§ 1859. Summoning.—In the district courts for Utah the grand jury is properly summoned by the United States marshal on a venire issued by order of the judge, and the summoning of such jury is regulated by the laws of congress and not by those of the territory. Demurrer to Challenge to the Array of Grand Jury,* 12 Int. Rev. Rec., 162.

§ 1860. Under the act of August 8, 1848 (9 Stat. at L., 73, § 3), a venire for a grand jury will issue only upon an order of the court. *United States v. Reed*,* 2 Blatch., 435.

§ 1861. Special venire.—A statute providing that county commissioners shall select grand jurors prior to a term of court, to serve at such term, and that the jurors shall be summoned upon a venire issued to the sheriff, and providing for a special venire by the court, on failure of the commissioners to do their duty, or on failure of the jurors selected to appear, does not exclude the common law method of selecting jurors in all cases; and after the discharge of the panel selected by the commissioners, the court may, during the same term, issue a special venire if the exigency requiring a second panel exists. *Mackey v. The People*,* 2 Colo. T'y, 13.

§ 1862. Proceedings of grand jury.—The court will not, upon motion of the attorney for the United States, send back to the grand jury an indictment, which the same grand jury had, some days before, at the same term, returned "*ignoramus*," with an instruction that, if they should find the facts stated in it to be true, they should return it a true bill. (THURSTON, J., dissenting.) *United States v. Watkins*,* 3 Cr. C. C., 441. See §§ 1819, 1820.

§ 1863. Section 43 of the Criminal Code of the state of Oregon, declaring that, "in the investigation of a charge for the purpose of indictment, the grand jury shall receive no other evidence than such as might be given on the trial of the person charged with the crime in question," applies only to cases where a person has been duly charged with the commission of crime before a committing magistrate and held to answer. *United States v. Brown*,* 1 Saw., 531.

§ 1864. A court cannot inquire into the mode of conducting the examination of witnesses who were properly before a grand jury, for the purpose of testing the validity of an indictment. The court has no control over the discretion of the grand jury in that matter. *United States v. Reed*,* 2 Blatch., 435.

§ 1865. Evidence before a grand jury must be competent, legal evidence, such as is legitimate and proper before a petit jury. *Ibid.*

§ 1866. It seems that a court will never examine the evidence before a grand jury to see if it is sufficient. *Ibid.*

§ 1867. A general oath to give evidence touching criminal charges to be laid before a grand jury, without reference to any particular person, is good though many separate indictments are found: and so also is such an oath naming one person and adding "and others." *Ibid.*

§ 1868. Powers.—No act of congress directs grand juries, or defines their powers. The powers of grand juries are given by necessary implication from the laws bestowing criminal jurisdiction. Grand juries which are summoned to attend the courts of the United States possess powers and duties co-extensive with the jurisdiction of the courts which they attend. The district court possessing power to inquire into offenses by a grand jury, and congress not having enabled grand juries to make presentments in one court, to be prosecuted in another, the presentment of an offense, cognizable only in the district court, made in the circuit court, cannot be the legal foundation for a proceeding in the district court, which can only be instituted on the presentment or indictment of a grand jury. *United States v. Hill*,* 1 Marsh., 156.

§ 1869. The grand juries in the national courts are limited in their investigations to (1) such matters as may be called to their attention by the court; or (2) may be submitted to their consideration by the district attorney; or (3) such matters as may come to their knowledge

in the course of their investigations into matters brought before them, or from their own observations; or (4) such matters as may come to their knowledge from the disclosures of their associates. Charge to Grand Jury,* 2 Saw., 667.

§ 1870. No private prosecutors should be allowed to intrude themselves into the presence of the grand jury and present accusations. Such information should be made to the district attorney. If the district attorney fails to act, such complaints may be made before a committing magistrate. *Ibid.*

§ 1871. The grand jury should receive only legal evidence, to the exclusion of mere reports, suspicions and hearsay evidence. Subject to this qualification they may receive any evidence throwing light on the investigation, whether it tends to establish the innocence or guilt of the accused. *Ibid.*

§ 1872. The grand jury ought not to find an indictment unless, in their judgment, the evidence before them, unexplained and uncontradicted, would warrant a conviction by a petit jury. *Ibid.*

§ 1873. The grand juries of the federal courts have no authority to inspect the books of the officers of the United States, or to subject the officers themselves to examination respecting the entries in such books. *Ibid.*

§ 1874. If any letter or communication in print or writing relating to any matter or issue pending before the grand jury, or pertaining to their duties, is sent to them, with intent to influence their action or decision, which has not been ordered to be sent by the court, it is their duty to indict or present the offending person, under the act of congress "to prevent and punish the obstruction of the administration of justice in the courts of the United States." *Ibid.*

§ 1875. It is the duty of the grand jury to keep their deliberations secret. They are not at liberty to state that they have had a matter under consideration. *Ibid.*

§ 1876. Duties of district attorney.—It is legal and proper for the district attorney to confer with the grand jury during their deliberations whenever he may deem it necessary. *Ex parte Crittenden*,* Hemp., 176; Charge to Grand Jury,* 19 Int. Rev. Rec., 19. He may properly explain the meaning of laws, lay before the grand jury the evidence in his hands officially, and aid in the examination of witnesses, but he should take no part in the determination of the guilt of an accused party. Charge to Grand Jury,* 19 Int. Rev. Rec., 19.

§ 1877. The uniform practice in proceedings before the grand jury for the district attorney to be attended by his clerk to aid them in the investigation of charges must be held to have settled the propriety of such practice; but any improper conduct of such clerk would be ground for the interference of the court in behalf of the defendant. *United States v. Reed*,* 2 Blatch., 435.

§ 1878. Testimony of juror.—A grand juror may be permitted to testify as to evidence taken before the grand jury. *United States v. Porter*,* 2 Cr. C. C., 63.

§ 1879. Indorsing name of informer.—Under an act requiring the grand jury to indorse on the presentment the name of the person on whose information it was found, such indorsement is *prima facie* evidence that the presentment was made upon the information of a person whose name it bears. *Virginia v. Gordon*, 1 Cr. C. C., 48.

§ 1880. Qualifications.—Where one of the persons appearing as grand juror stated, upon his *voir dire*, that he had conscientious scruples against indicting persons for a violation of the law of the United States of 1862, prohibiting polygamy, he was held to have been rightly discharged and not sworn on the grand jury. *United States v. Reynolds*,* 1 Utah T'y, 226.

§ 1881. It is no ground for a plea that one of the grand jurors who found the bill had previously expressed an opinion that the defendant was guilty of the offense charged. Such a plea would also be objectionable for not showing that without the vote of the juror objected to no indictment could have been found. *United States v. White*,* 5 Cr. C. C., 457.

§ 1882. Witnesses for accused.—The court will not send witnesses to the grand jury on the part of the accused. *United States v. Palmer*,* 2 Cr. C. C., 11.

§ 1883. A person whose case is under investigation will not be permitted to offer evidence before the grand jury. *United States v. Blodgett*,* 35 Ga., 336.

§ 1884. A person whose conduct is being inquired into by the grand jury has no right to be heard before them, and they should not admit him into the jury room, or to be examined as a witness in his own behalf. Charge to Grand Jury, Deady, 657.

§ 1885. Insanity of accused.—Upon an application by the grand jury to the court for their opinion on whether it was proper to call and examine witnesses to prove the sanity or insanity of the accused, the court instructed them that if in any case before them they should be satisfied by the evidence adduced on the part of the prosecution that the party accused committed the unlawful act with which he is charged, they had no right to send for and examine witnesses to prove mere matter of justification or excuse. *United States v. Lawrence*,* 4 Cr. C. C., 514.

§ 1886. **Refusal of witness to answer.**—On an inquiry by the grand jury as to the existence of an organization whose object is to violate the neutrality laws of the United States, if a witness refuses to answer on the ground that his answers would criminate him, he may be required to give bond to observe the neutrality laws, where the grand jury report that they have reason to believe that such an organization exists. *United States v. Quitman*,* 2 Am. L. Reg. (O. S.), 645.

§ 1887. **Accused persons required to testify.**—Each of several persons concerned in a criminal transaction may be compelled to testify before the grand jury concerning that part, if any, which each of the others took in the affair. And this, notwithstanding a provision that a defendant cannot be a witness either against himself or his co-defendant in a criminal proceeding, and that in the investigation of a charge for the purpose of indictment the grand jury shall receive no other evidence than such as might be given on the trial of the person charged with the crime in question, since there are, in fact or law, no defendants or co-defendants to an investigation before a grand jury touching an alleged or supposed commission of crime. *United States v. Brown*,* 1 Saw., 581.

§ 1888. **Challenges.**—A challenge to the array of the grand jury for irregularities in their designation must be made before the jury is impaneled, and cannot be made after it has been organized and has entered upon the discharge of its duties. A motion to quash the indictment based on the same grounds will also be overruled. *United States v. Butler*,* 1 Hughes, 457. See §§ 1822-25.

§ 1889. Where the statute of a state, adopted by the statute of the United States, has taken away the right of challenging the array of grand jurors, it has also taken away the right to raise the objection in any form, and any objections founded upon the want of qualifications of grand jurors, either as individuals or as a panel, is within the scope of the statute and unavailing. *United States v. Tuska*,* 14 Blatch., 5.

§ 1890. Any person who has been warned by the district attorney, that he will be prosecuted at a particular term, has a right to appear and challenge the grand jury; it is not necessary that he be in prison or on bail. *United States v. Blodgett*,* 35 Ga., 336.

§ 1891. Challenges will be heard after the jury is organized, if a reasonable excuse is offered for the delay. *Ibid.*

§ 1892. The oath to be administered to grand jurors, under section 2 of the act of 1862, as to their participation in the rebellion, will be administered only at the suggestion of the United States attorney; but any person having the right to challenge may urge the same qualifications, by challenge, under the first section. *Ibid.*

§ 1893. The court will dispose of such challenge by merely reading the oath to the jurors and permitting those to retire who deem themselves disqualified. *Ibid.*

§ 1894. A statute which gives the defendant the right to challenge a grand juror after the grand jury has been sworn and charged is merely declaratory of the common law. Such a challenge may be made as a matter of right, and the defendant need not give any reasons why he did not make the challenge before. *The People v. Wintermute*,* 1 Dak. T'y, 63.

§ 1895. The laws of the state of New York (3 R. S., 724, §§ 27, 28) regulating the right of a prisoner in the challenging of grand jurors are applicable to the federal courts sitting within that state. *United States v. Reed*,* 2 Blatch., 435.

§ 1896. A challenge to a grand juror for favor goes to his qualifications as a juror. *Ibid.*

§ 1897. A challenge to the array of a grand jury goes to the qualification of the panel to sit and act in the given case. *Ibid.*

§ 1898. Only persons bound over to appear at the term of court that a grand jury is summoned can challenge either the array or individuals for favor. Persons not bound over have no such rights; their only remedy for the misconduct of jurors is by way of motion addressed to the sound discretion of the court to prevent any prejudice to their rights or interest, and such motion, to be successful, must be founded upon facts implicating the officers summoning the jury. *Ibid.*

§ 1899. In cases in which the challenge to the array of grand jurors has been abolished, and there has been any improper conduct on the part of the officers drawing, summoning or organizing the grand jury, the court will set all proceedings aside if it appears that such irregularities have resulted or may result to the prejudice of the accused. *Ibid.*

§ 1900. The difference between a challenge to the array of a grand jury and a motion to set aside a panel is, that, in the former case, if the challenge is maintained it is fatal to the whole panel, while in the latter case the court has the discretion to adopt any means which will preserve the defendant from prejudice. *Ibid.*

§ 1901. **Witness not sworn.**—Where the grand jury who found an indictment received evidence, upon which the indictment was based, given by a witness who was not sworn and who was not entitled to the privileges of a Quaker, the court quashed the bill. *United States v. Coolidge*,* 2 Gall., 863.

§ 1902. *Charge of court.*—The court may, in its discretion, give an additional charge to the grand jury, although they do not ask it. When an instruction to the grand jury is asked, either by the accused or the prosecutor, it is a matter of discretion with the court to give the instruction or not; and in exercising that discretion they will take into consideration all the circumstances under which the instruction is prayed, and the extent of the prayer. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 1903. *May seek advice from the court.*—The right of a grand jury to apply to the court with which they are connected, for advice and direction, in aid of the duties they are called upon to discharge, is fully recognized by the law, and its free exercise is encouraged. *United States v. McKenzie*,* 1 N. Y. Leg. Obs., 371.

§ 1904. *Foreman fined for intemperance.*—In this case the court fined the foreman of the grand jury for intemperance, discharged him, and appointed another foreman in his place. *In re Ellis*,* Hemp., 10.

§ 1905. *Number of grand jurors.*—It is no ground for quashing the indictment that the bill was found and returned into court by fourteen grand jurors, one of the fifteen composing the grand jury having been absent, fifteen qualified grand jurors having been impaneled, sworn and sent out as the grand inquest, and a greater number than twelve having appeared in court and made the presentment. *United States v. Wilson*,* 6 McL., 604.

§ 1906. Where a statute provides that the number of grand jurors shall not be less than sixteen nor more than twenty-three, and the court orders twenty-three to be summoned, and twenty-one are returned and impaneled, this number is sufficient under the statute. *Mackay v. The People*,* 2 Colo. T'y, 13.

§ 1907. Twelve of the grand jury must concur in finding an indictment or presentment; a mere majority will not suffice. *Charge to Grand Jury*,* 2 Saw., 667.

§ 1908. Since the common law is in force in Utah territory, the number of grand jurors for the federal district courts must be twenty-three, and no act of the territorial legislature can change the rule. *The People v. Green*,* 1 Utah T'y, 11.

§ 1909. The act of congress of June 23, 1874, entitled an "Act in relation to courts and judicial officers in the territory of Utah," which merely provides the mode of procuring the grand jurors, does not thereby declare the number which shall constitute the grand jury, and therefore is not inconsistent with a law of the territory fixing the number. *United States v. Reynolds*,* 1 Utah T'y, 226.

-§ 1910. Where the grand jury which found an indictment was composed of twenty-three men instead of fifteen, as the law required, its action was held to be void. *Ibid.*

§ 1911. The number of grand jurors in a territorial district court is governed by the territorial laws and not by the provisions of the statutes of the United States relating to grand jurors in the circuit and district courts of the United States, for the territorial courts, though they have jurisdiction of all cases arising under the constitution and laws of the United States, are not courts of the United States. *Reynolds v. United States*, 8 Otto, 145 (§§ 854-865).

XXV. JURY.

SUMMARY—*Peremptory challenges*, § 1912.—*How far state laws control in the matter of challenges*, §§ 1913, 1914.—*Province of the jury on questions of law and fact*, §§ 1915-1919.

§ 1912. Section 819 of the Revised Statutes, declaring that "on the trial of any other felony," except treason or a capital offense, "the defendant shall be entitled to ten and the United States to three peremptory challenges," may operate to give the defendant ten challenges in the following cases: *First*, where the offense is declared by statute, expressly or impliedly, to be a felony; *second*, where congress does not define an offense, but simply punishes it by its common law name, and at common law it is a felony; *third*, where congress adopts a state law as to an offense, and under such law it is a felony. The crime of counterfeiting the coin of the United States does not come within any of these classes, and hence the defendant in such a case is entitled to but three challenges, as provided in that section under the designation of all other offenses. *United States v. Coppersmith*, §§ 1920-24. See § 1944.

§ 1913. The act of July 20, 1840 (5 Stats. at Large, 394), enables the courts of the United States to adopt the laws and usages of the state in respect to the challenge of jurors, whether peremptory or for cause, and in cases both civil and criminal, with the exception, in criminal cases, of treason and other crimes, of which the punishment is declared to be death. *United States v. Shackelford*, §§ 1925-26. See §§ 1944, 1953.

§ 1914. It seems that the right of challenge by the prisoner, recognized by the act of 1790, does not necessarily draw along with it this qualified right, existing at common law, by the government; and that, unless the laws or usages of the state, adopted by rule under the act

of 1840, allow it on behalf of the prosecution, it should be rejected, conforming in this respect the practice to the state law. *Ibid.*

§ 1915. According to the general practice of the courts in this country, the defendant seems to have a right to be heard before the jury, upon his construction of the law, if the court has not already, after hearing the arguments of the defendant's counsel, instructed the jury upon the law in the same case. *Stettinius v. United States*, §§ 1927-31. See §§ 2006, 2011, 2025.

§ 1916. It is the duty of the jury to follow the instructions given them by the court. *Ibid.*

§ 1917. The power of the jury to find a general verdict upon the general issue in a criminal case does not imply a right to decide the law of the case. The right of the jury, whatever it may be, as to deciding the law of the case, is exactly the same in criminal and in civil cases. In both the court may set aside a verdict as against the law, thereby showing that the jury has no right to decide the law. If the general verdict is in favor of the defendant in a criminal case, the court will not set it aside *in favorem vitæ*. But this practice is not grounded on the admission that the jury have a right to decide questions of law. *Ibid.*

§ 1918. There is no constitutional right belonging to the defendant in a criminal case which entitles his counsel to argue the whole law of the case to the jury. The sixth article of the amendments, declaring "that in all criminal prosecutions the accused shall enjoy the right" "to have the assistance of counsel for his defense," gives no such right. *Ibid.*

§ 1919. The judges are to decide every question of law, when the facts upon which the question arises are found or stated; and in all cases where, by the pleadings or the proceedings, the law and the facts are separated. The jury cannot decide a pure question of law unmingled with the facts. The law and the facts are separated by a demurrer to the evidence, by a special verdict, by a special plea, and by the hypothetical statement of facts, when, in the trial of a cause before the jury, the court is moved by the counsel on either side to instruct the jury as to the law arising from such supposed facts, if they should be found by the jury. It is not only the right but the duty of the judge to decide every question which may be thus presented to him. He may instruct the jury as to the whole law arising upon the evidence, whether asked or not. The argument of counsel upon such questions are properly addressed to the court. Counsel cannot, therefore, object to judges giving any instructions to the jury as to the law, and claim a right to argue both law and fact to the jury. *Ibid.*

[NOTES.—See §§ 1932-2044.]

UNITED STATES *v.* COPPERSMITH.

(Circuit Court for Tennessee: 2 Flippin, 546-558. 1880.)

Opinion by HAMMOND, J.

STATEMENT OF FACTS.—The defendant, being on trial for counterfeiting the coin of the United States, has peremptorily challenged three of the jurors tendered to him, and claims the right to challenge another, and any number to the extent of ten, under section 819 of the Revised Statutes. He insists that the offense of making counterfeit coin is a felony at common law, and therefore a felony in the purview of that section; he also insists that being punishable by imprisonment at hard labor, which necessarily implies confinement in a penitentiary, it is a felony according to the ordinary acceptation of the term in American law; that congress used the term in that sense in this statute, and did not intend to indicate capital offenses already provided for by the same section of the Revised Statutes.

§ 1920. *Rules as to challenges to jurors in criminal cases in the United States courts.*

Section 819, above referred to, is as follows: "When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony the defendant shall be entitled to ten and the United States to three peremptory challenges, and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges," etc. It is apparent that it was here intended to designate by the term "any other felony," other offenses than capital offenses, for they are otherwise specially provided for by this section.

Prior to legislation by congress this matter of peremptory challenges in the federal courts was in some confusion until the supreme court declared that they might, by rule, adopt the state practice. *United States v. Shackleford*, 18 How., 588 (§§ 1925-26, *infra*); *United States v. Douglass*, 2 Blatch., 207; *United States v. Reed*, id., 435, 447, and note; *United States v. Cottingham*, id., 470; *United States v. Tallman*, 10 Blatch., 21 (§§ 1845-48, *supra*); *United States v. Devlin*, 6 Blatch., 71.

When we could resort to the state practice it was generally found that legislation had accurately regulated the right of challenge by distinctly classifying offenses with such statutory definitions as left no room for doubt. But since congress has legislated we can no longer look to the state laws for guidance, nor to the common law, but only to the acts of congress themselves, which, unfortunately, have only increased the confusion by the use of an indefinite term. I am not advised of any reported case construing this section, nor of the practice in regard to it, except that it is said at the bar that heretofore in this district ten challenges have not been allowed in any case where the offense charged was not, by the statute creating it, declared to be a felony. The first act of congress, passed March 3, 1865 (13 St., 500), after providing for treason and capital offenses, as is done by this section 819, provided that, "on the trial of any other offense in which the right of peremptory challenge now exists, the defendant shall be entitled to ten and the United States to two peremptory challenges." The criticism of Judge Conkling, in the fifth edition of his Treatise, page 632, on this act, demonstrates how indefinite were the terms used, and he concludes that the section was nugatory as to all crimes except treason and capital offenses; because the right of peremptory challenge, he says, only exists in cases of felony, and now nothing is felony except capital offenses. In this criticism the learned district judge of Oregon seems to concur, for he also declares the section nugatory. *United States v. Randall*, 1 Deady, 524, 548. Yet, strange to say, the act of June 8, 1872 (17 St., 282), substitutes this word felony for the phrase in the act of 1865 which was thus condemned because it limited the right of peremptory challenges to cases of felony, and thereby left it impossible to determine under the act of 1865 to what cases it should apply. Perhaps a proper construction of the act of March 3, 1865, taken in connection with the law as it then stood under the decision in the case of *United States v. Shackleford*, *supra*, and the act of 1840 (5 St., 394), would have been to look to the state practice to determine in what cases the right of peremptory challenge "now exists," and to allow ten challenges in all such cases; for the state practice then furnished not only the rule as to number, but the rule as to the kind of offense in which the right of peremptory challenge existed, as we have already seen. There would have been some certainty in this, but now there is no other course but to determine by the common law what congress meant in this section of the Revised Statutes by the words "any other felony." If congress uses a common law term in defining a crime, or in any statute, we must look to the common law for a definition of the term used. 2 Abb. Pr., 171; Conk. Treatise, 178 (5th ed.); *United States v. Palmer*, 3 Wheat., 610 (§§ 535-541, *supra*); *United States v. Wilson*, Bald., 78, 93; *United States v. Barney*, 5 Blatch., 294, 296; *United States v. McGill*, 1 Wash., 463. The Massachusetts commissioners, many years ago, in enumerating felonies within the provisions of their code, in a note add that the meaning "of the word 'felony' (as by them defined) is limited to the use of the word in this code, and is not to be confounded with the common law signification of the same term, whatever

that meaning may be, for it is a matter of no little difficulty to settle it." Report, title "Explanation of Terms Cited;" 1 Hale's P. C. (A. D. 1847), 575, note.

§ 1921. *The question as to what crimes are felonies fully considered and discussed.*

The supreme court of Alabama said, in *Harrison v. State*, 55 Ala., 239, 241, that it is not easy to determine in all cases what are felonies and *crimenes falsi*. "To predicate of an act," say the supreme court of Ohio, "that it is felonious, is simply to assert a legal conclusion as to the quality of the act; and unless the act charged, of itself, imports a felony, it is not made so by the application of this epithet. Indeed, the term felony has no distinct and well-defined meaning applicable to our system of criminal jurisprudence. In England it has a well-known and extensive signification, and comprises every species of crime which at common law worked a forfeiture of goods and lands. But under our criminal code the word 'felonious,' although occasionally used, expresses a signification no less vague and indefinite than the word 'criminal.'" *Matthews v. State*, 4 Ohio St., 539, 542. In the constitution of Tennessee the words "criminal charge" are held to be synonymous with "crime," which is said to mean, technically, "felonious offense." *McGinnis v. State*, 9 Humph., 43. The term "felony" appears to have been long used to signify the degree or class of crime committed, rather than the penal consequences of the forfeiture occasioned by the crime according to its original signification. 1 Archb. Cr. Pl., 1, note; Russ. on Crimes, 43.

Capital punishment by no means enters into the true definition of felony. Strictly speaking, the term comprised every species of crime which occasioned at common law the total forfeiture of either lands or goods, or both. That was the only test. Felonies by common law are such as either concern the taking away of life, or concern the taking away of goods, or concern the habitation, or concern the obstruction of the execution of justice in criminal and capital causes, as escapes, rescues, etc. 1 Hale's P. C., 411. These crimes were of such enormity that the common law punished them by forfeiture: (1) the offender's wife lost her dower; (2) his children became base and ignoble and his blood corrupted; (3) he forfeited his goods and chattels, lands and tenements. The superadded punishment was either capital or otherwise, according to the degree of guilt; that is, the turpitude of the offense. There were felonies not punishable with death, and on the other hand there were offenses, not felonies, which were so punishable. However, the idea of felony was so generally connected with capital punishment, that, erroneously, it came to be understood that all crimes punishable with death were felonies; and so, if a statute created a new offense and declared it a felony, but prescribed no punishment, by implication of law it was punishable with death. This has been changed by statute, and now, where a felony is created and no punishment prescribed, it is transportation for seven years, or imprisonment, with or without hard labor, not exceeding two years; and for a second felony, transportation for life. 7 and 8 Geo. IV. The punishment for a misdemeanor at common law was fine or imprisonment, or both, unlimited, but in the most aggravated cases seldom exceeded two years. Tomlin's Dict., title "Felony;" 4 Black. Com., 94; 3 Inst., 43; 4 Bacon's Abridg., title "Felony" and title "Forfeiture;" Viner's Abridg., title "Forfeiture;" 1 Hale's P. C., 411, 574; 1 Archb. Cr. Pr., 1, and note, and p. 185; 1 Russ. on Crimes, 42; 1 Bish. Cr. L., §§ 580-590; *United States v. Williams*, 1 Cranch, C. C., 178; *Adams v. Barrett*, 5 Ga., 404, 412; *State v.*

Dewey, 65 N. C., 572; *United States v. Smith*, 5 Wheat., 153, 159 (§§ 532-534, *supra*); *United States v. Staats*, 8 How., 41 (§§ 2542-44, *infra*).

§ 1922. *Felony not accurately defined at common law.*

Tested by the common law, then, this term has no very exact and determinate meaning, and can apply to no cases in this country except treason, where limited forfeiture of estate is allowed. But technically that is a crime of a higher grade than felony, although it imports also felony. If it be conceded that capital punishment imports a felony, there can be none, at common law, except capital crimes. But that test is untechnical and founded in error. It does not always apply, and it is as arbitrary to say that a crime punished capitally is a felony, as it is to say that one punished by imprisonment in the penitentiary is a felony. Our ancestors brought with them the common law gradations of crime, as they stood in their day, and although they organized a government which is wholly destitute of a criminal common law, its influence has always prevailed to produce incongruities arising out of an attempt, even when creating new offenses, unknown to any law except our own peculiar system, to keep up its gradations of crime. The supreme court, in the case last cited, point out the distinction between the use of the word "felony" as descriptive of an offense, and as descriptive of the punishment; pronounce it the merest technicality, and hold that where a statute creates an offense and declares it a felony it is not necessary to plead a felonious intent. Bouv. Dict., "Feloniously." The court also speak of "the moral degradation attaching to the punishment actually inflicted," and intimate that it is about all that is left to us of the common law idea of felony. There is just as much of moral degradation in an offense called by the statute-makers a misdemeanor, if punished degradingly, as if with the same character of punishment they call it a felony.

§ 1923. *Use of the term "felony" in American law.*

In American law, forfeiture as a consequence of crime being generally abolished, the word "felony" has lost its original and characteristic meaning, and it is rather used to denote any high crime punishable by death or imprisonment. Burrill's Dict., title "Felony." The term is so interwoven with our criminal law that it should have a definition applicable to its present use; and this notion of moral degradation by confinement in the penitentiary has grown into a general understanding that it constitutes any offense a felony, just as, at common law, the idea of capital punishment became inseparably connected with that of felony. There is, therefore, much force in the suggestion of counsel that since we cannot define this word, as used in this statute, by the common law, it must be understood that congress used it in this modern sense. Because, where the words of a statute construed technically would be inoperative, but construed according to their common signification would have a reasonable operation, the courts do sometimes adopt the latter construction. Yet it will be found that this modern idea of felony has come into general use by force of state legislation on the subject, so far as it is legally established. From a very early day, and as a necessity, the state legislatures have passed laws defining and enumerating felonies as those crimes punishable by confinement in the penitentiary; and this has come to be the law in nearly every state. In Tennessee the law of 1829 elaborately enumerated felonies, and punishes them with hard labor in the jail or penitentiary, and the act of 1873, ch. 57, makes all crimes punishable by confinement in the penitentiary, felonies, and so defines the term. C. & N., 316; Acts 1873, p. 87. We have no such legislation by congress. Section 5391 of the Revised Statutes is limited to offenses committed

in places ceded to the United States, and adopts the state law as to such offenses if not otherwise provided for; and, of course, in such cases, if the offense is a felony by state law, it becomes a felony by this section.

There is no uniformity in the legislation of congress as to the punishment of criminal offenses, and we often find statutory misdemeanors punished more severely than statutory felonies; and while some of the statutes prescribe hard labor as a part of the punishment, when necessarily the confinement must be in some prison where it can be so enforced, on the other hand, the simple imprisonment prescribed may become confinement with hard labor by selecting a prison where it is a part of the discipline; so that we often find prisoners convicted of the same offense, and sentenced to the same punishment, undergoing, in fact, different punishments. *Ex parte* Karstendick, 93 U. S., 396 (§§ 3068-71, *infra*). In this case it is held that it is not the intention of our statutes to limit confinement in the penitentiary to those offenses where hard labor is imposed. R. S., § 5539. We find it, therefore, impracticable to apply any such test as that prescribed by the state legislation above mentioned, as the legislation of congress now stands, to the determination of the meaning of the word "felony" as used in section 819 now under consideration.

But, aside from this, nothing is better settled than that we cannot look to the state laws, in the criminal jurisprudence of the United States, for the characteristic elements which go to make up an offense, and enter into it as a part of its legal *status*; nor to the common law; nor even to the character of the punishment. The federal courts take no cognizance of state statutes in criminal proceedings, and deduce no criminal jurisdiction from the common law, which has no force, directly or indirectly, to make an act an offense not made so by congress; though in all matters respecting the accusation and trial of offenders, not otherwise provided for, we are referred to the laws and usages of the state when the judicial system was organized. 1 Abb. Pr., 197; 2 Abb. Pr., 171; *United States v. Reid*, 12 How., 361 (§§ 2694-99, *infra*); *United States v. Lancaster*, 2 McL., 431 (§§ 2474-79, *infra*); *United States v. Peterson*, 1 Woodb. & M., 306, 309; *United States v. Shepherd*, 1 Hughes, 520, 522; *United States v. Taylor*, *id.*, 514, 517; *United States v. Maxwell*, 3 Dill., 275, 276 (§§ 3006-3009, *infra*); *United States v. Shepard*, 1 Abb., 431 (§§ 3195-99, *infra*); *United States v. Cross*, 1 MacArth., 149; *United States v. Block*, 4 Saw., 211 (§§ 3012-15, *infra*); *United States v. Ebert*, 1 Cent. L. J., 205; *United States v. Williams*, 1 Cliff., 5; *United States v. Barney*, 5 Blatch., 294; *United States v. Watkins*, 3 Cranch, C. C., 441, 451; *United States v. Hammond*, 2 Woods, 197 (§§ 1832-41, *supra*); *United States v. Magill*, 1 Wash., 463.

In those cases where the state laws have been adopted, as in section 5391 of the Revised Statutes, they stand as if the act of congress had defined the offenses in the very words of the state law; and in those cases where congress has been content to denounce the offense by its common law name, as in murder and rape, for example (R. S., §§ 5339, 5354), they stand as if congress had re-enacted the common law *totidem verbis*. And in such cases, unquestionably, if the crime be a felony at common law or by state statute, it is a felony under the act of congress; and if not punished capitally would fall within the designation of "any other felony," as used in this section 819, by force, not of the common law or state statute, but of the federal statute. Murder is a felony at common law, but it may be doubted if rape is, it having been made so by statute. Merton, 2; 1 Hale's P. C., 226. If this latter offense were not punished capitally, and we were confined, as in some

of the states, to the ancient common law, and not that existing at the time of the Revolution, it would become a very difficult matter to determine how it was to be ruled under this section 819. This is mentioned to illustrate the almost inextricable perplexity which arises from the use of this word "felony" in the present state of our law, in acts of congress, without some statutory definition of it.

It does not follow, however, because we can find no common law definition of this term which will give it and this statute operation according to that law, and are forbidden to adopt the definition found in the modern use of it in state statutes, that this clause of the section is nugatory. The authorities cited show that congress has the undoubted power to create felonies by legislation operating within the limitations of its jurisdiction over crimes, and that from time immemorial legislatures having general jurisdiction over criminal offenses have added felonies to the common law list. *United States v. Tynen*, 11 Wall., 88. Statutes create felonies either by declaring offenses to be felonies in express terms, or impliedly, as in the ancient statutes, by enacting that the defendant should have judgment of life and member where the word "felony" is omitted, or where the statute says an act under particular circumstances shall be deemed to have been feloniously committed. 1 Archb. Cr. Pr., 1, and note; 1 Russ. on Crimes, 43; and authorities above cited. Now, where the common law operates, this declaration, express or implied, entailed the consequences of forfeiture, and if the statute fixed no punishment there was superadded by the ancient law the penalty of death, and now, in England, transportation, and in our American states, confinement in the penitentiary. But it is manifest that by the jurisprudence of the United States, as long as section 5326 of the Revised Statutes and other prohibitions of forfeiture of estate and corruption of blood as a punishment for crime continue to be the law, and as long as congress adopts no general legislation punishing felonies as such, either capitally or otherwise, the declaration that an offense shall be a felony in an act of congress is merely *brutum fulmen*, except so far as it inclines the legislative mind to affix a more severe penalty for the commission of the offense. Notwithstanding this, however, it has been, until recent years, the constant habit of congress to declare offenses created by it either felonies or misdemeanors in express terms, or to leave them to be misdemeanors by making no declaration on the subject. There is no doubt that offenses are felonies when so declared to be, and the accused is entitled, in such cases, where not punished capitally, to ten challenges under this section 819, and this is about the only substantive effect such a declaration has, unless it be that it further gives the accused the right to be proceeded against only by indictment under the fifth amendment to the constitution; though it has been judicially declared that under our system a felony is not an infamous crime in the sense of that amendment. *United States v. Cross*, *supra*, and the other authorities above cited. It would seem, therefore, that it is rather to the advantage than the disadvantage of the offender to have congress declare his offense a felony. Be this as it may, the clause under consideration may operate, in other than capital cases, to give the defendant ten challenges in the following classes of cases: *First*, where the offense is declared by statute, expressly or impliedly, to be a felony; *second*, where congress does not define an offense, but simply punishes it by its common law name, and at common law it is a felony; *third*, where congress adopts a state law as to an offense, and under such law it is a felony.

§ 1924. *Under the Revised Statutes, counterfeiting coin is not a felony.*

It only remains to be determined whether the offense charged in this indictment comes within either of these categories. Making counterfeit coin was, by the ancient common law, treason, and subsequently a felony, while uttering or passing it was only a misdemeanor. *Fox v. Ohio*, 5 How., 410, 433 (Constr., §§ 496-500); *Tomlin's Dict.*, title "Coin;" 1 *Hale's P. C.*, 210, 224; *United States v. M'Carthy*, 4 Cranch, C. C., 304; *United States v. Shepherd*, 1 Hughes, 521. The act of 1790 (1 St., 115) declares counterfeiting the public securities a felony, and punished it with death. The act of 1825 reduced the punishment to hard labor not exceeding ten years. 4 St., 119. The act of 1806, the first to protect the coin, declared counterfeiting a felony punishable by imprisonment at hard labor. 2 St., 404. The act of 1825 declared counterfeiting the coin a felony punishable with imprisonment at hard labor not exceeding ten years. 4 St., 121. The act of 1873 declared counterfeiting treasury notes a felony, as did the acts of 1847 and 1861. 9 St., 120; 12 St., 123; 17 St., 434. Counterfeiting postage stamps was declared felony by the acts of 1851 and 1853. 9 St., 589; 10 St., 256. Counterfeiting three-cent pieces was, by the act of 1865, made a misdemeanor. 13 St., 518.

The Revised Statutes drop this classification, as does the act of 1877, and these offenses are no longer declared felonies. R. S., 5414, 5457, 5464; 19 St., 223. And this demonstrates that the legislative will no longer declares this offense a felony, and we think the felony feature is impliedly repealed. It is argued very earnestly, however, that the effect of this is only to leave it a felony as at common law. We have already shown that, under our system, there is no common law felony, unless congress merely defines a crime which is a felony at common law by its common law name. If the act said "counterfeiting" shall be punished as prescribed, it would be a felony; but it does not say so; it defines the offense for itself, and does not declare it a felony for the obvious reason that such a declaration would not change the character of the crime or the punishment, and would be wholly useless. Besides, it would be absurd to punish the misdemeanors of uttering and passing counterfeit coin with precisely the same punishment, all defined in the same section, and then say it was the intention of congress to give a defendant charged with making the counterfeit ten challenges, and another defendant who passed it only three, while both offenses are defined and punished by the same section, and with the same punishment. There is no substantial reason for such a distinction. One crime is just as heinous as the other in the sense of this statute, and they are upon an equal footing.

It is ruled that the defendant can have but three challenges.

UNITED STATES *v.* SHACKLEFORD.

(18 Howard, 588-591. 1855.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This case comes up on a certificate of a division of opinion between the judges of the circuit court of the United States for the district of Kentucky.

The prisoner was indicted for a misdemeanor in wrongfully deserting the mails of the United States, before delivering them to the proper officer or agent, he being a mail carrier at the time, and, as such, having the mails in charge. Sec. 21 of Act of Cong., 3d of March, 1825; 4 Stats. at Large, 107. A

question arose, in impaneling the jury, whether the prisoner was entitled to a peremptory challenge of one or more jurors, upon which the judges were divided in opinion.

§ 1925. *Juries in United States courts to be formed according to state laws.*

The act of congress passed 20th July, 1840 (5 Stats. at Large, 394), provides that jurors to serve in the courts of the United States, in each state, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such state now have and are entitled to, and shall hereafter, from time to time, have and be entitled to; and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practiced, and hereafter to be practiced therein, so far as such mode may be practicable by the courts of the United States, or the officers thereof. "And, for this purpose, the said courts shall have power to make all necessary rules and regulations for conforming the designation, and impaneling of juries, in substance to the laws and usages now in force in such state; and, further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects, which may be hereafter adopted by the legislatures of the respective states for the state courts." The court is of opinion that the power conferred upon the federal courts to adopt "rules and regulations for conforming the designation and impaneling of juries to the laws and usages in force at the time in the state" enables them to adopt the laws and usages of the state in respect to the challenges of jurors, whether peremptory or for cause, and in cases both civil and criminal, with the exception, in criminal cases, of treason and other crimes, of which the punishment is declared to be death.

§ 1926. *Challenging jurors in United States courts.*

The section 30 of the crimes act of 1790 (1 Stats. at Large, 119) provides that if persons indicted for treason against the United States shall challenge peremptorily above the number of thirty-five of the jury, or if persons indicted for any other of the offenses before set forth, for which the punishment is declared to be death, shall challenge peremptorily above the number of twenty persons of the jury, the court in any of these cases shall, notwithstanding, proceed to the trial of the persons so challenging, etc. This act of congress having expressly recognized the right of peremptory challenge in the one case of the number of thirty-five jurors, and in the other of twenty, they should be regarded as excepted out of the power conferred upon the courts to regulate the subject by rule or order under the aforesaid act of 1840.

The right of challenge in the cases specified in the act of 1790, in respect to the number of jurors, is derived from the common law, which allowed thirty-five in cases of treason and twenty in cases of felony. 4 Bl. Com., 354, 355; 12 Wheat., 483 (§§ 2691-93, *infra*). That law also gave to the king a qualified right of challenge in these cases, which had the effect to set aside the juror till the panel was gone through with, without assigning cause, and if there was not a full jury without the person so challenged, then the cause must be assigned or the juror would be sworn.

The court is of opinion that the right of challenge by the prisoner, recognized by the act of 1790, does not necessarily draw along with it this qualified right, existing at common law, by the government; and that, unless the laws or usages of the state, adopted by rule under the act of 1840, allow it on behalf of the prosecution, it should be rejected, conforming in this respect the practice to the state law. It does not appear, in the case before us, whether or

not the court below had adopted the state law under the act of 1840, as it existed at or previous to the proceedings certified, and hence we are not enabled to express any opinion upon the particular question certified. But the opinion expressed upon the general question will enable the court below to dispose of the case without any amendment of the record, or further hearing of the case. The cause is, therefore, remanded to the court below to proceed according to the foregoing opinion.

STETTINIUS v. UNITED STATES.

(Circuit Court for the District of Columbia: 5 Cranch, C. C., 573-602. 1839.)

Opinion by CRANCH, J.

§ 1927. *The extent of the right of the jury to consider questions of law in the exercise of their functions.*

7. The seventh error suggested is stated in the traverser's first bill of exceptions upon the trial of the issue upon the indictment No. 107, and consists in the judge's overruling the objection of the traverser's counsel, to the judge's giving any instruction to the jury as to the law; the traverser's counsel having declined arguing the law to the court, on the ground that they had a right to argue to the jury both on the law and the evidence; to the overruling of which objection, and to the instruction which the judge, at the prayer of the United States attorney, gave to the jury, which was similar to that given at his prayer upon the trial of the issue on the indictment No. 106, the traverser's counsel excepted. As to the question whether the instruction thus given to the jury, in point of law, was correct, we have already said, in considering the instruction given upon the trial of the issue on the other indictment, that the offense was not committed unless the note was paper currency, or paper medium evidently intended for common circulation; a fact not found by the jury nor stated in the prayer for the instruction; and therefore we are of opinion that the judge erred in giving that instruction.

The objection to the judge's giving any instruction to the jury as to the law, when the defendant's counsel declines arguing the law to the court, and insists upon arguing it to the jury, seems to be founded upon the idea that the jurors are the sole judges of the law and are under no obligation to respect the decisions of the judge upon the questions of law arising in a criminal cause. The right of the jury to find a general verdict upon the general issue in a criminal cause is not disputed nor doubted; and as guilt consists of law and fact, and cannot be ascertained but by coupling them together, and comparing them, and applying the facts to the law, they must, in finding such a general verdict, decide the law thus coupled with the facts in that cause. But when the jurors thus took upon themselves to decide the law by a general verdict of not guilty, they subjected themselves, under the old English statutes, to very severe punishment, upon a writ of attain, if the grand inquest should convict them of finding a false verdict. To avoid this risk, it was formerly common for the jurors to render special verdicts, stating all the facts of the case, and referring the question of law to the court; but the practice of setting aside verdicts, upon motion, and granting new trials, has so superseded the use of attain, that there are few instances of an attain in the books later than the sixteenth century. 3 Bl. Com., 406. Yet as late as Sir Matthew Hale's time, according to his opinion, the king might have attain upon a verdict of acquittal, although

the prisoner, if convicted, could not; because his guilt is confirmed by two inquests — the grand and the petit jury.

The right and the power of the jury to decide the law and the fact together, by a general verdict upon the general issue, is not greater in criminal causes than in civil. The effect only is different. In civil causes, the court will set aside the verdict, if against its opinion of the law, whether the verdict is against the defendant or the plaintiff; but in criminal causes, if the verdict be in favor of the defendant, inasmuch as the king might have a writ of attaind and reverse the judgment; and as the prisoner is not to be put twice in jeopardy, nor to be twice vexed for the same offense, and as he could not have attaind if the verdict should be against him, the courts have uniformly, for more than two centuries, refused to award a new trial when the prisoner has been acquitted upon a general verdict of not guilty. This conclusive effect of a verdict of acquittal does not arise from the right of the jury to decide the law definitively in the case, because if the verdict of the jury had been against the defendant, contrary to law, or to the court's exposition of the law, the court unquestionably had the right and the power to set aside the verdict as being contrary to law, and to award a new trial. This could not be the case if the jury had the exclusive right to decide the law. If they had, the verdict would be as conclusive in the one case as in the other.

It is admitted by all who have advocated the right of the jury to decide the law in criminal cases that that right extends only to the finding of a general verdict upon the general issue. When the issue is on some collateral point it involves no question of law, but is confined exclusively to facts. When the verdict was upon such a collateral issue there was no attaind. That process lay only in cases where the jury undertook to decide the law by a general verdict on the general issue. Whenever, by the pleadings, the law was separated from the fact, so that each could be seen and considered by itself, no pretense that the jury had a right to decide the pure unmixed question of law has ever been set up by the wildest advocate of the rights of juries.

In the trial of the impeachment of Judge Chase, Mr. Randolph, one of the managers of the prosecution, in speaking of this right of juries to decide the law, calls it "their undeniable right of deciding upon the law as well as the fact necessarily involved in a general verdict." He said, also, "there is, in my mind, a material difference between a naked definition of law, the application of which is left to the jury, and the application by the court of such definition to the particular case upon which the jury are called upon to find a general verdict. Surely, there is a wide and evident distinction between an abstract opinion upon a point of law and an opinion applied to the facts admitted by the party accused, or proven against him." Speaking of the prior decisions of the same points of law in some former cases by other judges, Mr. Randolph said: "They exercised the acknowledged privilege of the bench in giving an opinion to the jury on the question of law after it had been fully argued by counsel on both sides." Again, he said: "I do not deny the right of the court to explain their sense of the law to the jury, after counsel have been heard, but I do deny that the jury are bound by such exposition."

Mr. Early, another of the managers of that impeachment, said: "It is no part of my intention to deny the right of judges to expound the law in charging juries; but it may be safely affirmed that such right is the most delicate they possess, and the exercise of which is to be guarded by the utmost caution and humanity." Mr. Edward Tilghman, who was examined as a witness

in the trial of that impeachment, testified that, in Pennsylvania, the judges, "in their charge to the jury, state the law and the evidence, and apply the law to the evidence. The court generally hear the counsel at large on the law; and they are permitted to address the jury on the law and the fact; after which the counsel for the state concludes. The court then states the evidence to the jury, and their opinion of the law, but leaves the decision of both law and fact to the jury."

In Crosswell's Case, 3 Johns. Cas., 346, the counsel for the defendant admitted it "to be the duty of the court to direct the jury as to the law; and it is advisable for the jury, in most cases, to receive the law from the court, and in all cases they ought to pay respectful attention to the opinion of the court; but it is also their duty to exercise their judgments upon the law as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound in such cases, by the superior obligations of conscience, to follow their own convictions." The same counsel said further that, "in civil cases, the power of the court to decide the law is absolute and conclusive, and may be rightfully so exerted. That in criminal cases, the law and the fact being always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, are intrusted with the power of deciding both law and fact." Judge Chase, in his answer to one of the articles of impeachment, says: "He well knows that it is the right of juries in criminal cases to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law; and that hence results the power of juries to decide on the law as well as on the facts in criminal cases." "But he also knows that, in the exercise of this power, it is the duty of the jury to govern themselves by the laws of the land, over which they have no dispensing power; and their right to expect and receive from the court all the assistance which it can give for rightly understanding the law. To withhold this assistance in any manner whatever; to forbear to give it in that way which may be most effectual for preserving the jury from error and mistake, would be an abandonment, or a forgetfulness of duty, which no judge could justify to his conscience or the laws." And in the opinion which the court had prepared in the case of John Fries, they said: "It is the duty of the court, in all criminal cases, to state to the jury their opinion of the law arising on the facts; but the jury are to decide in this, and in all criminal cases, both the law and the facts, on their consideration of the whole case."

Mr. Hargrave, in his note 7 to Co. Litt., 155b, has given a very able opinion upon this question of the right of the jury to decide the law in criminal cases. Lord Coke, in folio 155b, had said: "The most usual trial of matters of fact is by twelve such men; for *ad quæstionem facti non respondent iudices*; and matters in law the judges ought to decide and discuss; for *ad quæstionem juris non respondent juratores*." In his note to this passage, Mr. Hargrave says: "This *decantatum* (as Lord Chief Justice Vaughan calls it, on account of its frequency in the books), about the respective provinces of judge and jury, hath, since Lord Coke's time, become the subject of very heated controversy, especially in prosecutions for state libels; some aiming to render juries wholly dependent on the judge for matters of law, and others contending for nearly a complete and unqualified independence."

After stating several of the old cases, he says: "In respect to my own ideas on this subject, they are at present to this effect: On the one hand, as the jury may as often as they think fit find a general verdict, I therefore think it

unquestionable that they may so far decide upon the law as well as the fact; such a verdict necessarily involving both. In this I have the authority of Littleton himself, who hereafter writes that, if the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally (*ante*, § 368, and *post*, folio 228)." "But on the other hand, I think it seems clear that questions of law generally and more properly belong to the judges; and that, exclusively of the fitness of having the law explained by those who are trained to the knowledge of it by long study and practice, this appears from various considerations.

"1. If the parties litigating agree in their facts, the cause can never go to a jury; but is tried on a demurrer, it being a rule, and I believe without exception, that issues in law are determined by the judges, and only issues of fact are tried by a jury. *Ante*, 71b.

"2. Even when an issue in fact is joined and comes before a jury for trial, either party, by demurring to the evidence, which includes an admission of the fact to which the evidence applies, may so far draw the cause from the cognizance of the jury, for in that case the law is reserved for the decision of the court from which the issue of fact comes; and the jury is either discharged, or at the utmost only ascertains the damages. *Ante*, 72a; Doug., 127, 213; Bul. N. P., 2d ed., 313.

"3. The jury is supposed to be so inadequate in finding out the law, that it is incumbent upon the judge who presides at the trial to inform them what the law is; and as a check to the judge, in the discharge of his duty, either party may, under the statute of Westminster 2, ch. 31, make his exception in writing to the judge's direction, and enforce its being made part of the record, so as afterwards to found error upon it. See *post*, 2 Inst., 426; Trials *per pais*, 8th ed., 222, 466; case of *Fabrigas v. Mostyn*, in 11 St. Tr.; case of *Money v. Leach*, 3 Burr., 1742; Bul. N. P., 2d ed., 315.

"4. The jury is ever at liberty to give a special verdict, the nature of which is to find the facts at large, and leave the conclusion of law to the judges of the court from which the issue comes. Formerly, indeed, it was doubted whether in certain cases in which the issue was of a very limited and restrained kind, the jury was not bound to find a general verdict. But the contrary was settled in *Downman's Case*, 9 Coke, 11b; and the rule now holds both in civil and criminal cases, without exception. See *post*, 227b; Staundf. P. C., 165a; *Major Oneby's Case*, 2 Ld. Raym., 1494.

"5. While attaints, which still subsist at law, were in use, it was hazardous in a jury to find a general verdict, where the case was doubtful, and they were apprised of it by the judges, because, if they mistook the law, they were in danger of an attaint. *Post*, 228a; Hob., 227; Vaughan, 144; 2 Hale, H. P. C., 310; Gilb. Com. P. C., 2d ed., 128.

"6. If the jury find the facts specially, and add their conclusion as to the law, it is not binding on the judges, but they have a right to control the verdict and declare the law as they conceive it to be; at least, this is the language of some most respectable authorities. Staundf. P. C., 165a; Plowden, 114a, b; 4 Co., 42b; 1 Hale, H. P. C., 471, 476, 477; 2 Hale, H. P. C., 302.

"7. The courts have long exercised the power of granting new trials in civil cases where the jury find against that which the judge trying the cause, or the court at large, holds to be law; or where the jury find a general verdict, and the court conceives that, on account of difficulty of law, there ought to be a special one. *King v. Poole*, Cases B. R. temp. Hardw., 26. Though, too, in

criminal cases the judges do not claim such a discretion against persons acquitted, the reason, I presume, is, in respect of the rule, that *Nemo bis punitur, aut vexatur pro eodem delicto*; or the hardship which would arise from allowing a person to be twice put in jeopardy for one offense; and if this be so, it only shows that, on that account, an exception is made to a general rule. 4 Bl. Com., 8th ed., 361; 2 Ld. Raym., 1585; 2 Str., 899; 4 Co., 40a, and Wingate's Maxims, 695.

"Upon the whole, as my mind is affected with this interesting subject, the result is, that the immediate and direct right of deciding upon questions of law is intrusted to the judges; that in a jury it is only incidental; that, in the exercise of this incidental right, the latter are not only placed under the superintendence of the former, but are, in some degree, controllable by them; and therefore that in all points of law, arising on a trial, the jury ought to show the most respectful deference to the advice and recommendation of judges.

"In favor of this conclusion, the conduct of juries bears ample testimony; for to their honor be it remembered, that the examples of their resisting the advice of a judge, in points of law, are rare, except where they have been provoked into such an opposition by the grossness of his own misconduct, or betrayed into an unjust suspicion of his integrity by the misrepresentation and ill-practice of others.

"In civil cases, particularly, where the title of real property is in question, juries almost universally find a special verdict as often as the judge recommends their so doing; and though in criminal cases special verdicts are not frequent, it is not from any averseness to them in juries, but from the nature of criminal causes, which depend more upon the evidence of facts than any difficulty of law.

"Nor is it any small merit in this arrangement, that, in consequence of it, every person accused of a crime is enabled, by the general plea of not guilty, to have the benefit of a trial, in which the judge and the jury are a check upon each other; and that this benefit may always be enjoyed, except in such small offenses as are left to the summary jurisdiction of a justice of the peace; which exception, from the necessity of the times, is continually increasing; but which, however, cannot be too cautiously extended to new objects.

"Thus considered, the distinction between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two long continue to flourish, unspoiled, either by the proud encroachment of ill-designing judges, or the wild presumption of licentious juries."

The calm manner in which the subject is considered in the above opinion adds as much to its weight as it derives from the high character of its author as a jurist.

Blackstone, in his Commentary (vol. 4, p. 361), speaking of the right of juries, says: "They have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths; and if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attainat at the suit of the king, but not at the suit of the prisoner. But the practice, heretofore in use, of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional and illegal."

And Lord C. J. Hale (II. H. P. C., 313), in speaking of the fine imposed upon the jurors, in *Bushel's Case*, for not finding William Penn and others guilty, according to the direction of the court, says: "But it was agreed by all the judges of England (one only dissenting) that this fine was not legally set upon the jury, for they are judges of matters of fact; and although it was inserted in the fine that it was *contra directionem curiæ in materia legis*, this mended not the matter, for it was impossible any matter of law could come in question till the matter of fact were settled and stated, and agreed by the jury; and of such matter of fact they were the only competent judges. And although the witnesses might perchance swear the fact to the satisfaction of the court, yet the jury are judges as well of the credibility of the witnesses as of the truth of the fact, for possibly they might know somewhat, of their own knowledge, that what was sworn was untrue; and possibly they might know the witnesses to be such as they could not believe; and it is the conscience of the jury that must pronounce the prisoner guilty or not guilty. And to say the truth, it were the most unhappy case that could be, to the judge, if he, at his peril, must take upon him the guilt or innocence of the prisoner; and if the judge's opinion must rule the matter of fact, the trial by jury would be useless."

Blackstone, in citing this passage from Hale, has materially altered the language of the last clause of the last sentence. He says: "For as Sir Matthew Hale well observes, it would be a most unhappy case for the judge himself if the prisoner's fate depended upon his directions. Unhappy also for the prisoner; for if the judge's opinion must rule the verdict, the trial by jury would be useless." Hale says, "rule the matter of fact." Blackstone says, "rule the verdict." Hale speaks of the judge's controlling the jury as to the fact only. Blackstone makes him speak of the judge's controlling the jury generally as to their verdict, which may be in matter of law or matter of fact. This makes so great a difference in the case that Hale's language as cited by Blackstone has been used in support of the supposed exclusive right of the jury to decide the law in criminal cases (1 *Erskine*, 160); whereas the language of Lord Hale, in his own book, affords no such support, but evidently tends to support the contrary doctrine.

To the authorities already cited we might add that of Mr. Dane, one of the most able and learned jurists of New England, who has given to the profession a most valuable abridgment and digest of American law in eight volumes, and founded a professorship of law in the Harvard University, and who from these circumstances may well be called the American Viner; but we shall only refer to his able argument in his seventh volume, ch. 222, arts. 18 and 19 p. 382. Upon this point we will cite only one more authority. It is that of Mr. Justice Story of the supreme court of the United States, in his opinion in the case of *The United States v. Battiste*, in the circuit court of the United States for the Massachusetts district, at October term, 1835. 2 Sumn., 243. Mr. Justice Story, in summing up to the jury, said:

"Before I proceed to the merits of this case, I wish to say a few words upon a point suggested by the argument of the learned counsel of the prisoner, upon which I have had a decided opinion during my whole professional life; it is, that in criminal cases the jury are the judges of the law as well as of the fact. My opinion is that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue. In each of these cases their verdict, when general, is necessarily compounded of law and of fact, and includes both.

In each they must necessarily determine the law as well as the fact. In each they have the physical power to disregard the law as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary I hold it the most sacred, constitutional right of every party accused of a crime, that the jury should respond as to the facts and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law as laid down by the court. This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it; but in case of error there would be no remedy or redress by the injured party; for the court would have no right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party by a motion for a new trial or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land—the fixed law of the land,—and not by the law as a jury may understand it, or choose, from wantonness or by ignorance or accidental mistake, to interpret it. If I thought that the jury were the proper judges of the law in criminal cases I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege, and truest shield against oppression and wrong, I feel it my duty to state my views fully and openly on the present occasion.”

§ 1928. *The power of judges in questions of law.*

From these authorities we think we may draw the following conclusions:

1. That the judges are to decide every question of law, when the facts upon which the question arises are found or stated; and in all cases where, by the pleadings, or the proceedings, the law and the facts are separated. It has never been pretended that the jury are to decide a pure question of law unmingled with the facts. The law and facts are separated by a demurrer to the evidence; by a special verdict; by a special plea, and by the hypothetical statement of facts, when, in the trial of a cause before the jury, the court is moved by the counsel on either side to instruct the jury as to the law arising from such supposed facts, if they should be found by the jury.

This latter proceeding is in the nature of an anticipated special verdict, and, as far as it goes, separates the law and the facts as completely as could be done by a special verdict actually finding the same facts. This is a proceeding which either party has a right to adopt, if, in the opinion of the court, sufficient evidence has been given in the cause to justify the party in assuming the legal possibility that the jury may find the facts to be as he has stated them in his motion for the instruction. This statement and motion to direct the jury upon the point of law, withdraw it from the jury and submit it to the judges, as in a special verdict; the only difference is that in the latter case the law is decided by the court upon an actual finding, and in the former upon an assumed or supposed finding; and the court is as much bound to decide the question of law upon such a motion, as upon a demurrer to evidence, or a special verdict.

This proceeding is applicable to criminal cases as to civil, and shows that the court is the proper and exclusive tribunal to decide the law in both classes of cases whenever it can be decided without deciding the fact at the same time.

§ 1929. *The power to find a special verdict does not imply a right to decide the law.*

2. That the power of the jury to find a general verdict upon the general issue in a criminal case does not imply a right to decide the law of the case. The power is the same in a civil case, and yet it has never been supposed that the power of the jury, in a civil case, to render a general verdict on the general issue, was a right, or implied a right, to decide the law of the case. The right and the power of the jury, whatever they may be, as to deciding the law of the case, are exactly alike in both classes of cases; in both, the right and the power of the court are the same to set aside the verdict, if against the defendant, on the ground that it was a verdict against law; thereby clearly showing that the jury has no right to decide the law in either case; but that the court has. The most that can be said is, that the jury has the power of rendering a general verdict upon the general issue, either according to law, or against law; but no one can suppose that they have a right to render a verdict against law. If in a criminal case they render a general verdict against the defendant, upon the general issue, against law, the court will at once set it aside, because it is against law; but if the verdict be for the defendant, the court, *in favorem vitæ*, will not set it aside, although against law; and this practice, or maxim, is probably grounded on the reasons before mentioned, and not upon the admission that the jury is the exclusive judge of the law as well as of the fact in criminal cases. If the jury, as some have contended, "are the sole judges of the law in criminal cases," the prisoner, however erroneously the law may be laid down by the prosecutor to the jury, would have no more right to ask the court to expound the law to them than to ask the court to ascertain the facts; and, if the verdict should be against him, would have no right to ask the court to grant a new trial on the ground that the jury had either mistaken or disregarded the law. If juries are the exclusive judges of the law in criminal cases, there can be no appeal, no writ of error, no new trial even if the prisoner be convicted.

The act establishing the criminal court of this District provides for a writ of error to bring the cause into this court. If the jury is to decide all the law in criminal cases, their decisions of the law can never be reversed; for there are no means of ascertaining their decision upon a question of law, so as to bring it into review before this court; but when the judge decides the law, a bill of exceptions may be taken, and his judgment, if against the defendant, may be either affirmed or reversed upon a writ of error. In this very case the defendant's counsel, by asking the court to instruct the jury as to the law, had admitted the right of the judge to decide the law.

Again, the same act establishing the criminal court provides that that court may in any case, with the consent of the person accused, adjourn any question of law to this court, where it may be argued and decided. It is the court and not the jury who adjourn the question of law. It is to the court, therefore, that the question of law is to be made. These provisions of the act establishing the criminal court are totally inconsistent with the doctrine that, in criminal cases, the jury are the sole judges of the law. They show that, when a question of law arises, either party may require the judge to decide it or to adjourn it to this court to be decided here.

§ 1930. *The duty of the court to instruct the jury upon the law of the whole case.*

3. If, then, it is the province of the judge to decide conclusively every question of law arising in the case, which may be judicially presented to him unmixed with the facts; and if every question of law arising in the trial of a cause may be thus separated and presented to the judge, either by a demurrer to the evidence or a special verdict, or by motion to the court to instruct the jury as to the law arising upon the hypothetical statement of such facts as the party supposes the jury may find from the evidence, it follows that it is not only the right but the duty of the judge to decide every question which may be thus presented to him; and upon the motion of either party to give to the jury, during the trial, such instruction and opinion upon the law arising upon such hypothetical statement of facts as such supposed facts would justify him in giving, if found in a special verdict. But the right of the judge to instruct the jury as to the law of the case is not confined to the giving of such instruction as he may be asked to give. After the argument of counsel has been closed on both sides he may, if he will, instruct the jury as to the law arising upon the whole evidence; leaving the question of fact entirely with the jury. This is the practice in the courts of England, and in those of many of the states of this Union. Again: If it is the right and duty of the judge thus to decide all questions of law which can be separated from the facts, the argument of counsel upon such questions should naturally and properly be addressed to the judge.

§ 1931. *The constitutional right to have counsel does not imply that counsel should argue the law to the jury.*

But it has been contended that, in a criminal case, upon the trial of the general issue, the counsel for the defendant has a right to argue the whole law of the case to the jury; and this is said to be a constitutional right. The sixth article of the amendments to the constitution of the United States declares "That, in all criminal prosecutions, the accused shall enjoy the right" "to have the assistance of counsel for his defense." This is the whole constitutional provision upon the subject. This amendment was, no doubt, adopted because, in England, it was a settled rule of the common law, that, no counsel should be allowed a prisoner upon his trial upon the general issue, in any capital crime, unless some point of law should arise, proper to be debated. But the constitution does not give the counsel a right to address the jury upon the questions of law which may arise in the trial of the general issue in a criminal case. It only gives him that assistance of counsel which was denied by the common law.

The claim is, no doubt, founded upon the idea that in criminal cases the jury are the sole judges of the law as well as of the facts, because, upon the general issue, they have the power, if they will, to find a conclusive verdict in favor of the defendant, contrary to law; and the judges are forbidden, by the humane maxim of the law, to set it aside. But in finding a verdict against the prisoner, upon the same issue, the jury are not the sole judges of the law; for if such verdict is contrary to law, in the opinion of the judges, they will set it aside and grant a new trial; so that the jury, at the same time, are, and are not, upon the trial of the same issue, in the same cause, the sole judges of the law and the facts; that is, if they are in any manner judges of the law, they are so only when they find a verdict for the defendant on the general issue, but they are not so when they find a verdict against him. It is true that the court cannot control the jury in giving their verdict, nor compel them to find...

a special verdict. The only remedy for a verdict contrary to law is a new trial; for no appeal or writ of error lies from the verdict of a jury; but for a general verdict of not guilty, upon the general issue, in a criminal case, there is no remedy; for the process of attaint is now obsolete in England, and, we believe, never has been resorted to in this country; certainly not in Maryland, whose common law remains the common law of this country, and who never adopted the English statutes on that subject. The only control exercised by the courts over juries is to keep them together until they find such a verdict as will enable the court to render a judgment in the cause. But either party has a right to require the opinion of the court upon every question of law arising in the trial of the cause, especially where a writ of error will lie to another tribunal. If the judge should expound the law correctly and the jury should find a general verdict contrary to such exposition, a writ of error would be of no avail. If the defendant, upon the trial, does not choose to ask the judge for an instruction to the jury upon the law of the case, and refuses to argue the question of law to the court upon an instruction asked by the attorney of the United States, but insists upon arguing the whole law of the case to the jury, and the verdict should be against him, and contrary to the law as he understands it, upon what ground can he ask the court for a new trial? Will he then contend that the jury had no right to decide the law? If so, he would be condemned out of his own mouth. He must say that the jury is not the proper tribunal to expound the law. Is it right, therefore, in the court to suffer the defendant's counsel to argue the law to the jury, who, confessedly, have no right to decide the law against him? In theory and in principle we should say no. The good old maxim is still in force: "*Ad quæstionem facti non respondent iudices; ad quæstionem juris non respondent juratores.*" But, in practice, it is allowed in the courts of England, and of some of these states; and it is upon this ground, namely, that as the jury may find a conclusive general verdict in favor of the defendant, upon the general issue, which involves both law and fact, they have a right to hear from the defendant, or his counsel, the defendant's construction of the law, and his reasons for such construction. Before the jury can apply the facts to the law, which it is their peculiar province to do, they must know what the law is. They may ask the opinion of the court, but they are not bound to do so. They have the power to take upon themselves the responsibility of judging for themselves as to the meaning of the law; or they may, if they will, but not of right, find a verdict against law; and such a verdict against law, if in favor of the defendant, will be as conclusive and effectual as if it were according to law. But the jury have no more right to find a general verdict against law in a criminal case than in a civil.

According to the general practice of the courts in this country, the defendant seems to have a right to be heard before the jury, upon his construction of the law, if the court has not already, after hearing the arguments of the defendant's counsel, instructed the jury upon the law in the same case. But there are few, if any, courts of criminal jurisdiction, who will suffer counsel to appeal from the judge to the jury, upon a question of law which the court has decided against him after he has orally joined issue upon the question, and argued it before the court. This would be an indignity to which no court ought to submit. If the court has erred the defendant has a right to his writ of error, or to a motion for a new trial. But when the counsel for the defendant declines to join in the issue of law to the court, tendered to him by the

counsel for the prosecution, by his motion to the court to instruct the jury, this court has permitted the defendant's counsel to argue the question of law to the jury upon the general issue. This was done in the case of *The United States v. Fenwick*, indicted at March term, 1836, for a riot.

The court, in that case, after argument by the counsel of some of the defendants, had decided a question of law against them. The counsel for some of the other defendants offered to argue the same question of law to the jury, in opposition to the instruction which the court had given. The court said that after a point of law had been argued by the counsel of the parties, and the court had, at the request of either party, instructed the jury upon the point so argued, they could not permit the question of law to be re-argued to the jury, in opposition to the instruction given by the court. But, it appearing in that case that the counsel who had argued the question of law to the court were not counsel for all the defendants, the counsel for other defendants, who had not joined in the argument to the court, and who said they had objected to the court's giving any instruction to the jury on that point until they had argued it to the jury (although the court had not understood them as so objecting), were permitted to argue it to the jury,—Morsell, J., observing "that the court never denied the power of the jury to decide the law as well as the fact, in criminal cases, by finding a general verdict; but when either party has asked an instruction, and the other party has proceeded to argue the question before the court, and the court has given an instruction upon that question, the counsel has no right to argue the same question of law before the jury. If the party does not join in the argument to the court, but insists upon arguing it to the jury, the court will require him to proceed with his argument, and will, after the argument, give or refuse such instruction, as the court shall think proper." The counsel for those defendants then proceeded to argue the law to the jury upon the whole case; the counsel for the United States replied, and concluded by requesting the court to instruct the jury upon *the whole law of the case*, which the court did in their charge to the jury.

In the case of *The United States v. Columbus*, at March term, 1837, after the court had given an instruction to the jury upon a question of law, the counsel for the defendant being about to argue to the jury against the instruction then just given, was stopped by the court, and informed that he could not be permitted to argue the point of law to the jury, against the instruction which the court had given them. The counsel contended that as he had not asked the opinion of the court upon that point he was not precluded from arguing it to the jury; that in criminal cases the jury are judges of the law as well as of the fact, and therefore the law ought to be argued to them. The court observed, "that this court had always refused to permit counsel to argue the question of law after it had been decided by the court in the cause. That the jury has a right to find a general verdict, which includes the question of law as well as of fact; but the jury has no right to decide the question of law disconnected from the fact; that this point had been decided early in the existence of this court, upon full argument, and that such had been the uniform decision and practice of the court from its commencement more than thirty years ago." See the cases of *The Commonwealth of Virginia v. Zimmerman*, in *Alexandria*, at January term, 1802, MS., and *Cotton's Case*, at the same term.

4thly. That when the court, after hearing the arguments of the parties, whether addressed to the court or to the jury, has instructed the jury upon the point of law thus argued, the jury ought to respect such instruction, and not

lightly substitute their own often crude expositions, or the sometimes wild or interested suggestions of counsel, for the deliberate, calm and impartial opinion of judges, who ought to be, and generally are, selected for their knowledge of the law and their judicial integrity. We say, in the language of Mr. Justice Story, already cited, "It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law as laid down by the court. This is the right of every citizen, and it is his only protection;" and we say, also, in the language of Mr. Justice Baldwin, of the supreme court of the United States, in the case of *The United States v. Wilson*, 1 Bald., 108: "Their judgment is final, *not because they settle the law*, but because they either think it *not applicable*, or *do not choose to apply it to the case*."

No person has more fully admitted, or rather insisted upon, the right and the duty of the judge to instruct the jury in criminal causes, upon trial of the general issue, than Mr. Erskine, the great advocate of the rights of juries; and we refer to his printed speeches, vol. 1, pp. 113, 114, 163, etc., and his whole argument upon the motion for a new trial in the case of *The Dean of St. Asaph*, indicted for a libel. The act of parliament (32 Geo. 3, c. 60) respecting the trial of prosecutions for libels merely places such prosecutions on the same ground as other criminal trials, by authorizing the jury to find a general verdict on the general issue; but it expressly requires the judge who tries the cause to give *his opinion or directions to the jury on the matter in issue*," "in like manner as in all other criminal cases." Lord Mansfield, in delivering the opinion of the court of king's bench, in the case of *The Dean of St. Asaph*, 1 Ersk., 211, said: "Whether the fact alleged, supposing it to be true, be a legal excuse, is a question of law; whether the allegation be true, is a question of fact; and according to this distinction the judge ought to direct, and the jury ought to follow the direction, though by means of a general verdict they are intrusted with a power of blending law and fact and following the prejudices of their affections or passions." And in page 217 he says: "The fundamental definition of trial by jury depends upon a universal maxim that is without exception: *ad quæstionem juris non respondent juratores — ad quæstionem facti, non respondent judices*. Where a question can be severed by the form of pleading, the distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the court."

Where, by the form of pleading, the two questions are blended together, and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the jury. The constitution trusts that, under the direction of a judge, they will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law. They are not sworn to decide the law; they are not required to decide the law. If it appears upon the record, they ought to leave it there, or they may find the facts subject to the opinion of the court upon the law. But further, upon the reason of the thing, and the eternal principles of justice, the jury ought not to assume the jurisdiction of the law. As I said before, they do not know, and are not presumed to know anything of the matter; they do not understand the language in which it is conceived, or the meaning of the terms. They have no rule to go by but their affections and wishes. It is said that if a man gives a right sentence upon hearing one side only, he is a wicked judge, because he is right by chance only, and has neglected to take the proper method to be informed; so the jury who usurp the judicature of the law, though they happen to be right, are themselves wrong, because they are right by chance only, and have not taken the

constitutional way of deciding the question. "It is the duty of the judge in all cases of general justice to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences."

§ 1932. **Selecting and impaneling.**—By the act of congress of July 20, 1840, relating to the selection and impaneling of juries in the courts of the United States, the courts, from necessity, were to exercise a discretion as to the practicability of designating and impaneling juries according to the mode prescribed for selecting juries of the highest courts of law in the state. They have the power and the discretion to change the mode from time to time. The court may assimilate the mode of designating and impaneling grand juries to that practiced in the inferior courts of the state, if that exercised in the highest court of the state is not commendable. *United States v. Wilson*,* 6 McL., 604.

§ 1933. The act of congress relating to the selection of jurors does not adopt the state laws but only requires conformity to them in certain respects, and gives courts power to make rules for the attainment of such conformity. The act does not require a minute and slavish adherence to the details of the state practice, or that the federal courts shall employ any officers or agencies except their own, or those under their control. So a jury list of a federal court is not required to be taken from lists made by state authorities. *United States v. Collins*,* 1 Woods, 499.

§ 1934. Where the laws of a state require that the selection of jurors be made from the tax lists, such requirement is not binding upon a federal court. The obligation upon the officers summoning such jury is that they shall summon men having the same qualifications as those summoned by the state officers. *Ibid*.

§ 1935. The act of June 30, 1879, in regard to the manner in which jurors shall be selected, providing "that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box," etc., does not repeal section 804 of the Revised Statutes, declaring that "when from challenges or otherwise there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the by-standers sufficient to complete the panel." Calling from the by-standers is not summoning within the meaning of the act first recited. *United States v. Rose*,* 6 Fed. R., 136.

§ 1936. The accused is entitled to a jury selected according to state laws, as nearly as practicable. *United States v. Woodruff*,* 4 McL., 105.

§ 1937. Where a juror, whose name was drawn from the jury box in due order of lot, to try the defendant, left the court without leave, and objection was made to the impaneling of the jury without such juror, which was overruled and the jury selected without him, it was held, on motion in arrest and for a new trial, that no error had been committed. *United States v. Byrne*,* 19 Blatch., 259.

§ 1938. The act of congress of September 24, 1789, in referring to the laws of the states in relation to juries, applies only to the mode of selecting them, and not to the number to be selected. As to the former the laws of the states must be followed; as to the latter the courts are governed by the common law. *United States v. Dow*,* Taney, 34.

§ 1939. If a juror is misnamed in the venire he cannot be sworn, because it would be a mistrial if it should appear from the record that the juror sworn was not the same person who was summoned and returned in the venire. *United States v. Wilson*,* Bald., 78.

§ 1940. By the common law it is competent to take the grand and petit jurors from the body of the district over which the court for which they are summoned has jurisdiction. *The People v. Green*,* 1 Utah T'y, 11.

§ 1941. In a trial in the United States circuit court, it is no objection that the order for summoning the jury who were to try the indictment was issued and served before the bill of indictment was found by the grand jury. In that court, a jury is not drawn for a single cause, but the panel is returned to serve in all proper causes, civil as well as criminal, which may be depending at that term before the court. *United States v. Cornell*,* 2 Mason, 91.

§ 1942. The panel having been exhausted, the marshal was directed to summon talesmen. The day following, on the opening of court, the marshal returned the names of twenty-four persons present in court as talesmen, whose names were placed in the box, and from whom a jury was completed. *Held*, that, notwithstanding section 804, Revised Statutes, directing the marshal, when the panel is exhausted, to summon by-standers, such jurors were proper, and that, being present within court when returned and their names placed in the box, they were by-standers, though they had not been in court when the panel was exhausted and the order made. *United States v. Loughery*,* 13 Blatch., 267.

§ 1943. Where the whole panel was drawn out of the balloting box without furnishing twelve names unchallenged, the counsel for the prisoner was allowed to retract his challenge of one who had been rejected, who was then qualified by order of the court. *United States v. Porter*, 2 Dal., 345.

§ 1944. Challenge for cause in a criminal case is doubtless a constitutional right, as, without its exercise, the prisoner might be deprived of an impartial jury; but it seems that the peremptory challenge is a privilege conferred by law, and may be enlarged, abridged or annulled by legislative authority. *United States v. Plumer*, 3 Cliff., 65. See §§ 1912-14.

§ 1945. After challenging individual jurymen, it is too late to challenge the array. *United States v. Loughery*,* 13 Blatch., 267.

§ 1946. It is good cause for challenge of a juror in a case where the punishment is death that he has conscientious scruples against giving a verdict which, in its consequences, might be the means of taking away the life of the accused. *United States v. Wilson*,* Bald., 78.

§ 1947. A juror challenged for favor is presumed indifferent until the contrary appears, and if the party challenging does not support his challenge with effect the juror must be sworn. Hence, where the two triers could not agree, the juror was sworn. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 1948. Nothing that is a cause of challenge to a juror before verdict can be used to set aside the verdict, as for a mistrial, even though the cause of challenge was unknown to the party when the jury were sworn. Where, in a criminal trial, one of the jurors was deaf, and the fact was unknown to the defendant when the jury were sworn and impaneled, it was held that the deafness of the juror was no cause for setting aside the verdict. *United States v. Baker*, 3 Ben., 68.

§ 1949. Scruples of conscience as to the lawfulness of capital punishment is good cause for the challenging of a juror in a capital case. *United States v. Ware*,* 2 Cr. C. C., 477.

§ 1950. When a new *tales* is returned, the parties have a right to challenge any one of the original panel who has been formerly sworn in chief, but it must be for a cause arising after he was sworn; not for cause existing before he was sworn, although it did not come to the knowledge of the party until after he was sworn. The court cannot, *ex mero motu*, or even upon the motion of the counsel for the United States, discharge a juror who has been sworn in chief, without challenge, because the juror has disclosed to the court matter which might be given in evidence under a challenge. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 1951. A judgment will not be reversed because a challenge good for favor was sustained in form for cause. If a juror is incompetent it matters not on what form of challenge he was set aside. *Reynolds v. United States*, 8 Otto, 145 (§§ 854-865).

§ 1952. Where it is alleged that a challenge to a juror for cause was improperly overruled because the evidence on his *voir dire* showed he was prejudiced, the finding of the trial court upon that issue should not be set aside unless error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for a new trial on the ground that the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that in law he could not be deemed impartial. The case must be one in which it is manifest the law left nothing to the conscience or discretion of the court. *Ibid.*

§ 1953. **Peremptory challenge.**—Where the defendant in a criminal case has fully exercised his right of peremptory challenge, it is not necessary that that fact should appear from the record. *United States v. Plumer*, 3 Cliff., 66. See § 1912.

§ 1954. Peremptory challenges must be made alternately by the government and the accused. *United States v. Cole*,* 5 McL., 518.

§ 1955. In offenses made capital by the act of April 30, 1790, the party may challenge twenty jurors peremptorily, and in treason thirty-five. In offenses made capital since the act of 1790, the party is entitled to thirty-five peremptory challenges, according to the rules of the common law. *United States v. Dow*,* Taney, 34.

§ 1956. At common law, the right of peremptory challenge does not exist in cases of misdemeanor. The act of July 20, 1840, declaring that "jurors to serve in the courts of the United States in each state respectively shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such state now have, and are entitled to, and shall hereafter, from time to time, have and be entitled to, and shall be designated by ballot, lot, or otherwise, according to the mode of forming juries now practiced, and hereafter to be practiced therein, in so far as such mode may be practicable by the courts of the United States, or the officers thereof," does not adopt as the practice for the courts of the United States a state law allowing peremptory challenge in misdemeanors. *United States v. Devlin*,* 6 Blatch., 71.

§ 1957. The government having the right to challenge jurors peremptorily, it should stand

upon the same footing with the defense, and has no right to a qualified challenge. It must exercise the right of challenge at once or not at all. *United States v. Butler*,* 1 *Hughes*, 457.

§ 1958. In prosecutions for murder the United States has the right of qualified peremptory challenge, that is, the right to have a juror stand aside, and to have him excluded without cause shown, unless the panel is exhausted by the challenges of the defendant. (Per *NELSON, J.*; *BETTS, J.*, dissenting.) *United States v. Douglass*,* 2 *Blatch.*, 207.

§ 1959. In criminal prosecutions in the federal courts the prosecution has a qualified right of challenge. It may require the juror to stand aside for the time, but if the panel is exhausted he cannot be excused unless challenged for cause. *United States v. Wilson*,* *Bald.*, 78.

§ 1960. The defendant in the courts of the United States has no right of peremptory challenge except in capital cases, though such challenges are allowed in the courts of the state in which he is tried. *United States v. Cottingham*,* 2 *Blatch.*, 470; *United States v. Carrigo*,* 1 *Cr. C. C.*, 49.

§ 1961. The law of March 3, 1868 (13 Statutes at Large, 500), does not give the right of peremptory challenge in any except capital cases. *United States v. Randall*,* *Deady*, 524.

§ 1962. Where an offense is charged in an indictment as a felony the defendant is entitled to the peremptory challenges given in cases of felony, although the act would have constituted a lesser offense had it not been charged to have been done feloniously. *United States v. Browning*,* 1 *Cr. C. C.*, 330.

§ 1963. Peremptory challenge is allowable in a trial for manslaughter. *United States v. Craig*, 2 *Cr. C. C.*, 86.

§ 1964. A defendant indicted for simple larceny, under the acts of congress, is held not to be entitled to the right of peremptory challenge. *United States v. Toms*, 1 *Cr. C. C.*, 607.

§ 1965. The act of congress of March 2, 1831, declaring that every person duly convicted "of maliciously and wilfully burning any dwelling-house . . . or . . . any of the public buildings in the cities, towns or counties of the District of Columbia, belonging to the United States, or the said cities, towns or counties," etc., "or as being accessory thereto, shall be sentenced to suffer imprisonment and labor for a period of not less than one nor more than ten years," does not describe a capital offense. The defendant is not, therefore, entitled to a peremptory challenge; and the statute of limitations is two years. *United States v. White*,* 5 *Cr. C. C.*, 73.

§ 1966. Upon an indictment for stealing, under the act of congress of April 30, 1790, it was held that no peremptory challenge was allowable. *United States v. McPherson*, 1 *Cr. C. C.*, 517.

§ 1967. Upon an indictment, under the act of congress, for casting away and destroying a vessel, by the owner, for the purpose of injuring the underwriters, the defendant is entitled to thirty-five peremptory challenges, this being the number that might be challenged in all capital cases at common law. *United States v. Johns*,* 1 *Wash.*, 383.

§ 1968. A state law giving a defendant in a criminal case the right of peremptory challenge does not apply in the federal courts. *United States v. Shive*,* *Bald.*, 510.

§ 1969. In the absence of an act of congress permitting it in that particular case, the defendant, in a prosecution for forgery, has no right of peremptory challenge. *Ibid.*

§ 1970. Upon a joint trial each prisoner is entitled to his full number of peremptory challenges, and jurors challenged by each must be withdrawn from the panel as to all. *United States v. Marchant*, 12 *Wheat.*, 480 (§§ 2691-93).

§ 1971. The right of peremptory challenge is not of itself a right to select, but a right to reject jurors. It excludes from the panel those whom the prisoner objects to, until he has exhausted his challenges, and leaves the residue to be drawn for his trial according to the established order or usage of the court. *Ibid.*

§ 1972. Qualifications.—It is no legal objection to a juror that he served in a former case against the same defendant. *United States v. Watkins*,* 3 *Cr. C. C.*, 441.

§ 1973. Where two defendants are tried separately, the fact that a juror called on the trial of the second was a juror on the trial of the first is no cause for challenge unless he has formed or expressed an opinion as to the case of the second. *United States v. Wilson*,* *Bald.*, 78.

§ 1974. The statute of Rhode Island, directing that the jurors drawn to serve at any court shall be warned to attend by the town sergeant six days before the court at which they are to serve, if obligatory on the United States circuit court, has nothing to do with the qualifications of jurors or the regularity of their draft. Jurors are not less qualified because they attend without being warned. *United States v. Cornell*,* 2 *Mason*, 91.

§ 1975. If a prisoner was tried by lawful jurors, it is after the trial utterly unimportant what were the defects of other jurors who were summoned and not sworn; it is therefore no objection, after the trial, that two Quakers summoned were discharged without being chal-

lenged by either side, upon expressing, without being under oath or affirmation, that they had scruples of conscience against sitting as jurors in a capital case. *Ibid.*

§ 1976. The court sustained a challenge for cause, under section 820, Revised Statutes, on the ground that the juror had served in the Confederate army. *United States v. Butler,* 1 Hughes, 457.*

§ 1977. A juror cannot be excluded from the jury box for failure to pay taxes, when, owning taxable property, he has not been assessed. *United States v. Reynolds,* 1 Utah T'y, 226.*

§ 1978. Under a law requiring that the proper officer "shall alternately select the name of a male citizen of the United States who has resided in the district for the period of six months next preceding," it is error not to sustain a challenge to a juror who was not a citizen of the United States at the time his name was placed upon the jury list, nor at the time he was drawn and summoned, but who was naturalized two days after the term of the court for which he was drawn. *People v. Shafer,* 1 Utah T'y, 260.*

§ 1979. A person temporarily residing in another state, but with the intention of returning, is a competent juror in the state of his former residence, though the law requires therefor the qualifications of an elector, and an elector is obliged to have resided in the state a year, and thirty days in the precinct where he offers to vote. *United States v. Thorpe,* 2 Bond, 340.*

§ 1980. In a trial for treason, where there had been an attempt by portions of the press to prejudice the public mind, and to anticipate the decision of the court and jury upon the subject, the court allowed more searching questions than are usually allowed to be put to the persons summoned as jurors. *United States v. Hanway, 2 Wall. Jr., 139.*

§ 1981. Where a juror, on being sworn concerning his qualifications to sit on the jury, on examination by the defendant's counsel states that he has had a conversation with another person concerning the case since he was summoned as a juror, and the defense interposes no challenge, but accepts the juror, and he is sworn, the defendant cannot afterwards rely on the incompetency of the juror as a ground for a new trial. *United States v. Smith,* 1 Saw., 277.*

§ 1982. Upon an indictment for having deposited a lottery circular in the mail, it is no ground for a motion to quash the panel, before the jury is sworn, that a witness for the prosecution has conversed with some of the jurymen on the panel about lottery prosecutions and the evidence gathered by him and in his possession, and what he expects to do in the future, and that three of the jurymen have heard the conversation or portions thereof. *United States v. Duff,* 19 Blatch., 9.*

§ 1983. In a trial for bigamy, it is no error to exclude a juror because he believes that the practice of polygamy is in obedience to the will of God; and especially when the bias of the juror has been tried by triers according to the laws of the territory, and the challenge found true. It is competent to inquire into the religious beliefs of a juror in such a case. *Miles v. United States,* 13 Otto, 304.*

§ 1984. Upon the trial of an indictment for polygamy, it was held that a juror was rightly excluded, who, upon being asked "Are you living in polygamy?", refused to answer, under the caution of the court that he need not criminate himself. *United States v. Reynolds,* 1 Utah T'y, 319.*

§ 1985. The decision upon the challenge of a juror for favor is not reviewable on a motion for new trial or in arrest. *United States v. McHenry,* 6 Blatch., 503.*

§ 1986. When a juror is challenged for favor his indifference should not be submitted to triers, unless the court, from the answer which led to the challenge, cannot ascertain his indifference. But this rule is varied in case one of the jurors has been a juror in the trial of one jointly indicted with the defendant, but who was tried separately. In the case of such jurors the question of their indifference will be submitted to the triers. *United States v. Wilson,* Bald., 78.*

§ 1987. Upon proceedings on an indictment for depositing a lottery circular in the mail, questions, asked a juror challenged for favor, whether he would give less credit to the defendant's testimony because he is proved to be in the lottery business, and whether he would give less credit to the testimony of any person proved to be in the lottery business than he would to a person not in that business, are rightly excluded. The occupation of a person may always be shown as bearing upon his credibility. *United States v. Duff,* 19 Blatch., 9.*

§ 1988. It cannot be held that the fact of having heard, before he was impaneled, general talk about the wickedness of those engaged in an illegal occupation, disqualifies a person from sitting as a juror upon the trial of one engaged in such occupation, who is charged with crime. *Ibid.*

§ 1989. The fact that a person is prejudiced against the lottery business does not disqualify him for sitting as a juror in a case in which the defendant is charged with a violation of the law in relation to lotteries. *United States v. Borger, 19 Blatch., 249 (§§ 2687-90).*

§ 1990. In impaneling a jury to try an indictment for sending circulars relating to lotteries

through the mail, questions to a juror, whether he had any prejudice against the lottery business or those engaged in it, whether he was disposed in his mind to put an end to the traffic in lottery tickets, and whether he was in favor of active measures for the suppression of the lottery business, were correctly excluded as immaterial and as not tending to disclose any prejudice which would render the juror incompetent. *United States v. Noelke*, 17 Blatch., 554 (§§ 975-987).

§ 1991. Where it was shown by affidavit that a juror, in a case in which a verdict of guilty had been rendered, after being summoned to serve for the term, used expressions evincing a bias or prejudice generally against certain cases known as the Indian agency cases, and the case in question was one of those cases, the court reversed the judgment and remanded the cause. *United States v. Upham*,* 2 Mont. T'y, 170.

§ 1992. Upon a trial of an indictment for a misdemeanor, it is competent for the court, after a juror has been examined on the *voir dire* as to his bias and sworn, and then challenged, to admit evidence as to his bias, and exclude him, if it is not made to appear that the cause of challenge for which he was rejected existed when he was sworn. *United States v. Morris*,* 1 Curt., 23.

§ 1993. It is a good cause of challenge to a juror that he has a bias or prejudice against the prisoner, and does not stand indifferent towards him, touching his guilt or innocence of the crime with which he is charged, or has made up his mind or expressed an opinion on the subject. *United States v. Wilson*,* Bald., 78.

§ 1994. The proper question to ask a juror is whether he has formed and delivered an opinion as to the guilt of the prisoner. *United States v. Devaughan*,* 8 Cr. C. C., 84.

§ 1995. Where a juror forms and delivers an opinion as to the guilt of the prisoner, after being summoned, with a view to disqualify himself, he is guilty of a contempt. *Ibid.*

§ 1996. A challenge of a juror is held to have been correctly overruled, where the juror stated that he had formed an opinion as to the guilt or innocence of the accused, but he did not think that that opinion was such as to influence his verdict, there being nothing shown either by the juror or by extrinsic testimony to give the court any idea of the character or nature of the opinion. *United States v. Reynolds*,* 1 Utah T'y, 319.

§ 1997. It is no cause for challenge that a juror read about a half a column in a newspaper concerning the case, when his testimony shows beyond a doubt that he had formed no fixed opinion, or made up his mind respecting the guilt of the accused. *United States v. McHenry*,* 6 Blatch., 503.

§ 1998. Upon an indictment for treason, a juror who stated that he had formed some opinion relative to the matter to be tried, but had not expressed it; and that he had made up his mind as to the subject of treason, provided the facts were proved, but not as to the guilt of the prisoner, was excluded by the court upon challenge for cause. *United States v. Hanway*, 2 Wall. Jr., 139.

§ 1999. On an indictment for treason, a juror, on being questioned, stated that he had read the newspaper accounts at the time, and had come to his own conclusions; that he, at the time, made up his mind that the offense was treason, though he did not remember of having expressed any opinion. On being challenged for cause, he was set aside. *Ibid.*

§ 2000. It is no reason for excluding a juror upon an indictment for treason, that, when asked whether he has formed an opinion as to the matter to be tried, he answers that he has formed an opinion that the laws have been outraged. *Ibid.*

§ 2001. A juror, in a trial for treason, said that he had "expressed an unfavorable opinion towards the course of these gentlemen," but that he was sensible of no such bias or prejudice as would affect his action as a juror; that he had neither formed nor expressed any opinion as to the guilt or innocence of the accused, or of the other persons alleged to have participated with him in the offense charged; that he did not know any of "these gentlemen individually," and that he had not formed or expressed anything more than an opinion against the transaction, and that the persons engaged in it ought to be punished. He was held to be a competent juror. *Ibid.*

§ 2002. Upon an indictment for treason, a juror who, being asked whether he has formed or expressed an opinion as to the guilt or innocence of the accused, says that he is in doubt, but that if it is not treason he does not see how treason can be committed against the United States, is not incompetent to sit as a juror if his opinions are not of such a character as to influence his action if the court shall instruct him that they are erroneous. If they will influence him in any degree, notwithstanding such instructions, it is a good cause of challenge. *Ibid.*

§ 2003. The prosecution have no right to ask a juror whether he has so made up his mind as to the character of the crime that it could not be altered in the course of the trial. *Ibid.*

§ 2004. A juror sworn on his *voir dire* testified that he believed he had formed an opinion, but that he had never expressed it, and that he did not believe that it would influence his verdict on hearing the testimony. A challenge for this cause being overruled, the supreme

court on a writ of error held the ruling to be proper. *Reynolds v. United States*, 8 Otto, 145 (§§ 854-865).

§ 2005. On a trial for polygamy, persons living in polygamy are not competent jurors, and it matters not on what form of challenge they were set aside, whether for cause or favor. *Ibid.*

§ 2006. Province of the jury.—A jury in a criminal case have nothing to do with the punishment prescribed by law for the offense charged, or the real or apparent hardship of the case. *United States v. Dodd*,* 15 Int. Rev. Rec., 9; *United States v. Bittering*,* 21 Int. Rev. Rec., 342. See §§ 1915-19.

§ 2007. A jury has nothing to do with the consequences which may follow conviction. *United States v. Blaisdell*,* 3 Ben., 132.

§ 2008. The act of congress of May, 1790, ch. 9, § 22, declaring that the defendant, on conviction for a violation of its provisions, shall "be imprisoned not exceeding twelve months and fined not exceeding three hundred dollars," the jury are to find the verdict and the court to assess the fine. And the state practice requiring the jury to assess the fine will not be followed. *United States v. Mundell*,* 1 Hughes, 415; 6 Call (Va.), 245.

§ 2009. Questions of jurisdiction are ordinarily for the court; but where the jurisdiction depends upon the existence of facts, the jury may, under the direction of the court, affirm through the medium of a verdict that there is or is not jurisdiction. *United States v. Sanders*,* Hemp., 483.

§ 2010. In a criminal prosecution the jury are bound to presume that all the testimony which is pertinent to the issue in question and favorable to the defendant has been submitted to them. *United States v. Mayer*,* Deady, 127.

§ 2011. — as to issues of law and of fact.—The court is bound to declare the law, whenever it is called upon, both in civil and in criminal cases; but in the latter, it is the duty of the court to inform the jury that they are not obliged to take its direction as to the law. *United States v. Hodges*,* 2 Wheeler, 477. See § 1915.

§ 2012. In criminal cases the jury is the judge both of the law and of the fact, in the sense that if they acquit the accused their judgment therein is final. While it is not absolutely bound by the opinion of the court as to the law, the interests of justice are better served by its doing so. *United States v. Wilson*,* Bald., 78.

§ 2013. Under the constitutional provision that "the trial of all crimes, except in cases of impeachment, shall be by jury," it is the duty of the court to decide every question of law which arises in a criminal trial. If the question touches any matter affecting the course of the trial, such as the competency of a witness, or the admission of evidence, the jury receive no direction concerning it. If the question of law enters into the issue, and forms part of it, the jury are to be told what the law is, and they are bound to consider that they are truly told, that law they are to apply to the facts, and in this sense they pass on both the law and facts. *United States v. Morris*,* 1 Curt., 23.

§ 2014. The jurors are the judges of the facts in a criminal case, and, unless the evidence greatly preponderates against the verdict, courts are exceedingly cautious in interfering with the verdict of the jury. *Leschi v. Washington Territory*,* 1 Wash. Ty, 13.

§ 2015. Juries are not to look at the consequences of conviction. That is a matter for the law; and the jury has no power to repeal, alter, dispense with or annul its provisions. The degree of the punishment cannot alter the weight of the evidence or the meaning and words of the law, and a jury is bound to render its verdict by these alone, be the punishment what it may. *United States v. Wilson*,* Bald., 78.

§ 2016. A jury in a criminal case is bound by the decision of the supreme court of the United States as to the constitutionality of the law upon which the prosecution is founded. *United States v. Shive*,* Bald., 510.

§ 2017. The question whether one fact can be inferred from another is a question of law, and to be decided by the court; and if the inference can, in law, be drawn, it ought to be drawn by the jury, if there be no contradictory evidence. *United States v. Stockwell*,* 4 Cr. C. C., 671.

§ 2018. In a criminal case, the jury have a right to give a general verdict, and in doing so must, of necessity, decide upon the law as well as the facts of the case. *United States v. Fenwick*,* 4 Cr. C. C., 675.

§ 2019. It is the duty of the jury in every criminal case to accept the law as laid down to them by the court. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it, but in case of error there would be no remedy or redress by the injured party, for the court would have no right to review the law as it had been settled by the jury. *United States v. Battiste*, 2 Sumn., 243; *United States v. Doyle*,* 6 Saw., 612; *United States v. Anthony*, 11 Blatch., 210.

§ 2020. Although the jury have the power to disregard the instructions of the court, and in case of acquittal their decision is final, yet they have no moral right to adopt their own view of the law. It is their duty to take the law from the court and apply it to the facts of the case. *United States v. Greathouse*, 4 Saw., 457 (§§ 1193-94).

§ 2021. Juries, in criminal cases, have not the right to decide any question of law. *United States v. Riley*,* 5 Blatch., 204.

§ 2022. It is no error to require the counsel to argue the questions of law, in a criminal case, to the court instead of the jury. Argument on questions of law should be addressed to the court; on questions of fact, to the jury. *Ibid*.

§ 2023. The counsel are not permitted to argue a question of law to the jury which has been submitted by both parties to the court, and by them decided, and the jury instructed thereon. The only way in which the jury can decide the law of a case is by giving a general verdict, which necessarily involves the question of law as well as of fact. But if the instruction actually given exceeds the matter submitted to the court, and involves questions of law not involved in the instruction asked, the counsel may argue to the jury any such questions not involved in the instructions asked. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 2024. Counsel will not be permitted to argue a point of law to the jury against an instruction which has already been given, although the counsel have not asked the opinion of the court on the point. The jury in a criminal case have a right to find a general verdict, which includes the question of law as well as of fact; but they have no right to decide the question of law, disconnected from the fact. *United States v. Columbus*,* 5 Cr. C. C., 304.

§ 2025. — as to weight of evidence and credibility of witnesses.—The jury are the judges of the weight of the evidence and the credibility of the witnesses. *United States v. Faulke*,* 6 McL., 349; *United States v. Coons*,* 1 Bond, 1; *United States v. Harries*,* 2 Bond, 311; *United States v. Smith*, 2 Bond, 330; *United States v. Cole*,* 5 McL., 513; *United States v. Dodge*,* Deady, 186; *United States v. Babcock*,* 3 Dill., 619. But they must act carefully and with judgment in exercising their discretion, especially in the case of hostile and friendly witnesses. *United States v. Mayer*,* Deady, 127.

§ 2026. The jury are not bound to believe the testimony of the accused simply because it is uncontradicted. The jury are the judges of the credibility of witnesses. *United States v. Borger*, 19 Blatch., 249 (§§ 2687-90).

§ 2027. In judging of the credibility of a witness, the jury will always consider the circumstances under which he testifies, and under which his statements at different times were made. *United States v. Brown*,* 4 McL., 142.

§ 2028. In a criminal case the jury is the sole judge of the degree of credit to be given to the testimony of witnesses, and the inferences, if any, to be drawn from the facts proved. Yet the power of the jury must not be arbitrarily exercised, but must be subordinate to the rules of evidence. *United States v. Dodge*,* Deady, 186.

§ 2029. To the jury exclusively belongs the duty of weighing the evidence and determining the credibility of witnesses. With that the court has absolutely nothing to do. The degree of credit due to a witness should be determined by his character and conduct; by his manner upon the stand; his relation to the controversy and to the parties; his hopes and fears; his bias or impartiality; the reasonableness, or otherwise, of the statements he makes; the strength or weakness of his recollection, viewed in the light of all the other testimony, facts and circumstances of the case. If any of the witnesses are shown knowingly to have testified falsely on the trial, touching matters involved, the jury are at liberty to reject the whole of their testimony on the trial of the case. *United States v. Babcock*,* 3 Dill., 619.

§ 2030. If the jury find that a witness has deliberately testified falsely in a material point, it has a right to believe that he is not worthy of credit in any particular. *United States v. Blaisdell*,* 3 Ben., 182.

§ 2031. In judging of the credibility of witnesses, the jury should consider the motives by which they are influenced and the manner in which they conducted themselves on the examination. *United States v. Buchanan*,* 4 Hughes, 487.

§ 2032. The credibility of witnesses must be considered and judged of by the jury, and the jury may consider and give weight to the reputed good character of the defendant in connection with the other facts in the case. *United States v. Emerson*, 6 McL., 406.

§ 2033. Where the defendant in a criminal case has voluntarily made contradictory statements, such statements cannot, as in the case of an ordinary witness, have the effect of merely neutralizing his testimony, but the jury must be left to draw therefrom such inferences as in view of all the circumstances may seem just, and they may properly infer, if truth is withheld, that it was done because the truth might not be favorable to innocence. *United States v. Gleason*,* Woolw., 128.

§ 2034. Taking case from jury.—Though the right to a trial by jury in a criminal case is a constitutional right, yet in cases where all the facts are conceded, or they are proved and

uncontradicted by evidence, the court has the right to take the case from the jury and decide it as a matter of law. *United States v. Anthony*, 11 Blatch., 200.

§ 2035. Where a female was indicted under the act of May 31, 1870, for voting at an election for representatives in congress, in New York, where none but males have the right to vote for members of the most numerous branch of the legislature, and the fact that she voted was not denied but conceded, the court refused to submit to the jury whether the defendant believed she had a right to vote, and directed the jury to find a verdict of guilty. *Held*, on motion for a new trial, that the action of the court was not erroneous, and that the right of trial by jury was not violated. *Ibid*.

§ 2036. Separation.—It seems that on a trial for murder the jury should not be allowed to separate. *United States v. Woods*, 4 Cr. C. C., 487.

§ 2037. Right of trial by jury.—In criminal proceedings to declare the forfeiture of property, the owner thereof has the same right to be informed of the nature of the charge, and to a jury trial, as he would enjoy in an action against him personally. *Greene v. Briggs*, 1 Curt., 331.

§ 2038. Laws conferring criminal jurisdiction on justices of the peace must preserve unimpaired the right of trial by jury or the whole proceeding is void *ab initio*. *Ibid*.

§ 2039. In a criminal case the accused has an absolute right to a trial by jury. He has a right, also, to be so charged that, when the trial takes place, the jury shall pass upon the whole charge so far as it involves matters of fact, and shall, under the direction of the court, apply the law to all mixed questions of law and fact. *Ibid*.

§ 2040. The offense of libel was always triable by a jury, and must be under the constitution of the United States. *In re Dana*, 7 Ben., 4.

§ 2041. The act of June 17, 1870, establishing a police court in the District of Columbia, which had jurisdiction of all misdemeanors not punishable by imprisonment in the penitentiary, and in which the trial was to be without jury, is unconstitutional so far as it includes offenses triable at common law by a jury, even though it provides for an appeal from that court to a court in which the offense is triable by jury. *Ibid*.

§ 2042. Swearing the jury.—Under an act prescribing the oath that the jury shall take, but not requiring such oath to be spread upon the record, a record which recites that the jury were duly sworn is sufficient. *Leschi v. Washington Territory*,* 1 Wash. T'y, 13.

§ 2043. Discharge after being sworn.—After a juror has been sworn, the court can discharge him for objection taken, without the consent of the defendant. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 2044. After the jury has been sworn and the prosecution has begun the opening, in a capital case, the court cannot, without the consent of the prisoner, excuse a juror at his own request, because he cannot, consistently with his feelings, sit in a case of life and death. *United States v. Randall*, 2 Cr. C. C., 412.

XXVI. INDICTMENT.

1. In General.

SUMMARY—Objections good on demurrer are good in arrest, § 2045.—Charging fraud, § 2046.—Offenses created by statute, §§ 2047, 2048.—Use of the word *wilfully*, §§ 2049, 2050.—Variance as to name of owner of property, § 2051.

§ 2045. Any objection to an indictment which would be good on demurrer is fatal on a motion in arrest of judgment. *United States v. Goggin*, §§ 2052-53.

§ 2046. An indictment charging fraud of any sort ought to aver wherein the fraud consisted and by what means it was effected. *Ibid*.

§ 2047. The general rule that an indictment for an offense created by statute is sufficient if it follows the language of the statute is subject to the qualification that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar in a subsequent prosecution for the same offense. *Ibid*. See § 2135.

§ 2048. Where a statute defining an offense contains an exception in the enacting clause, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the

pleader may safely omit any such reference, as the matter contained in the exception is matter of defense, and must be shown by the accused. *United States v. Cook*, §§ 2054-58.

§ 2049. Where a statute defining an offense describes it as a wilful act, the information must also charge that the act was wilful. *United States v. Three Railroad Cars*, §§ 2059-64.

§ 2050. The word "wilfully" is commonly used in a bad sense to express an evil or improper motive, intent or feeling, or to characterize an act done wantonly, or one which a man of reasonable knowledge and ability must know to be contrary to his duty. *Ibid.*

§ 2051. A. was indicted for an assault committed on board a vessel, under the act of 1825. The twenty-second section of this act describes the offense, and section 5, conferring jurisdiction over the offense upon the circuit court, requires that the offense should have been committed on board of a vessel belonging to citizens of the United States. The indictment alleged that the ship was the property of William Nye, and the proof showed it to be the property of Willard Nye. It being wholly immaterial who were the owners of the ship, provided it belonged to citizens of the United States, and the objection of variance applying solely to words which state the jurisdiction and not to words descriptive of the offense charged, the variance was held not fatal. *United States v. Howard*, §§ 2065-70. See § 2125.

[NOTES.—See §§ 2071-2209.]

UNITED STATES *v.* GOGGIN.

(Circuit Court for Wisconsin: 9 Bissell, 269-274. 1880.)

Opinion by DYER, J.

STATEMENT OF FACTS.—This is an indictment for presenting for payment to the pension agent in Milwaukee a false and fraudulent claim for pension moneys. The defendant was tried and convicted at the last term of the court, and the case is again up for consideration upon a motion in arrest of judgment. It is not without reluctance that I have come to the conclusion which I am constrained to announce, since the evidence adduced on the trial tended strongly to show the perpetration of a gross fraud upon the government; but it is the duty of the court to administer the law according to its best understanding, regardless of consequences.

The defendant was indicted under section 5438, Revised Statutes of the United States, which provides that every person who presents for payment, to or by any person or officer in the civil service of the United States, any claim upon or against the government or any department thereof, knowing such claim to be false, fictitious or fraudulent, shall be punished as the statute directs.

§ 2052. *In an indictment for presenting a fraudulent claim against the government it is not sufficient to follow the words of the statute. Degree of particularity required.*

The indictment contains three counts, but as they are equivalent in form, reference to one will be sufficient: The first count charges that on the 4th day of December, 1879, the defendant did present and cause to be presented for payment to and by a person in the civil service of the United States, to wit, Edward Ferguson, a pension agent of the United States, at the city of Milwaukee, a claim against the government of the United States, to wit, a claim for the sum of \$24 then and there claimed and represented by the defendant to be due to him from the said government of the United States, as a pensioner, under and by virtue of a certain instrument known as a pension certificate, which said pension certificate had been theretofore procured and obtained by the said Richard Goggin upon false and fraudulent proofs, and by criminal and fraudulent devices, and without the authority of law, and in fraud of the law governing pensions and pension certificates; he, the said Richard Goggin, well knowing at the time and place of making said claim, and of presenting

the same for payment, that it was then and there false, fictitious and fraudulent. Objection is made to this indictment as not stating any offense, or, in other words, that no offense is described with such certainty as the law of criminal pleading requires. The reply of the learned district attorney is that it states the offense substantially in the language of the statute, and that this is sufficient. It will be observed that the gist of the offense, as it is defined in the statute, is the presentation for payment of a false or fraudulent claim. The indictment alleges no facts which constitute the fraud; it is not shown how the fraud was perpetrated, nor wherein the claim was false, except that the defendant presented a claim which he represented to be due to him by virtue of a pension certificate which had been theretofore procured upon false and fraudulent proofs, and by unlawful and fraudulent devices, and without authority of law. What the false and fraudulent proofs and unlawful and fraudulent devices were is not stated. The question is, are these allegations sufficiently certain, and do they contain statements of fact which will support a conviction? My impression upon the argument was that the objection urged by counsel for defendant was not one which reached the substance of the indictment, and that as he had not moved to quash, his objection was not good in arrest of judgment; but the rule is that any objection to an indictment which would be good upon demurrer is fatal on motion in arrest, and this being so, the objection to the indictment, if well grounded in law, may be as well taken at the present stage of the proceedings as by motion to quash. In the case of *United States v. Watkins*, 3 Cranch, C. C., 441, the court had occasion to state the rule with reference to certainty in alleging fraud in a case of false pretenses, and it was there held that an indictment charging fraud should aver the means by which the fraud was effected; that fraud is an inference of law from certain facts, and the indictment must aver all the facts which constituted the fraud; that whether an act has been fraudulently done is a question of law, so far as the moral character of the act is involved; to aver that an act was fraudulently done is therefore to aver a matter of law and not a matter of fact.

§ 2053. *An indictment charging fraud must allege wherein the fraud consisted.*

It is true that this was a case of false pretenses, and there may be a well-grounded distinction, as urged by the learned counsel for the United States, between such a case and the case in hand; because, in a case of false pretenses, it is, undoubtedly, essential that the facts and circumstances should be alleged with such certainty that the court may see upon the face of the pleading that the pretenses were false, and that they were of such character and were made under such circumstances as constituted false pretenses, within the meaning of the criminal law; that they were relied upon — acted upon, and that the party defrauded had a right to rely upon them; and herein, and perhaps in some other respects, such a case is distinguishable from the case at bar. But it is, undoubtedly, a sound principle that an indictment charging fraud of any sort ought to aver with requisite particularity wherein the fraud consisted, and the means by which it was effected, and I have been unable to find any cases which dispense with the application of this rule. It is true that many of the niceties and technicalities with reference to form in criminal pleadings which once existed are not allowed now to prevail, but I do not understand that there has been any relaxation of the rule with reference to certainty and clearness as to the matter charged. It is also a general rule that in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the

statute. In the case of *The United States v. Simmons*, 96 U. S., 360 (§§ 2410-14, *infra*), the supreme court had occasion to point out the precise scope and limitation of this rule, and, after stating the rule, Mr. Justice Harlan says in the opinion: "But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense;" and here, I think, we strike the fatal point in this indictment. For, after consideration, I am unable to see how the defendant could plead his present conviction under this indictment, and a judgment thereon, in bar of a second prosecution for the same offense. It is alleged only that he presented to the pension agent a claim for pension moneys under a pension certificate, which was procured by false and fraudulent proofs, and unlawful and fraudulent devices. The fraud should have been, by apt allegation, more particularly identified; it should have been alleged what the proofs and devices were, and wherein they were fraudulent; and it is, in my judgment, immaterial when the proofs were made or devices resorted to, whether at the time of presenting the claim, or at a time anterior, if they were made as the basis for obtaining the pension certificate. If the fraudulent devices had consisted of an act done when payment was demanded, it would, I think, be clear that the nature of the devices or particular fraud practiced at the time should be alleged, and if this is so, it seems also essential that they should be alleged, though they were, in fact, practiced at and before the time of obtaining the pension certificate. The offense, it is true, was one committed, not in 1867, when the pension certificate was obtained, but in 1877 and in 1878, when payment of an instalment was demanded; that is, a claim was presented for payment at those times; but, going back to the origin of the alleged fraud, I do not understand why it is not as necessary to allege wherein the fraud consisted at its inception and when made the basis for obtaining the pension certificate, as it would be if it consisted of some device practiced at the very time the claim was presented for payment.

It was necessary to show the alleged fraud and the acts which constituted it, on the trial, and it was therefore necessary that the same facts should be alleged, at least with sufficient particularity to enable the defendant to plead any judgment which might follow, as a bar to a subsequent prosecution for the same offense. The allegation is that a claim was presented by the defendant, as a pensioner, under and by virtue of a certain instrument known as a pension certificate; but this certificate is not described so that it can be identified, as I think it should have been, as, by date, the names of the persons who purported to sign it, and the like, so as to satisfy the requirements of the rule as laid down by the supreme court in *United States v. Simmons*, *supra*. If we adopt as authoritative upon the question under consideration the case of *The United States v. Bettilini*, 15 Int. Rev. Rec., 32, which is a case somewhat in opposition to *United States v. Ballard*, 13 Int. Rev. Rec., 195, it is very clear that we should have to hold this indictment insufficient; and I incline to the opinion that the correct rule is stated in the former case.

It was urged upon the argument that what is alleged in the indictment in regard to fraud in obtaining the pension certificate relates to the evidence of the offense, and not the offense itself; but it is not the presentation of the claim for payment which makes the offense, it is the presentation for payment of a false or fraudulent claim; and as no fraud can be committed but by deceit-

ful practices, the particular practices by which the fraud was here committed, or which made the claim fraudulent, should have been so set forth as to make the fraud appear upon the face of the indictment. This may be in a certain sense alleging the evidence of the offense, but it is rather the statement of essential facts which constitute the fraud, and therefore make the presentation for payment of the claim a criminal offense. The point is one that cannot be made clearer by elaboration. I rest my judgment upon the fact that the allegations of the pleading are not sufficient, within the rule stated by the supreme court, to apprise the defendant with that certainty which the law requires of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. Judgment must be arrested.

UNITED STATES v. COOK.

(17 Wallace, 168-182. 1872.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Southern District of Ohio.
Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Officers and other persons charged with the safe-keeping, transfer and disbursement of the public moneys, are required by an act of congress to keep an accurate entry of each sum received, and of each payment or transfer; and the sixteenth section of the same act provides that if any one of the said officers shall convert to his own use, in any way whatever, any portion of the public moneys, intrusted to him for safe-keeping, disbursement or transfer, or for any other purpose, every such act shall be deemed and adjudged to be embezzlement of so much of the public moneys as shall be thus taken and converted, which is therein declared to be a felony; and the same section also provides that all persons advising or participating in such act, being convicted thereof before any court of the United States of competent jurisdiction, shall be punished as therein provided. 9 Stats. at Large, 63.

Founded on that provision, the indictment in this case contained six counts, charging that the defendant, as paymaster in the army, had in his custody for safe-keeping and disbursement, a large sum of public money, intrusted to him in his official character as an additional paymaster in the army, and that he, on the respective days therein alleged, did unlawfully, knowingly and feloniously embezzle and convert the same to his own use. Such conversion is alleged in the first count, on the 1st of May, 1862, in the second on the 6th of July, in the third on the 16th of October, in the fourth on the 12th of September, in the fifth on the 20th of September, and in the sixth on the 15th of November, all in the same year. Service was made, and the defendant appeared and demurred to the first five counts, showing for cause that it appears on the face of the indictment, and by the allegations of the said several counts, that the crime charged against him was committed more than two years before the indictment was found, and filed in court.

Three questions were presented by the demurrer for the decision of the court, upon which the opinions of the judges were opposed, in substance and effect as follows: (1) Whether it was competent for the defendant to take exception, by demurrer, to the sufficiency of the first five counts of the indictment for the causes assigned. (2) Whether the said five counts, or either of them, allege or charge, upon their face, any crime or offense against the defendant for which he is liable in law to be put upon trial, convicted and pun-

ished. Both of those questions are presented in the record as one, but inasmuch as the answers to them must be different, it is more convenient to divide the question into two parts. (3) Whether the thirty-second section of the crimes act applies to the case, and limits the time within which an indictment must be found for such an offense. 1 Stat. at Large, 119.

Forgery of public securities was made a capital felony by that act, as well as treason, piracy and murder, and the thirty-second section of the act provides that no person shall be prosecuted, tried or punished for treason or other capital felony, wilful murder or forgery excepted, unless the indictment for the same shall be found by the grand jury within three years next after the treason or capital offense shall be done or committed. *Id.* Provision is also made by the succeeding clause of the same section, that no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment for the same shall be found within two years from the time of committing the offense. Fines and penalties, under any penal statute, were also included in the same limitation, but that part of the clause having been superseded by a subsequent enactment, it is omitted. 5 *id.*, 322; *Stimpson v. Pond*, 2 Curt., 502. Appended to the thirty-second section, enacting the limitation under consideration, is the following proviso: *Provided*, that nothing herein contained shall extend to any person or persons fleeing from justice. 1 Stat. at Large, 119.

§ 2054. *Rules of pleading in setting out an offense created and limited by statute.*

Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused. *Steel v. Smith*, 1 Barn. & Ald., 99; Archb. Cr. Pl., 15th ed., 54.

Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed. *Rex v. Mason*, 2 Term R., 581. With rare exceptions, offenses consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error. Archb. Cr. Pl., 15th ed., 54.

§ 2055. *If an exception or proviso is part of the description of the offense it must be set forth in the indictment, otherwise it is matter of defense. This rule not a universal criterion.*

Text-writers and courts of justice have sometimes said that, if the exception is in the enacting clause, the party pleading must show that the accused is not

within the exception, but where the exception is in a subsequent section or statute, that the matter contained in the exception is matter of defense and must be shown by the accused. Undoubtedly that rule will frequently hold good, and in many cases prove to be a safe guide in pleading, but it is clear that it is not a universal criterion, as the words of the statute defining the offense may be so entirely separable from the exception that all the ingredients constituting the offense may be accurately and clearly alleged without any reference to the exception. *Commonwealth v. Hart*, 11 Cush., 132. Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is nevertheless clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offense, that it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty. *State v. Abbey*, 29 Vt., 66; 1 Bish. Cr. Pro., 2d ed., § 639, n. 3.

Support to these views is found in many cases where the precise point was well considered. Much consideration was given to the subject in the case of *Commonwealth v. Hart*, 11 Cush., 130, where it is said that the rule of pleading a statute which contains an exception is the same as that applied in pleading a private instrument of contract; that if such an instrument contains in it, first, a general clause, and afterwards a separate and distinct clause which has the effect of taking out of the general clause something that otherwise would be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception, but *if the exception itself is incorporated in the general clause*, then the party relying on "the general clause must, in pleading, state the general clause together with the exception," which appears to be correct, but the reasons assigned for the alternative branch of the rule are not quite satisfactory, as they appear to overlook the important fact in the supposed case that the exception itself is supposed to be incorporated in the general clause.

Where the exception itself is incorporated in the general clause, as is supposed in the alternative rule there laid down, then it is correct to say, whether speaking of a statute or private contract, that unless the exception in the general clause is negatived in pleading the clause, no offense or no cause of action will appear in the indictment or declaration when compared with the statute or contract, but when the exception or proviso is in a subsequent substantive clause, the case contemplated in the enacting or general clause may be fully stated without negativing the exception or proviso, as a *prima facie* case is stated, and it is for the party for whom matter of excuse is furnished by the statute or contract to bring it forward in his defense.

Commentators and judges have sometimes been led into error by supposing that the words "enacting clause," as frequently employed, mean the section of the statute defining the offense, as contradistinguished from a subsequent section in the same statute, which is a misapprehension of the term, as the only real question in the case is whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission or other ingredients which constitute the

offense. Such an offense must be accurately and clearly described, and if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading, but if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is matter of defense and must be shown by the other party, though it be in the same section or even in the succeeding sentence. 2 Lead. Cr. Cas., 2d ed., 12; *Vavasour v. Ormrod*, 9 Dowl. & Ryl., 599; *Spieres v. Parker*, 1 Term R., 141; *Commonwealth v. Bean*, 14 Gray, 53; 1 Stark. Cr. Pl., 246.

Both branches of the rule are correctly stated in the case of *Steel v. Smith*, 1 Barn. & Ald., 99, which was a suit for a penalty, and may perhaps be regarded as the leading case upon the subject. Separate opinions were given by the judges, but they were unanimous in the conclusion, which is stated as follows by the reporter: "Where an act of parliament in the enacting clause creates an offense and gives a penalty, and in the same section there follows a proviso containing an exception *which is not incorporated in the enacting clause by any words of reference*, it is not necessary for the plaintiff in suing for the penalty to negative such proviso in his declaration." All of the judges concurred in that view, and Bayley, J., remarked that where there is an exception so incorporated with the enacting clause that the one cannot be read without the other, there the exception must be negatived.

§ 2056. *What is an exception and what a proviso in a statute.*

Doubtless there is a technical distinction between an exception and a proviso, as an exception ought to be of that which would otherwise be included in the category from which it is excepted, and the office of a proviso is either to except something from the enacting clause or to qualify or restrain its generality, or to exclude some ground of misinterpretation of it, as extending to cases not intended to be brought within its operation, but there are a great many examples where the distinction is disregarded and where the words are used as if they were of the same signification. *Gurly v. Gurly*, 8 Cl. & F., 764; *Minis v. United States*, 15 Pet., 445; *Stephen*, Pl. (9th Am. ed.), 443. Few better guides upon the general subject can be found than the one given at a very early period, by Treby, C. J., in *Jones v. Axen*, 1 Ld. Raym., 120, in which he said, the difference is that where an exception is incorporated in the body of the clause he who pleads the clause ought also to plead the exception, but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause and leave it to the adversary to show the proviso; which is substantially the same rule in both its branches as that given at a much more recent period in the case of *Steel v. Smith*, which received the unanimous concurrence of the judges of the court by which it was promulgated.

Apply those rules to the case before the court, and all difficulty is removed in answering the questions for decision. Neither an exception nor a proviso of any kind is contained in the act of congress defining the offense, and every ingredient of the offense therein defined is accurately and clearly described in the indictment. Nothing different is pretended by the defendant, but the contention is that the demurrer does not admit the force and effect of these allegations, because another act of congress provides that no person shall be prosecuted, tried or convicted of the offense unless the indictment for the same shall be found within two years from the time of committing the offense.

§ 2057. *The statute of limitations cannot be taken advantage of by demurrer to an indictment.*

Argument to show that a demurrer to an indictment admits every matter of fact which is well pleaded is unnecessary, as the proposition is not denied; and inasmuch as the offense is well alleged in each of the counts to which the demurrer applies, it is difficult to see upon what ground it can be contended that the defendant may, by demurrer, set up the statute of limitations as a defense, it appearing beyond all doubt that the act defining the offense contains neither an exception nor a proviso of any kind. Tested by the principles herein suggested it is quite clear that such a theory cannot be supported, but it must be admitted that decided cases are referred to which not only countenance that view, but adjudge it to be correct. Some of the cases, however, admit that the judgment cannot be arrested for such a defect, if it appears that the statute of limitations contains any exception, as the presumption in that state of the case would be that evidence was introduced at the trial which brought the defendant within some one of the exceptions. *State v. Hobbs*, 39 Me., 212; *People v. Van Santvoord*, 9 Cow., 660; *State v. Rust*, 8 Blackf., 195.

Obviously the supposed error, if it be one, could not be corrected by a motion in arrest, for the reason suggested in those cases, and it is quite as difficult to understand the reason of the rule which affirms that a demurrer will work any such result, as it cannot be admitted that a demurrer is a proper pleading where it will have the effect to shut out evidence properly admissible under the general issue to rebut the presumption of the supposed defect it was filed to correct. Suppose that is so, then it clearly follows that the demurrer ought not to be sustained in this case, as the statute of limitations in question contains an exception, and it may be that the prosecutor, if the defendant is put to trial under the general issue, will be able to introduce evidence to show that he, the defendant, is within that exception. Although the reasons given for that conclusion appear to be persuasive and convincing, still it is true that there are decided cases which support the opposite rule, and which affirm that the prosecutor must so frame the indictment as to bring the offense within the period specified in the statute of limitations, or the defendant may demur, move in arrest of judgment, or bring error. *State v. Bryan*, 19 La. Ann., 435; *United States v. Watkins*, 3 Cranch, C. C., 550; *People v. Miller*, 12 Cal., 294; *McLane v. State*, 4 Ga., 340.

Sometimes it is argued that the case of *Commonwealth v. Ruffner*, 28 Penn. St., 260, and *Hatwood v. State*, 18 Ind., 492, adopt the same rule, but it is clear that neither of those cases supports any such proposition. Instead of that they both decide that it is not necessary to plead the statute of limitations in criminal cases; that the defendant may give it in evidence under the general issue, which undoubtedly is correct, as it affords the prosecutor an opportunity, where the statute contains exceptions, to introduce rebutting evidence and bring the defendant within one of the exceptions. Accused persons may avail themselves of the statute of limitations by special plea or by evidence under the general issue, but courts of justice, if the statute contains exceptions, will not quash an indictment because it appears upon its face that it was not found within the period prescribed in the limitation, as such a proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception. *United States v. White*, 5 Cranch, C. C., 60; *State v. Howard*, 15 Rich. (S. C.), 282.

Nor is it admitted that any different rule would apply in the case even if the statute of limitations did not contain any exception, as time is not of the essence of the offense; and also for the reason that the effect of the demurrer, if sustained, would be to preclude the prosecutor from giving evidence, as he would have a right to do, under the general issue, to show that the offense was committed within two years next before the indictment was found and filed.

Examples are given by commentators which serve to illustrate the general doctrine even better than some judicial opinions. No mariner, it was enacted, who was serving on board any privateer employed in certain British colonies, should be liable to be impressed unless it appeared that he had previously deserted from an English ship of war; and the act provided that any officer who should impress such a mariner should be liable to a penalty of \$50. Judgment was arrested in an action brought for the penalty there imposed, because the declaration did not allege that the mariner had not previously deserted, as that circumstance entered into the very description of the offense, and constituted a part of the transaction made penal by the statute. *Spieres v. Parker*, 1 Term R., 141.

Labor and traveling on the Lord's day, except from necessity and charity, are forbidden in some states by statute, which also furnishes an example where the exception is a constituent part of the offense, as it is not labor and traveling, merely, which are prohibited, but *unnecessary* labor and traveling, or labor and traveling *not required for charity*. *State v. Barker*, 18 Vt., 195. Innkeepers are also prohibited by statute, in some jurisdictions, to entertain on the Lord's day persons not lodgers in the inn, if resident in the town where the inn is kept, and an indictment founded on that statute was held to be bad, because it did not aver that the persons entertained were not lodgers, as it is clear that that circumstance was an ingredient of the offense. *Commonwealth v. Tuck*, 20 Pick., 361.

So an English statute made it penal for any person not employed in the public mint to make or mend any instrument used for coining, and it was held that the indictment must negative the want of authority, as that clause was a part of the description of the offense. 1 East's Pl. Cr., 167; 2 Lead. Cr. Cas., 2d ed., 9.

Equally instructive examples are also given by commentators, to show that nothing of the kind is required where the exception is not incorporated with the clause defining the offense, nor connected with it in any manner by words of reference, as in such cases it is not a constituent part of the offense, but is a matter of defense and must be pleaded or given in evidence by the accused. 1 Bish. Cr. Proc., 2d ed., §§ 405, 632, 635, 639; *Steel v. Smith*, 1 Barn. & Ald., 99; *State v. Abbey*, 29 Vt., 66; 1 Am. Cr. L., 6th ed., §§ 378, 379; 1 Wat. Archb. Cr. Pr., ed. 1860, 287; *Rex v. Pearce*, Russ. & Ry. Cr. Cas., 174; *Rex v. Robinson*, id., 321; *Rex v. Baxter*, 2 East's Pl. Cr., 781; S. C., 2 Leach's C. C., 4th ed., 578; 1 Gabbett's Cr. L., 283. Sufficient has already been remarked to show what answer must be given to the first and second questions, which are both contained in the first interrogatory in the record, and it is only necessary to add in respect to the third, which is numbered second in the transcript, that the only statute of limitations applicable to the offense alleged in the indictment is the one enacted in the thirty-second section of the original crimes act, which cannot, however, avail the defendant under the demurrer filed to the indictment.

§ 2058. *Answers certified to the circuit court.*

Let the following answers be certified to the circuit court:

(1) That it is not competent for the defendant to take exception by demurrer to the first five counts of the indictment, for the cause assigned.

(2) That the said five counts, and each of them, do allege and charge upon their face a crime or offense against the defendant, for which he is liable in law to be put upon trial, convicted and punished.

(3) That the thirty-second section of the crimes act enacts the only statute of limitation applicable to the offense charged against the defendant, but that he cannot avail himself of it under the demurrer filed to the indictment.

UNITED STATES v. THREE RAILROAD CARS.*

(District Court, Northern District of New York: 1 Abbott, 196-211. 1868.)

Opinion by HALL, J.

STATEMENT OF FACTS.—The information in this case is founded upon section 5 of the act of June 27, 1864. Section 1 of this act provides for the unloading and inspection, at the first port of entry or custom-house of the United States, of all merchandise and other articles imported into this country from any contiguous foreign country, except as hereinafter provided. Section 2 provides that in order to avoid the inspection at the first port of arrival, as required by section 1, cars, etc., containing such merchandise or other articles may be sealed or closed, under regulations authorized by such act to be prescribed by the secretary of the treasury; "whereupon the same may proceed to their port of destination without further inspection." It also provides that such cars, etc., shall proceed, without unnecessary delay, to their destination as named in the manifest of their contents, and be there inspected as provided in section 1. Section 3 authorizes the secretary to make regulations for the sealing and closing of cars, etc., and sections 4 and 5 are in the following words:

"Sec. 4. *And be it further enacted*, That if the owners, master or person in charge of any vessel, car or other vehicle, sealed as aforesaid, shall not proceed to the port or place of destination thereof named in the manifest of its cargo, freight or contents, and deliver such vessel, car, or vehicle, to the proper officer of the customs, or shall dispose of the same by sale or otherwise, or shall unload the same, or any part thereof, at any other than such port or place, or shall sell or dispose of the contents of such vessel, car or other vehicle, or any part thereof, before such delivery, he shall be deemed guilty of felony, and on conviction thereof, before any court of competent jurisdiction, pay a fine not exceeding \$1,000, or shall be imprisoned for a term not exceeding five years, or both, at the discretion of the court; and such vessel, car or other vehicle, with its contents, shall be forfeited to the United States, and may be seized whenever found within the United States, and disposed of and sold as in other cases of forfeiture: *Provided*, that nothing in this section shall be construed to prevent sales of cargo, in whole or in part, prior to arrival, to be delivered as per manifest, and after due inspection."

"Sec. 5. *And be it further enacted*, That if any unauthorized person or persons shall wilfully break, cut, pick, open or remove any wire, seal, lead, lock or other fastening or mark attached to any vessel, car or other vehicle, crate, box, bag, bale, basket, barrel, bundle, cask, trunk, package or parcel, or any-

* This opinion is published here on account of its supposed value as a statement of the principles of pleading in criminal and penal proceedings and the doctrine of criminal intent.

thing whatsoever, under and by virtue of this act and regulations authorized by it, or any other act of congress, or shall affix or attach, or in any way wilfully aid, assist or encourage the affixing or attaching, by wire or otherwise, to any vessel, car or other vehicle, or to any crate, box, bale, barrel, bag, basket, bundle, cask, package, parcel, article, or thing of any kind, any seal, lead, metal or anything purporting to be a seal authorized by law, such person or persons shall be deemed guilty of felony, and, upon conviction before any court of competent jurisdiction, shall be imprisoned for a term not exceeding five years, or shall pay a fine of not exceeding \$1,000, or both, at the discretion of the court. And each vessel, car, or other vehicle, crate, box, bag, basket, barrel, bundle, cask, trunk, package, parcel or other thing, with the cargo or contents thereof, from which the wire, seal, lead, lock or other fastening or mark shall have been broken, cut, picked, opened or removed, by any such unauthorized person or persons, or to which such seal, or other thing purporting to be a seal, has been wrongfully attached as aforesaid, shall be forfeited to the United States."

The information, after stating the seizure of the property in question, alleges the proper sealing and closing of the three cars containing the three hundred barrels of flour, at Clifton, in Canada, by the consul of the United States, as authorized by the regulations prescribed under the authority of the act of congress; that said cars were permitted, by reason thereof, to enter and pass the port of Niagara without inspection; and that before the said cars arrived at the port of their destination, the seals, by which said cars had been sealed and closed by the consul, were broken, cut, opened and removed from each and all of the said cars by some unauthorized person, by which such cars and the r contents had become forfeited. The information does not allege that such seals were "*wilfully*" broken, cut, opened or removed; nor does it contain any allegation that the same was done wilfully or maliciously, or with any fraudulent, corrupt, unlawful or improper purpose or intent.

The answer of the claimants admits the material allegations of the information, but sets up that the seals of the consul were removed from such cars by mistake, and not wilfully, nor for the purpose of violating any act of congress, or any regulation of the treasury; nor for the purpose of interfering with or removing any of the property contained therein; that said cars were not opened, nor was any of the property therein removed or interfered with; and that such seals, and the wires to which they were attached, were so removed by an employee of the railroad company, in ignorance of their character, and of their being the seals of the consul, and for the purpose of putting on the doors of the cars a fastening which it had been the custom to place thereon, and thereby make the same more secure.

At the trial the jury returned a special verdict by which they found that the seals of the consul, affixed to the cars of the claimants, as stated in the information, were removed by an unauthorized person who was in the employ of the claimants; but that they were so removed in ignorance of the character and purpose of such seals, and without knowing by whom, or why, or for what purpose, they had been placed upon said cars; that they were so removed for the purpose of making the fastening of said cars more secure, without any improper or illegal motive or intention, or any desire or purpose to defraud the government, or enable any person to do so; and that no officer, agent or employee of the claimants aided, or assisted in, or directed or authorized, such removal, or in any manner consented thereto. Upon these pleadings, and this special verdict, the counsel for the claimants insisted, in substance: 1. That in

order to a conviction of a person for removing seals under the first clause of section 5, above quoted, it is necessary to show that the removal of the seals was *wilful*; that this was not shown by the evidence in this case, and is negatived by the special verdict. 2. That the forfeiture declared by the last sentence of the section is only a further penalty for the commission of the act made criminal by the preceding sentence, and that there can be no forfeiture unless the facts proved would justify a criminal conviction of the party by whom the seals were removed.

§ 2059. *The meaning of the words "knowingly," "wilfully" and "maliciously" considered.*

1. The first question thus presented depends mainly upon the signification, purpose and effect of the term *wilfully*, as used in the section referred to; and it must be conceded that the question is not free from doubt. The words *knowingly*, *wilfully* and *maliciously*, either singly or united, or one of them connected with another, have been frequently used in criminal and penal statutes; but their signification and effect have not been, and cannot be, so precisely defined that different interpretations are not required in different cases,—depending to some extent upon the connection in which they are found. The first of these words does not, in common parlance, or in legal construction, necessarily and *per se* imply wicked purpose or perverse disposition, or indeed any evil or improper motive, intent or feeling; but the second is ordinarily used in a bad sense to express something of that kind, or to characterize an act done wantonly, or one which a man of reasonable knowledge and ability must know to be contrary to his duty. The last of these terms, *maliciously*, in its ordinary sense, and when used in criminal or otherwise penal statutes, implies the existence of a wicked, base or revengeful purpose, or an evil disposition and wanton disregard of the rights of others; though in its technical sense, as used in the merely formal though necessary allegations of an indictment, it generally has a less noxious signification, implying that legal malice which is presumed to exist whenever any unlawful and injurious act is voluntarily committed, rather than the actual existence of malignant feeling and evil purpose. In its ordinary sense, and when used in statutes, it is generally considered as including the term *wilfully*, and something more; and it has therefore been held that in an indictment founded on a statute requiring the act charged to be wilfully done in order to make it criminal, charging that the act was done *maliciously* was sufficient; but when the words *wilfully* and *maliciously* are both used in the statute creating the offense, it was held that both must be used in the indictment, and that an allegation that the act was done *unlawfully and maliciously* was not sufficient. Archb. Cr. P., 50.

§ 2060. *"Wilfully" is ordinarily used in a bad sense.*

The definitions given by our best lexicographers, as well as the authority of legal writers, show that *wilfully* is ordinarily used in a bad sense. Webster, whose definitions are most reliable, gives as the proper definition of *wilful*, in its present use, "governed by the will without yielding to reason; obstinate; perverse; inflexible; stubborn; refractory;" and he gives as the definition of *wilfully*, "in a wilful manner; obstinately; stubbornly." Upon the best consideration I have been able to give to this case and to the authorities which my researches have discovered, I am quite confident that neither the evidence nor the special verdict will justify the conclusion that the removal of the seals of the consul, as found by the verdict, was *wilful*, within the meaning and intent of the act of congress. It is true that a person who deliberately does an act

which he knows to be unlawful, or wrongful, is generally held to have done it wilfully; and the familiar doctrine that a person is conclusively presumed to know the law of the country of his domicile or temporary sojourn was pressed upon the court for the purpose of bringing this case within the principle of the cases in which this doctrine has been applied. Without considering the question whether the regulations presented by the secretary of the treasury, under an act of congress, are to be considered as laws, it must be observed that in all cases of this kind the intention of the legislature is to govern; and that when, as in this case, the act must be *wilfully* done to make it criminal, it can hardly be supposed that the legislature intended to declare an act committed without any illegal or improper motive, and under the honest belief that it was entirely right and proper, to be a felony punishable, in the discretion of the court, by a large pecuniary fine and five years' imprisonment. Indeed, under such proof of the absence of all criminal or improper intent or feeling, eminent judges have directed acquittals in cases where the punishment authorized was much less severe.

In the case of *United States v. Hart*, Pet. C. C., 390, Mr. Justice Washington held that a constable who stopped and detained the mail coach by arresting the driver, because he was driving through the streets of Philadelphia at a speed which was considered dangerous to the persons of its citizens, was entitled to a verdict of not guilty on an indictment founded upon a statute making it criminal for any person "*knowingly and wilfully* to obstruct or retard the progress of the mail;" — the judge holding that driving at a dangerous speed upon the streets of the city was a breach of the peace and an offense at common law, and authorized an arrest of the offender without a warrant; — and that it could not therefore be said that the act was a *wilful* stopping of the mail; — and this decision was referred to and approved by Mr. Attorney-General Crittenden, in an opinion furnished the postmaster-general in 1852.

I am aware that the authority of Mr. Justice Washington's decision may be said to have been shaken by the decision of Mr. Chief Justice Taney, in *United States v. Harvey*, 8 Boston Law Rep., 77. The chief justice felt it to be his duty to follow a decision made in the same district by Judge Winchester; and which he supposed to be in conflict, to some extent, with Mr. Justice Washington's decision; and he therefore decided that arresting and detaining the mail carrier under civil process, and thereby obstructing and retarding the progress of the mail, justified a conviction of the constable who made the arrest. This decision and the case of *People v. Brooks*, 1 Den., 457, and other analogous cases, have raised doubts upon the question now under consideration; but the decision of the chief justice was made during the hurry of a circuit, and it is quite certain that the case before Judge Winchester was clearly distinguishable from those before Mr. Justice Washington and the chief justice, for reasons which do not appear to have been considered by the latter. In the case before Judge Winchester the defendant was a private individual, who had detained the mail by holding possession of the horses employed in its transportation, on the ground that he had a lien on them for food furnished for them, while engaged in that employment, prior to such detention; and Judge Winchester evidently reached the conclusion that no such lien existed, even against the owner of the horses, and that it was entirely clear that no such lien could be enforced against the right of the government to use the horses in the transportation of the mail. The act of detention was intentional and deliberate, and under such circumstances that the defendant was bound to know that it was

without legal right, and in violation of law; and it was therefore held to be an offense under the statute.

§ 2061. *One who does a prohibited act without improper motive, but through mistake or ignorance, cannot be said to have done it wilfully.*

In the case before Judge Washington the defendant was in the execution of what he believed to be his duty as a peace-officer; and in that before the chief justice the defendant was a constable, holding a civil process to arrest the mail-carrier, and he may well have supposed it to be his duty to execute the process in his hands. If he acted upon his honest conviction of duty, without improper motive or feeling, I confess my inability to assent to the propriety of his conviction. In short, I cannot believe that congress, when expressly requiring that the act should be *wilful*, intended to subject a public officer to indictment and punishment for honestly endeavoring to do what he really believed to be his official duty. I cannot believe that congress, when it required the act to be *wilful*, intended that an honest mistake upon a question of law, in respect to which the opinions of such eminent judges as Mr. Justice Washington and Judge Winchester had been opposed, and which had not been settled by any later decision, should be punished as a crime.

This decision of the chief justice, and others which serve to sustain, to some extent, the position of the district attorney, were doubtless based upon the maxim that "ignorance of the law excuses no one," and in accordance with which a party is legally presumed to know what the law is, even when the question depends upon the intent and meaning of an act of congress of which he has never heard, and in regard to which the opinions of judges and lawyers are not only in opposition but almost equally divided; and it can hardly be doubted that the term *wilfully* is sometimes, if not generally, introduced into criminal and penal statutes to prevent the gross injustice that might otherwise be perpetrated in the strict application of the rule which requires this legal presumption in opposition to the real truth of the case.

§ 2062. *Ignorance of law.*

But there is another view of the case which deserves consideration. The maxim "*Ignorantia juris non excusat*" has its co-relative in the maxim "*Ignorantia facti excusat*." Broom, Leg. Max., 122. And while ignorance of the law, which every man is presumed to know, does not excuse, ignorance of a material fact may excuse a party from the legal consequences of his acts; more especially when such acts are criminal only when wilful. Thus, if a man, believing a woman to be unmarried and free, marries her when she is in fact a married woman, he will not be criminally responsible. So, under the statute against wilfully obstructing the passage of the mail, the stopping of a private carriage and horses, although such carriage and horses might at the time be actually employed in the transportation of the mail, would not be criminal if the fact of such employment was unknown to the party charged, and he had no reason to suspect the fact of such employment. Even where an act of congress had made it criminal to cut or remove timber from the lands of the United States, without expressly requiring that the act should be wilfully, or even knowingly, done, it would seem to have been the opinion of the learned judge of the district of Michigan that evidence showing mistake, ignorance of the section lines, and a well founded belief that the timber was being removed from other lands than those of the United States, would constitute a good defense. *United States v. Schuler*, 6 McL.; 28, 42. And under an indictment for knowingly and wilfully obstructing or resisting an officer in the discharge

of his duties, it is well settled that it must be proved that the party charged had knowledge or notice that the party obstructed or resisted was an officer, and engaged in such official duties. Whart. Cr. L., §§ 1289, 1290; and see 5 Mas., 455; Reed v. Davis, 8 Pick., 515.

As the party who removed the seals in this case was wholly ignorant of their character and purpose, it may be doubtful whether he would have been guilty of an offense under section 5, so often referred to, even if the word *wilfully* had not been used as descriptive of the criminal offense; and, upon the statute as it stands, and the whole case, I am of the opinion that neither the evidence nor the facts found by the jury would justify a conviction of the person who removed the consular seals, as alleged in the information. To convict a person of *wilfully* removing official seals under proof clearly showing the absence of any will or intent to do that or any other unlawful or improper act, would seem to be palpably unjust. But the question which has now been discussed at great length is not, in strictness, involved in this case. The information does not allege that the seals were *wilfully* removed, and the verdict of the jury establishes the fact that they were removed in ignorance of their character and purpose, and without improper or illegal purpose, motive or intent.

Now, it is very clear, as a question of pleading, that the omission of the allegation that the seals were *wilfully* removed,—this being absolutely necessary to the statutory definition of the offense intended to be charged,—would be fatal in an indictment against a party charged with such removal, unless, indeed, the sense of the word “*wilfully*” was legally embraced in some other word used to characterize the act. This must dispose of the case, if the second position of the counsel for the claimants can be maintained. It is true that, in a proper case, a court might allow a defect of that kind to be remedied by an amendment; but, under the proofs in this case, it is clear no amendment of that kind should be allowed. The evidence showed that the seals were removed by a subordinate employee of the claimants, who had been directed by the station agent to put upon the cars the leaden seal of the station, and had him furnished with leaden blanks for that purpose; that the station seal had been usually placed on a peculiar kind of lock, which had been in use on the cars, and on which said leaden blanks for the station seal were intended to be used; that when this employee went to the cars to affix the station seals, he found no locks upon the cars, and could not, therefore, do as he had been directed, without placing the locks thereon; that he went to the depository of such locks, in the station, and obtained the necessary locks, and put the same on the cars, and affixed the station seal thereto; that he found that, in order to put said locks and the station seals on the cars, it was necessary to remove the wires and leads that he found thereon, and that he did so remove the same for that purpose, and after having done so reported the facts to the station agent; that the station agent, understanding from this report that consular seals had been removed, immediately went with the person who removed them to the consul at Clifton, and reported the facts and circumstances of such removal; that the consul declined doing anything in the matter, as his duties were to be discharged in Canada, and directed the station agent to report the facts to the collector on this side; that affidavits showing the mistake and the facts in regard to the removal were made by the station agent and the employee, but that the collector seized the property and insisted upon the forfeiture. Under such proof, and the finding of the jury in this case, no court

should allow an amendment in order to decree a forfeiture of the property of parties entirely free from all suspicion of blame.

This point upon the pleadings was not raised upon the argument, and it did not occur to me afterwards until I had nearly completed my examination of the authority I have referred to. Having performed the labor of searching for and examining the authorities, I have thought it better to express my opinion upon both the questions argued, rather than to dispose of the question of the construction and effect of the first sentence of section 5 of the statute, upon the ground that no wilful removal of the seals is alleged in the information. If the question were now evaded, I might soon be called upon to decide it upon an indictment.

§ 2063. *In a prosecution under section 5 of the act of June 27, 1864, it must be proved that the consular seals were wilfully removed.*

The remaining question which was argued by counsel is, in substance, whether the last sentence of section 5 — which declares the forfeiture — is so connected with and dependent upon the preceding sentence that a *wilful* removal of the consular seals must be alleged and proved to entitle the government to a forfeiture of the property in controversy; and it need hardly be said that the question is not free from doubt. The latter part of the section is closely connected with the first by its general relation to the same subject-matter, and by a copulative conjunction; and without such connection, or some reference to prior provisions of the act, the last sentence of the section would be wholly inoperative. And there is certainly much reason for saying that the forfeiture provided for is intended as a cumulative penalty for the commission of the act just made criminal. The word *such*, in the expression "*such* unauthorized person," can only refer to the person just referred to,— that is, one who has *wilfully* removed the seals just described; and these *indicia*, though not controlling, must strengthen the probabilities that congress did not intend to declare that consequences so penal as the forfeiture of the merchandise of an entire stranger to the transaction, and of a carrier wholly innocent of blame, should be visited upon such parties, because a third person, equally innocent of improper or unlawful intentions, had, by mistake, and in ignorance of their character and purpose, removed the seals of a government agent. It may well be that congress intended that property owners and carriers should be responsible for the integrity and good faith of those to whom they had intrusted the care of merchandise and property, passing through the country under official seals; but it can hardly be supposed that this responsibility was intended to be extended to a case like the present.

§ 2064. *Construction of statutes. Punctuation, how far considered.*

The words "as aforesaid," near the close of the section, may have been intended to apply to the first as well as to the last portion of the sentence, and if a comma were inserted immediately before these words, as well as after them, such would, I think, be the necessary construction of the sentence. There is, however, no comma immediately before those words, and though the punctuation of a statute, as printed, affords no very decisive means for determining its construction, yet, so far as it affects the question, the punctuation is undoubtedly an indication that the words "as aforesaid" are only intended to apply to the affixing and not to the removing of seals.

But a strong argument in favor of giving these words a broader application may be based upon the fact that they would seem to have no effect unless they can be applied to the first branch of the sentence. The word *such* precedes

the words "seals, or other thing purporting to be a seal," and the word *wrongfully* is used in respect to the attaching of seals, so that there would seem to be no reason for using the words *as aforesaid* in regard to the attaching of seals, whilst their use in respect to the removal of seals would render it clear that the forfeiture for such removal was intended only when such removal was *wilful*. After a careful consideration of the language of the act, I am strongly inclined to the opinion that in order to produce a forfeiture there must be proof that the consular seals were wilfully removed.

It must be conceded that the construction which I have deemed it my duty to give to the statute on which the proceedings in this case have been based is not free from doubt; but if the questions discussed were more doubtful, and even if the judicial mind was slightly inclined to the opposite construction, rather than to the one now adopted, it is supposed that in a case like this, involving a forfeiture, and when no improper motive existed, the final judgment of the court should still be for the claimants. In the case of *The Enterprise*, 1 Paine, 34, Mr. Justice Livingston said: "A court has no option when any considerable ambiguity arises on a penal statute, but is bound to decide in favor of the party accused;" and although this doctrine ought not to be acted upon except in a case of serious and considerable doubt, it may well be considered as relieving a court from all embarrassment in deciding a case like the present.

The claimant must have judgment upon the special verdict, but, as the law of the case was unsettled and doubtful, the usual certificate of probable cause will be granted, notwithstanding the fact that I have a very decided opinion that the case is one which should not have been prosecuted. After the facts had been made known to the collector, and the removal of the seals had been shown by affidavit to have been made by mistake, the collector would have, in my judgment, done all that his duty required if he had directed the cars to be returned to the Canada portion of the suspension bridge, and procured the consul to renew the seals thereon. And if the consul had declined to do so, I think the collector might then have properly taken other measures to secure the government against injury by reason of the mistake made by the railroad employee, and even advised the remission of the forfeiture, if any one had claimed that a forfeiture had been incurred. Decree accordingly.

UNITED STATES v. HOWARD.

(Circuit Court for Massachusetts: 3 Sumner, 12-19. 1837.)

STATEMENT OF FACTS.—This was an indictment against one Howard for an assault on board a vessel called the "Mount Vernon." Counsel for defendant moved for a new trial on the ground of misdirection of the jury by the court, in that the indictment charged that the vessel belonged to William Nye and others, and the testimony was that the name of the owner was Willard Nye, and the court had instructed the jury that the variance was immaterial.

Opinion by STORY, J.

The present indictment is founded on the act of 1825, ch. 276, §§ 22 and 5, the twenty-second section describing the offense, and the fifth conferring jurisdiction on the court to try it. The language of the fifth section is as follows: "That if any offense shall be committed on board of any ship or vessel belonging to any citizen or citizens of the United States, while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of the ship, etc., on any other person belonging

to the company of the said ship, etc., the same offense shall be cognizable and punishable by the proper circuit court of the United States, etc., as if the said offense had been committed on board of the said ship or vessel on the high seas," etc. It is apparent, therefore, that the objection of variance in this case does not apply to any words descriptive of the offense charged in the indictment, but solely to the words which state the jurisdiction. It is as clear that it is wholly immaterial who are the particular owners of the ship on board of which the offense is committed, provided only that the ship is owned by citizens of the United States. Now it is not disputed that the Mount Vernon is a ship of the United States, and is wholly owned by American citizens. The question then is whether, as the names of the owners are specially set forth (although it was wholly unnecessary) in this indictment, the variance in the name of *Willard Nye*, one of those owners, is fatal.

§ 2065. *Mere surplusage will not vitiate an indictment.*

It will not be found easy to reconcile all the cases upon the subject of variance, either in civil or in criminal causes. In the latter the authorities are not always in harmony, even where the same circumstances have occurred. There are, however, some principles which will guide us in arriving at a correct conclusion; and as these principles will be found well laid down by Mr. Russell in his work on Crimes and Misdemeanors, ch. 4, § 3, pp. 704 to 718, with illustrative examples, I shall state them from his work, because I find them confirmed by the authorities cited by him. Two questions generally arise. The first is, what allegations must be proved, and what may be disregarded in evidence. The second is, what is sufficient proof of allegations, which cannot be disregarded in evidence. The former includes the consideration of what constitutes mere surplusage in an indictment; the latter what properly constitutes variance. Mere surplusage will not vitiate an indictment, and need not be established in proof. The material facts which constitute the offense charged must be stated in the indictment, and they must be proved in evidence.

§ 2066. *What may be rejected as surplusage.*

But allegations not essential to such a purpose, which might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, are considered as mere surplusage and may be disregarded in evidence. But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment can ever be rejected as surplusage. The former proposition may be illustrated by cases which have actually passed in judgment. Thus, where the prisoner was charged with robbery *near the highway*, and the evidence proved the robbery in a house, it was held immaterial; for it was equally a robbery ousted of clergy, whether committed near the highway or elsewhere. See *Sumner's Case*, 2 East, P. C., ch. 16, § 168, p. 785; *Rex v. Wardle*, Russ. & Ry. Cr. Cas., 9; 2 Russ. on Crimes, 705. So in *Pye's Case* (Russ. & Ry. Cr. Cas., 9, note; S. C., 2 East, P. C. ch. 16, § 168, pp. 785, 786), where the robbery was charged with being committed in the dwelling of A. W. The proof was that the robbery was committed in a house, but it did not appear who was the occupier of it; it was held immaterial. So, upon an indictment under the statute 8 & 9 Will. 3, ch. 6, § 1, for having a die, made of iron and steel, in possession, it was held that, as it was immaterial as to the offense of what the die was made, proof of a die either of iron or steel, or both, would satisfy the charge. *Rex v. Oxford*, Russ. & Ry. Cr. Cas., 382; *Rex v. Phillip*, Russ. & Ry. Cr. Cas., 369; 2 Russ. on

Crimes, 705. So an indictment for stealing so much lead "belonging to the Rev. G. C. W., and then and there fixed to a certain building called Hernden church;" it was held that it should have been charged only as affixed to the church, and that therefore the allegation that it belonged to G. C. W. ought to be rejected as surplusage. *Rex v. Hudman*, 2 East, P. C., ch. 76, § 31, p. 519. See, also, *Rex v. Holt*, 5 T. R., 446; S. C., 2 Leach, Cr. Cas., 593 [676].

On the other hand, if a man should be charged with stealing a black horse, the allegation of color, although unnecessary, yet being descriptive of that which is material, could not be rejected as surplusage. 2 Russ. on Crimes, 706. So upon an indictment for stealing live tame turkeys, the description of live could not be rejected as surplusage, and proof of stealing dead turkeys would not support the indictment. That was so held in *Rex v. Edwards*, Russ. & Ry. Cr. Cas., 497. Indeed, in such cases, an acquittal or conviction on one indictment would be no bar to another, for the identity could not be averred of the described animal.

§ 2067. *A variance between the indictment and the evidence is not material, provided the substance of the matter be found.*

In regard to the other question, what is sufficient proof of allegation, which cannot be disregarded as evidence, or, in other words, what constitutes a material variance in proof from the charge in the indictment, the general rule is that a variance between the indictment and the evidence is not material, provided the substance of the matter be found. Hence it is that even in capital offenses it is not necessary to prove more than the substance of the averment in the indictment. Thus, for example, in an indictment for murder, if it appear that the party was killed by a different weapon from that described in the indictment, it will still maintain the indictment; as, for example, if the wound or killing be alleged to be by a sword, and it be proved to be by an axe or staff; or it is alleged to be by a wooden staff and it be proved to be with a stone. For in all these cases the substance is the same, the wounding or killing with a weapon. So, if the indictment be of a death by one sort of poisoning, and it turns out in the evidence to be by another sort of poisoning, the difference is not material, for in each of these cases the mode of the death is substantially the same, viz., by poisoning. But if the indictment charge a death by poisoning, it will not be supported by the proof of a death entirely different, as by shooting, starving or strangling. This doctrine is clearly laid down by Mr. Russell in his work on Crimes (2 Russ. on Crimes, 701-712), and by Mr. East in his work on Crown Law (1 East, Pl. Cr., ch. 5, § 107, p. 341). Indeed *Mackalley's Case*, in 9 Coke, 62, 66, where the indictment specially charged the murder of a sergeant at mace in London upon an arrest, and supposed that the sheriff made a precept to the sergeant for the arrest; and upon the evidence it appeared that there was no such precept, but that the sergeant made the arrest *ex officio*, at the plaintiff's request, upon the entry of the plaint according to the custom of the city, the proof was held sufficient, for the substance of the matter was, whether the defendant killed an officer in the lawful execution of legal process. S. C., 1 East, Pl. Cr., ch. 5, § 115, p. 345; 2 Russ. on Crimes, 711. So, in general, if the indictment charge the offense to be committed in a particular place within the county, it is not necessary to prove that it was committed in that place, or aver that there is such a place in the county, but only to prove that it was committed within the county. See 2 Russ. on Crimes, 716, 717. In such a case the place is immaterial, provided it be within the county, and it constitutes no part of the description of the offense. So,

where an offense was alleged to be committed on the 20th of July, in the fourth year of the reign of King George the Fourth (although in fact tried in 1820, in the second year of the reign of George the Fourth), the judges rejected the words "fourth year of," as surplusage, and read the indictment as if it stood "on the 20th of July, in the reign of King George the Fourth," and held the conviction right. *Rex v. Gill*, Russ. & Ry. Cr. Cas., 431, 432.

§ 2068. *When a misnomer is fatal.*

In regard to cases of misnomer, it will be found that in all the cases where the variance has been held fatal, it was a misnomer of a party whose existence was essential to the offense charged in the indictment; as, for example, in cases of theft, where the property is charged as that of A. B., and it turns out in proof to be of A. C.; or in cases of robbery, where the person robbed is alleged to be A. B. and it turns out on proof to be C. B. See 2 Russ. on Crimes, 707, 714, 715. Now, if we apply the principles here stated to the present case, it seems to me clear that the variance is not fatal. In the first place the variance, as has been already stated, does not occur in the description of the offense. It occurs only in the clause which confers, or is supposed to confer, jurisdiction over the offense. Now that jurisdiction equally exists (as has been already stated), whoever are the owners of the ship, provided she belong to citizens of the United States.

§ 2069. *Technical meaning of the words "a ship of the United States," given.*

The allegation of the particular ownership was wholly unnecessary, and is wholly immaterial. The words in the indictment allege the offense to be committed "in and on board a ship of the United States, called the Mount Vernon." Now under our laws, these words, "a ship of the United States," have a technical meaning; for the Ship Registry Act (act of 1792, ch. 45)—and this was a registered ship—declares that no ships, except those which are registered according to that act, shall be denominated and deemed ships or vessels of the United States, entitled to the benefits and privileges appertaining to such ships or vessels; and it proceeds to prescribe that no ships or vessels, except those which are wholly belonging to citizens, shall be registered. Indirectly (though not as it should properly do), the indictment does contain an allegation of the American character of this ship, so as to found the jurisdiction. And if it had stopped here, a nice question might have arisen, how far such an allegation, not stating in the terms of the act of 1825, ch. 276, § 5, that the offense was committed on board of a ship or vessel belonging to any citizen or citizens of the United States, but stating it in the manner above cited, would have been sufficient to found the jurisdiction, or to sustain the indictment. But the indictment goes on to allege, "the ship then and there belonging" to certain persons (naming them), "citizens of the said United States."

§ 2070. *Misnomer not material to the jurisdiction.*

Now the substance of this allegation is that all the owners of the ship are citizens; and this is strictly true, and was established in evidence. The misnomer is not in any part material to the jurisdiction, and the charge in its substance was proved so far as it bore on the question of jurisdiction. I think the names of the owners may be either rejected as surplusage, or the variance as to the proof was as to a fact purely immaterial. *Pye's Case* (Russ. & Ry. Cr. Cas., 9, note; 2 East, Pl. Cr., 785, 786) and *Mackalley's Case* (9 Coke, 62, 66) are far stronger cases of variance. And the variances upon indictments for murder, as to the weapon or other means used to effect the crime, are far

more striking, as to a dispensation with exact proofs of circumstances alleged in the indictment.

Upon the whole, my opinion is that the motion for a new trial ought to be overruled. The district judge concurs in this opinion; and, therefore, let the motion be overruled.

§ 2071. **Certainty—Statement of the offense.**—The rules of criminal pleading require that every fact relied upon to constitute the crime, and upon which conviction depends, shall be set out and described with as much particularity as the nature of the case will allow. *United States v. Weld,* McCahon, 185.*

§ 2072. In an indictment everything must be charged positively and not inferentially. Nothing which is material to the description of the substance of the offense can be supplied by implication. *United States v. Cruikshank, 2 Otto, 550 (CONST., §§ 809-911).*

§ 2073. An indictment must contain every averment necessary to show that an offense has been committed. It must be sufficient of itself, when aided by those intendments which the law requires to be made from what appears therein, and it cannot be made good by merely extraneous matter though that may be matter of record. *United States v. Stowell,* 2 Curt., 153; United States v. Weld,* McCahon, 185.*

§ 2074. In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right to be informed of the nature and cause of the accusation. The indictment must be drawn with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged. Every ingredient of which the crime is composed must be accurately and clearly specified. *United States v. Cruikshank, 2 Otto, 557; affirming S. C., 1 Woods, 303.*

§ 2075. The object of the indictment is said to be, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. *McCall v. United States,* 1 Dak. T'y, 320.*

§ 2076. Every indictment must be "certain to a certain intent in general," and "nothing material shall be taken by intendment." *United States v. Watkins,* 3 Cr. C. C., 441.*

§ 2077. In an indictment for a statutory misdemeanor it is not necessary to charge the offense with the particularity of time, place and circumstance required for a felony or a common law offense. If the defendant makes it appear to the court that in order to prepare his defense it is necessary to have a bill of particulars, the court will compel the prosecution to furnish one and confine the prosecution to it strictly on the trial. *United States v. Schimer,* 5 Eiss., 195.*

§ 2078. The facts necessary to constitute the offense must be set forth in the indictment; and an indictment is not good, which, if true, yet leaves a possibility that the defendant may be innocent. If a part of the description of the offense consist of a negative proposition, it is necessary that the indictment should state the negative as well as the affirmative part of the description. Where a statute punishes a minister for joining in marriage certain designated persons "without the consent of the parent or guardian of every such person," it is not sufficient that the indictment alleges the act to have been done without the consent of the parent. It must allege that it was without the consent of the guardian also, and notwithstanding that it afterwards appears that there was no guardian. (FITZHUGH, J., dissenting, was of the opinion that the indictment in this case was good.) *United States v. McCormick,* 1 Cr. C. C., 593.*

§ 2079. If an indictment be uncertain as to some particulars only, and certain as to the rest, it is void only as to the former, and good for the residue. *United States v. La Coste, 2 Mason, 140.*

§ 2080. The words of an indictment are to be construed according to their strict legal meaning. *United States v. Wells,* 2 Cr. C. C., 43.*

§ 2081. Unnecessary matters of description in an indictment must be proved; but if the unnecessary matter be wholly foreign and irrelevant, the allegations will be rejected as surplusage. *United States v. Brown,* 3 McL., 233.*

§ 2082. Descriptive allegations in the first count in an indictment may be adopted in subsequent counts by mere reference, and need not be repeated; and a reference to a person as "the said A. B." will be held to embrace the character and status of the person as set forth in the former count. *United States v. Hendric,* 2 Saw., 477.*

§ 2083. In all indictments upon statutes all the circumstances which constitute the definition of the offense in the act must be set forth, so as to bring the defendant precisely within

it. So an indictment for making a fraudulent entry, and aiding in the fraudulent entry, of goods, which alleges that the offense was committed by "fraudulent means," is insufficient. *United States v. Bettilini*, 1 Woods, 654 (§§ 2553-56).

§ 2084. There are no common law offenses against the United States. An act or omission, to be criminally punished in the federal courts, must be declared an offense by an act of congress. So where the elements constituting the offense under the statute differ from those which constitute it at common law, that fact should be considered in determining the weight of English cases as to the particularity and certainty essential to indictments for such offense. *United States v. Walsh*, 5 Dill., 58 (§§ 2279-82).

§ 2085. While a particularity and clearness are required in an indictment which will inform the defendant of the charge he has to meet, and the court of the offense claimed to have been committed, so that it may pronounce judgment if there be a conviction, the validity of indictments should not depend upon too great niceties of language. *United States v. Nunnemacher*, 7 Biss., 129 (§§ 2394-99).

§ 2086. Unless every material ingredient of the charge is set forth in the indictment the defect may be reached by demurrer or the judgment arrested. *United States v. Martin*, 4 Cliff., 156 (§§ 2299-2304).

§ 2087. Every indictment must charge the crime with such certainty and precision that it may be understood — charging all the requisites which constitute the offense; and every averment must be so stated that the party accused may know the general nature of the crime of which he is accused. *United States v. Corbin*, 11 Fed. R., 233 (§§ 2545-47).

§ 2088. A charge that two persons and each of them carried on a certain business is good, if they were partners and jointly concerned in the trade. *United States v. Fox*, 1 Low., 199 (§§ 2415-18).

§ 2089. Whatever is well alleged in an indictment is admitted by a demurrer thereto. *United States v. Martin*, 4 Cliff., 156 (§§ 2299-2304).

§ 2090. An indictment will not be quashed on motion unless bad beyond a reasonable doubt. *United States v. Dustin*, 2 Bond, 332 (§§ 2233-34).

§ 2091. A defect only pleadable in abatement, and which is cured by pleading over, is not ground for quashing an indictment. A motion by a defendant to quash an indictment must be founded on defects which would make a judgment against him on that indictment erroneous. *United States v. Pond*, 2 Curt., 265 (§§ 2454-59).

§ 2092. Unlawfully.—In an indictment it is not necessary to charge that the alleged criminal act was done unlawfully where the facts are set forth which, if true, constitute the offense. *Ibid.*

§ 2093. One good count.—If any one count in an indictment is good it will support a judgment by the court upon a general verdict. *United States v. Marks*, 2 Abb., 532; *United States v. Burroughs*,* 3 McL., 405; *United States v. Rhodes*,* 1 Abb., 28; *United States v. Burns*,* 5 McL., 28; *United States v. Whalan*,* 7 Int. Rev. Rec., 163; *United States v. Patterson*, 6 McL., 406 (§§ 2470-73); *United States v. Trout*, 4 Biss., 105 (§§ 2340-43); *United States v. Dustin*, 2 Bond, 332 (§§ 2233-34); *United States v. Pirates*, 5 Wheat., 184 (§§ 542-551).

§ 2094. Use of generic terms.—Where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as the definition; but it must state the species — it must descend to particulars. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstance. *United States v. Cruikshank*, 2 Otto, 558; affirming *S. C.*, 1 Woods, 308.

§ 2095. Matters of law.—It is never necessary to set forth matters of law in an indictment. *United States v. Rhodes*,* 1 Abb., 28.

§ 2096. Conclusions of law are inadmissible in an indictment. The facts should be stated and the court will draw its own inferences. *United States v. Weld*,* McCahon, 185.

§ 2097. Matters of form.—Under § 1025, Revised Statutes, matters of form will not vitiate an indictment unless they tend to prejudice the defendant. *United States v. Nye*,* 4 Fed. R., 888.

§ 2098. Dates.—In an indictment figures for dates should not be used. *United States v. Prescott*,* 2 Abb., 169; 2 Biss., 325.

§ 2099. Misdemeanors.—Indictments for misdemeanors are less strictly and technically construed in favor of the defendant than indictments in capital cases. *United States v. Smith*, 2 Mason, 148.

§ 2100. *Aggravation.*— A charge in an indictment which is only a matter of aggravation need not be proved. *United States v. Scholfield*,* 1 Cr. C. C., 255; *United States v. Larkin*,* 4 Cr. C. C., 617.

§ 2101. *Caption.*— Defects in the caption of the indictment cannot be made the ground of a motion in arrest of judgment. *United States v. Thompson*,* 6 McL., 56.

§ 2102. Where the caption of an indictment for conspiracy contains the words "United States of America," it is sufficient that the body of the indictment charge the fraud to have been directed against the "United States." *United States v. Boyden*, 1 Low., 266 (§§ 2294-98).

§ 2103. *Scienter.*— An indictment for keeping a dog of fierce and furious nature, and suffering him to go unmuzzled and at large in and about the public streets and highways, to the danger and nuisance of the people, need not allege *scienter*. *United States v. McDuell*, 5 Cr. C. C., 891.

§ 2104. Where the statute forbids the use of a still for the purpose of distilling, and is silent as to intention, the indictment need not aver knowledge. *United States v. Malone*,* 9 Fed. R., 897.

§ 2105. Where not required by statute, it is not necessary for an indictment to charge that an offense was committed by the defendant "knowingly." *United States v. Smith*, 2 Mason, 150.

§ 2106. *Ownership.*— Where the real ownership of property is unknown, or where the evidence is conflicting, it may be alleged to belong to persons unknown. *United States v. Plumer*, 3 Cliff., 65.

§ 2107. *Unknown person.*— An indictment for assault and battery, "upon a person unknown" (not to the jurors unknown), was held to be sufficiently certain. *United States v. Davis*, 4 Cr. C. C., 333.

§ 2108. *Feloniously.*— That part of section 59 of chapter 106 of the act of 1864, relating to national banks, which makes the offense of attempting "to pass any falsely altered circulating note purporting to have been issued by any banking association of the United States, knowing the same to be false," a felony, having been repealed by the revision of 1874, whose repealing chapters repeal all former acts of congress, "any portion of which is embraced in this revision," the offense is no longer a felony, and need not, therefore, be charged as having been committed feloniously. *United States v. Shepherd*,* 1 Hughes, 520.

§ 2109. *Alternative allegations.*— The prosecutor cannot, in the same count, charge different offenses in the alternative. But where a statute declares cutting, or procuring to be cut, one offense, *i. e.*, cutting on the principle that the procurer is the doer; aiding or assisting one offense, as he who aids is of identity with him who assists; and removing, or procuring to be removed, another offense, a count for aiding or assisting is good, because aiding is assisting. *United States v. Potter*,* 6 McL., 182.

§ 2110. *Ambiguity.*— Where an indictment for killing a horse alleges that the defendant shot the said horse so that he died from the said wound, but does not say whether the defendant used a rifle, shot-gun, or what kind of a gun he used, there is no ambiguity in the indictment in this respect of which the defendant can complain, especially where a statute of the territory declares that the indictment shall not be void "for want of the averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." *Fein v. Wyoming Territory*,* 1 Wyom. T'y, 376.

§ 2111. *Time and place.*— It is necessary in an indictment to allege a date, but, unless the date is of the essence of the crime, it need not be proved as alleged. *United States v. Blaisdell*,* 3 Ben., 132.

§ 2112. Every indictment must allege a day and a year certain on which the offense was committed. An allegation that the crime was committed "on or about" a certain day does not show that the action has not been barred by the lapse of time. *United States v. Winslow*,* 3 Saw., 337.

§ 2113. Indictment quashed because it stated the time as "on or about." *United States v. Crittenden*,* Hemp., 61.

§ 2114. The time laid in an indictment is not material, and proof may be made at the trial that the prosecution was commenced within the statute of limitations, notwithstanding the day laid in the indictment indicates the contrary. *Johnson v. United States*, 3 McL., 89.

§ 2115. It is immaterial what date is alleged in an indictment as the day on which the crime was committed, provided such day be prior to the finding of the indictment, and within the time prescribed by the statute of limitations; but the rule as to proof under an indictment is not so liberal, as it must be confined to a given crime at a given time. Under an indictment for permitting poker to be played in a building under the defendant's control, the permission of every game of poker played constitutes a distinct offense, and when the prosecution fix

the time by one witness, they cannot offer proof as to other times. The evidence must be confined to one distinct offense. *Fields v. Wyoming Territory*,* 1 Wyom. T'y, 78.

§ 2116. It is no ground for arresting the judgment that the indictment, which was for distilling coal oil without a license, charged the offense to have been committed on a certain day, and on divers other days between that day and the finding of the bill. *United States v. Trobe*,* 3 Pittsb. R., 6.

§ 2117. An indictment for a single offense constituting a misdemeanor alleged the offense to have been committed "heretofore and after the 20th day of April, A. D. 1818, that is to say, at some time between the day of the month and year last mentioned, and the 12th day of February now last past." Held, that this averment of time was sufficient. *United States v. Smith*, 2 Mason, 144.

§ 2118. An indictment must charge with certainty the place where the crime charged is alleged to have been committed. So an indictment in a territorial court charging the offense to have been committed within a particular judicial district, which consisted of several counties, without specifying in which county, is fatally defective. *Territory v. Freeman*,* McCahon, 56.

§ 2119. An indictment for a single offense contained the allegation that it was committed on a day "now last past, and on divers days and times before and since the last mentioned day," etc. Held, that allegation of the day certain was sufficient, and should be held to refer to the last day of that description prior to the finding of the indictment, and the words "on divers days and times" should be rejected as surplusage, as the allegation in this respect is too uncertain to warrant a judgment for such times. *United States v. La Coste*, 2 Mason, 139.

§ 2120. In an indictment for piracy, it is a sufficient statement of venue to allege that the crime was committed on the high seas, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state. *United States v. Gibert*,* 2 Sumn., 37.

§ 2121. An indictment must lay the offense in such a locality that the court may judge upon the face of it whether they have the power to punish its commission, and an indictment describing the locality as the particular district in which the court sits is sufficient, without naming the county. The crime must be tried in the district where committed, but whether in the county or not depends on the convenience of the court. *United States v. Wilson*,* 1 Bald., 78.

§ 2122. Where an indictment stated that "Lorenzo Dow, late of the district of Maryland, mariner, on the 31st day of October, 1839, then and there, being on board a certain brig called the Francis, belonging to a citizen of the United States, on the high seas, on the Atlantic Ocean, in latitude thirty-three," out of the jurisdiction of any particular state and within the jurisdiction of the United States, did, then and there, commit the crime charged in the indictment, it was held bad for repugnancy and the judgment thereon arrested. The words "then and there" are held to be equivalent to "at the time and place aforesaid;" and as the only time and place preceding these words are "the 31st of October, 1839," and "the district of Maryland," the indictment plainly alleges that the crime was committed at this time and place; and in the same clause it is alleged that the crime was committed out of the jurisdiction of any particular state. These two averments were therefore held to be repugnant. *United States v. Dow*,* Taney, 34.

§ 2123. Where an indictment charges an offense to have been committed in a certain district and in a certain county, the fact that the offense is shown to have been committed in another county is immaterial, and the averment as to the particular county may be rejected as surplusage. *United States v. Smith*, 2 Bond, 323 (§§ 207-214).

§ 2124. It is not necessary, in an indictment, to allege any venue or time of the unlawful intent, where venue and time are laid of the act which is alleged to have been done with such intent. *United States v. Pond*, 2 Curt., 265 (§§ 2454-59).

§ 2125. Variance.—The letter "M," appearing between the word "one" and the words "per centum," in a promissory note set out in an indictment under the act of March 3, 1825, as having been bought, received and concealed by the defendant knowing that it had been stolen from the mail, is a material part of the note. It limits the interest on the note to one mill per centum, instead of one per centum. Although this note might have been sufficiently described in the indictment without stating the rate of interest, yet this part of the note being described it must be done accurately. Any substantial variance between the note as thus described, and the one offered in evidence, will be fatal to the prosecution. *United States v. Hardyman*,* 13 Pet., 176. See § 2051.

§ 2126. Where an indictment for forgery sets forth the tenor of the original check forged, and the specific alterations made, the government is held to a strict proof of the instrument as set forth; and if there be any material variance or defect in the proof, the prisoner is entitled to a verdict. *United States v. Britton*,* 2 Mason, 461.

§ 2127. Where it is averred in an indictment for stealing bank-notes, contained in a letter in the mail, that the letter was directed to "M. Garraty, Esquire, Cashier," and the letter is not produced, and the witness, not being positive, states that the letter was directed to "M. Garraty, Esquire," and the verdict is guilty generally, it will not be set aside for variance. And especially if there are counts in the indictment to which the variance does not apply. *United States v. Burroughs*, * 3 McL., 405.

§ 2128. Where an indictment for making a false declaration as to the employment of a vessel in the cod fisheries contrary to the act of congress of July 29, 1813, charged that the defendant produced to the collector "a certain paper purporting to be a written account of the length, breadth and depth of the said boat or vessel, in substance and effect, as follows, that is to say, that the boat *Fame*, of *Ipswich*, was of the burthen of fourteen tons and forty-five ninety-fifths of a ton," etc., etc., and the paper produced as that described in the indictment stated the boat to be of the burthen of fourteen tons and fifty ninety-fifths of a ton, the variance was held fatal. *United States v. Lakeman*, 2 Mason, 229.

§ 2129. Variances in an indictment in the description of an instrument set forth, which do not make a word different in sense and grammar, which have sound and sense in substance the same, are merely literal and are not fatal. *United States v. Mason*, 12 Blatch., 497 (§§ 2334-36).

§ 2130. *Duplicity*.—Where an indictment contains a clear and distinct, though not a sufficient, charge of fraud by false pretenses, it cannot be relied on as charging forgery also, since that would render it objectionable for duplicity. *United States v. Watkins*, * 3 Cr. C. C., 441.

§ 2131. *Surplusage*.—Unnecessary words added to an indictment by way of aggravation may be rejected as surplusage. *United States v. Larkin*, * 4 Cr. C. C., 617; *United States v. Scholfield*, * 1 Cr. C. C., 255. An unnecessary word in an indictment, which tends to obscure the sense as to the person charged, may be rejected as surplusage. *United States v. Patterson*, 6 McL., 466 (§§ 2470-73).

§ 2132. If an indictment set forth an offense with greater particularity than was necessary, the proof must correspond to the allegation, for nothing descriptive of the offense can be rejected as surplusage. *United States v. Thomas*, * 2 Abb., 119; 4 B. n., 370.

§ 2133. Where an indictment against the owner of a vessel for destroying her with intent to prejudice the underwriters thereon charges that the act was done with intent to defraud the underwriters, an allegation that the act was done with a view to gain corrupt advantage to himself, etc., may be treated as surplusage and need not be proved. *United States v. Johns*, * 1 Wash., 263.

§ 2134. A material allegation in an indictment which is sensible and consistent in the place where it occurs, and is not repugnant to any antecedent matter, cannot be rejected as surplusage, merely on account of there occurring afterwards, in the same indictment, another allegation inconsistent with the former, and which latter allegation cannot itself be rejected. *United States v. Dow*, * Taney, 34.

§ 2135. *Offenses created by statute*.—In an indictment for a statutory offense it is sufficient as a general rule to charge the offense in the language of the statute. *United States v. Schimer*, * 5 Biss., 195; *United States v. La Coste*, 2 Mason, 141; *United States v. Wilson*, * Bald., 78; *United States v. Goggin*, 1 Fed. R., 49; *United States v. Ballard*, * 13 Int. Rev. Rec., 195; *Dewee's Case*, * Chase's Dec., 531; *United States v. Scott*, 4 Biss., 29 (§§ 2232-27); *United States v. Crosby*, 1 Hughes, 418 (§§ 2285-89); *United States v. Henry*, 3 B. n., 29 (§§ 2419-21). See §§ 2047, 2049.

§ 2136. The rule is subject to this qualification, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. *United States v. Goggin*, 1 Fed. R., 49; *United States v. Simmons*, 6 Otto, 360 (§§ 2410-14).

§ 2137. Greater particularity is always required where the offense was known to the common law, and is described in the statute by its common law name, but not where the statute is complete in itself, or where, by creating it, it defines the offense. *United States v. Ballard*, * 13 Int. Rev. Rec., 195.

§ 2138. It is sufficient to substantially set forth the offense though not in the precise words of the act. *Dewee's Case*, * Chase's Dec., 531.

§ 2139. In general it is sufficient if the indictment sets forth an offense in the words of the statute creating it, or as defined by the common law, without the particulars of the manner or means, place or circumstance. *United States v. Wilson*, * Bald., 78.

§ 2140. It is not in general necessary, in an indictment for a statutory offense, to follow the exact words of the statute. It is sufficient if the offense be set forth with substantial accuracy and certainty to a reasonable intendment. Where the words of the statute are, "if any person shall forcibly resist, prevent or impede any officers of the customs, etc., in the

exercise of their duties," an indictment which charges that the defendant "did with force and arms violently and unlawfully resist, prevent and impede," etc., is sufficient. *United States v. Bachelder*, * 2 Gall., 14.

§ 2141. If the defendant insists on a greater particularity, it is for him to show that, from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to such general rule. *United States v. Henry*, 8 Ben., 29 (§§ 24-9-21).

§ 2142. In an indictment for a statutory crime it is not sufficient to pursue the very words of the statute, unless, by so doing, the fact in the doing or not doing whereof the crime consists is fully, directly and expressly alleged. *United States v. Corbin*, 11 Fed. R., 238 (§§ 2515-47).

§ 2143. An indictment for an offense defined by statute must conform to the requirements of the statute, even though the allegations may in those respects differ from those prescribed by the common law for charging an offense of the same name. *United States v. Martin*, 4 Cliff., 156 (§§ 2299-2304).

§ 2144. Allegations in an indictment founded on a statute which completely cover the terms of the statute and make the offense complete are not vitiated because another allegation is added which is indefinite and insufficient, but such allegation will be rejected as surplusage. *United States v. Nunnemacher*, 7 Biss., 129 (§§ 2394-99).

§ 2145. Where an offense is created by statute, if the statute itself so defines the act or acts constituting the offense as to give to the offender information of the nature and cause of the accusation, the indictment need go no further than the statute; but if it does not do this, the averment necessary to secure the constitutional right to such information must be added. It makes no difference whether the crime be a felony or a misdemeanor. The constitution secures to the offender, in all criminal prosecutions, the right to be informed of the nature and cause of the accusation. *United States v. Staton*, 2 Flip., 319 (§§ 2400, 2401).

§ 2146. Much more laxity of pleading has been permitted in setting out the offenses created by acts of congress than obtained under the system of the common law, even where that system was applied to new statutes. *United States v. Laws*, 2 Low., 115 (§§ 2464-67).

§ 2147. The rule that a statutory crime must be charged in the language of the statute does not apply where the acts set out are no part of the offense. *United States v. Eoyden*, 1 Low., 268 (§§ 2294-93).

§ 2148. Where an indictment is for an offense described by statute, it is, in general, sufficient if the pleader follows the words of the statute, unless the statute employs some technical term or phrase, or contains some word or words of compound signification. *United States v. Martin*, 4 Cliff., 156 (§§ 2299-2304).

§ 2149. In an indictment for a statutory offense it is not necessary that the exact words of the statute be used, if their precise equivalent is expressed. *United States v. Nunnemacher*, 7 Biss., 129 (§§ 2394-99).

§ 2150. If the words be indefinite and vague, ambiguous or general, the indictment must so particularize the act that the party charged shall be in no doubt of the offense alleged against him. The certainty required is that which will enable him to plead the verdict in bar of any future action. *United States v. Crosby*, 1 Hughes, 448 (§§ 2285-89).

§ 2151. Though it is sufficient, as a general rule, in prosecutions for statutory offenses, that the indictment follow the language of the statute, the rule scarcely ever applies to capital crimes; and when the statute defines the crime generally, without naming the particular acts which constitute it, it is necessary to set out the acts done so that it may appear to the court whether the acts done amount to the crime. *United States v. Scott*, 4 Biss., 29 (§§ 2222-27).

§ 2152. The general rule that the words of a statute are to be followed in an indictment is not absolutely and always true. On the one hand it is often sufficient, when the statute expresses a simple and clear meaning in one way, that the indictment should give the same meaning clearly in another way. And on the other hand, when the statute is itself elliptical, so that its meaning must be gathered from the context, or from other parts of the same or other statutes, the indictment, which has not the advantage of such aids in its interpretation, must of itself allege a crime according to the true intent of the statute. *United States v. Reed*, * 1 Low., 232.

§ 2153. — *misdemeanors*.— It is ordinarily sufficient in cases of a misdemeanor to allege the offense in the language of the statute. *United States v. Connally*, * 9 Biss., 338; *United States v. Quinn*, 8 Blatch., 48, 66; *United States v. Ballard*, * 13 Int. Rev. Rec., 195; *United States v. Mills*, 7 Pet., 138 (§§ 2452-53); *United States v. Lancaster*, 2 McL., 431 (§§ 2474-79). Where the indictment follows the words of the statute it is sufficient, unless the words of the statute embrace cases not intended by the legislature to be included within the law, and if they do the indictment must show that this was not one of the cases thus excluded. *United States v. Pond*, 2 Curt., 265 (§§ 2454-59).

§ 2154. It is sufficient that the indictment charge the offense in the language of the statute.

adapted to the particular circumstances involved in the offense charged. *United States v. Quinn*, 8 Blatch., 48, 66.

§ 2155. If the accused insists on greater particularity it is for him to show from the obvious intention of the legislature, or the known principles of law, that the case falls within some exception to the general rule. *United States v. Ballard*,* 18 Int. Rev. Rec., 195.

§ 2156.—*Instances*.—Where a phrase which has acquired a definite meaning is used in a statute creating an offense, the indictment may use it, and need not avoid or define it. *United States v. La Coste*, 2 Mason, 141.

§ 2157. Under the act of congress of March 2, 1831, punishing the offense of stealing bank-notes, the indictment need not follow the language of the act. *United States v. Lodge*, 4 Cr. C. C., 673.

§ 2158. Under section 5209 of the Revised Statutes, punishing the embezzling, abstracting or wilfully misapplying the funds or credits of national banks, an indictment which charges the offense in the language of the statute is not bad for being too general. A more definite statement may always be reached by a bill of particulars. *United States v. Voorhees*,* 9 Fed. R., 143.

§ 2159. Where the offense of wilfully setting fire to a ship at sea, with intent to burn her, is charged in the indictment in the words of the statute creating the crime, the allegation is sufficient without adding the word "feloniously." *United States v. McAvoy*, 4 Blatch., 418.

§ 2160. It is sufficient in an indictment, under the slave trade act, for fitting out a vessel for a slave trade voyage, to charge the offense in the language of the act. It is generally sufficient to charge an offense in the words of the statute creating it, and the charge of fitting out a vessel with intent to use it in the slave trade is as definite as the charge could be made without descending into evidence. *United States v. Gooding*, 12 Wheat., 460.

§ 2161. *Exception in statute*.—Where an exception to a criminal statute is contained in the same clause of the act which creates the offense, the indictment must show that the act or person in question is not within the exception. But if the exception or proviso be in a subsequent clause or subsequent statute, it need not be stated in the indictment, but is a matter of defense. *United States v. Moore*,* 11 Fed. R., 248; *United States v. Schimer*,* 5 Biss., 195.

§ 2162. If an exception is contained in the enacting clause of a criminal statute, the indictment must show that the defendant is not within the terms of the exception; but if the exception is in a subsequent clause or a subsequent statute, the defendant must show it by way of defense. *United States v. Imsand*, 1 Woods, 581 (§§ 2407-2409).

§ 2163. *Conclusion*.—Indictment quashed on motion because it did not conclude "against the peace and dignity of the United States of America." *United States v. Lemmons*,* Hemp., 63; *United States v. Crittenden*,* Hemp., 61.

§ 2164. Though an indictment for a statutory offense must conclude against the statute, still the technical words, "against the form of the statute in such cases made and provided," are not absolutely indispensable, and other equivalent words may be substituted. So the words, "contrary to the true intent and meaning of the act of the congress of the United States in such cases made and provided," are sufficient. *United States v. Smith*, 2 Mason, 150.

§ 2165. It is held that, under act of congress of March 3, 1801, an indictment must conclude against the government of the United States. *United States v. Boling*, 4 Cr. C. C., 579.

§ 2166. An indictment charging a statutory offense to have been committed "in contempt of the laws of the United States of America," without referring to the particular statute creating the offense, is not good. *United States v. Andrews*,* 2 Paine, 451.

§ 2167. Where a statutory offense is otherwise fully and exactly described in the indictment, the fact that in the conclusion the offense is called by a wrong name does not vitiate the indictment. The conclusion may be rejected as surplusage. *United States v. Elliot*,* 3 Mason, 156.

§ 2168. An indictment which concludes in the plural,—"against the form of the statutes of the United States in such cases made and provided,"—is good, although the offense is punishable by one statute only. *United States v. Gibert*,* 2 Sumn., 37; *United States v. Trout*, 4 Biss., 105 (§§ 2340-43). And it seems that an indictment framed under several statutes may conclude in the singular. *United States v. Trout*, 4 Biss., 105.

§ 2169. An information for the recovery of a penalty under a statute, which avers that the act is against the peace and dignity of the United States, and contrary to the act of congress in such case made and provided, sufficiently shows that the action is founded on a statute. It need not use the common formula "against the form of the statute." *United States v. Babson*, 1 Ware, 450.

§ 2170. *No presentment*.—The court refused to quash an indictment for forgery because there had been no previous presentment or order of court. *United States v. Tompkins*, 2 Cr. C. C., 46.

§ 2171. **Jurisdiction.**—The verdict of guilty finds the precise offense charged in the indictment, and unless the indictment clearly shows that it was committed within the jurisdiction of the court, the court will not proceed to judgment. *United States v. Dow,* Taney, 34.*

§ 2172. **Conspiracy to commit breach of peace.**—Counts in an indictment in a federal court which charge nothing more than a conspiracy to commit a breach of the peace in a state are insufficient. *United States v. Cruikshank, 2 Otto, 536 (Const., §§ 898-911); affirming 1 Woods, 303.*

§ 2173. **Name.**—A person is well described in an indictment by the name by which he is generally known, whether it be the first, the second, or the third of his given names. Thus an indictment is proper which describes a person as D. K. Olney Winter. *United States v. Winter,* 13 Blatch., 276.*

§ 2174. **"Steers" and "working cattle,"** when used in an indictment, are synonymous. In ordinary conversation they mean cattle that have worked. *Wessels v. The Territory,* McCahon, 100.*

§ 2175. **Grand jury.**—An indictment is good though the word "grand" is omitted before the word jury in the beginning of the indictment. *United States v. Williams, 1 Cliff., 13.*

§ 2176. The names of the grand jurors who find the indictment in the circuit court of the United States need not appear in the indictment itself, where such is the practice of the courts of the state in which the court sits, although the practice in the king's bench is different. *United States v. Crawford,* 1 N. Y. Leg. Obs., 338.*

§ 2177. The designation "foreman," appended to the name of the person signing the indictment, as such, is sufficient, as the designation "foreman" refers to the introductory clause of the indictment and to the record, as verifying the legal inference that "foreman" means foreman of the grand jury. *United States v. Plumer, 3 Cliff., 71.*

§ 2178. **The court.**—Where the court described in the caption of an indictment was "the United States district court of the territory of Montana for the second judicial circuit," and the court as thus described was unknown to the territory, but the record accompanying the indictment showed that the indictment was found by the grand jury of the district court of the second judicial district of the territory of Montana, which court had undoubted jurisdiction to find such indictment, the wrong description of the court in the caption of the indictment was held not to vitiate the indictment, the record showing that the court in which the indictment was found had jurisdiction of the offense. *United States v. Upham,* 2 Mont. T'y, 170.*

§ 2179. The act of April 20, 1818, dividing the district of Pennsylvania into two districts, and creating two district courts in that state instead of one, but which did not create a new circuit court for the western district, and left the circuit court to remain as it was before, could not vitiate the caption in an indictment in the circuit court stating a circuit court of the United States in and for the Pennsylvania district. Nor is it an objection that the caption states the presentment to be by the grand jury of the United States, inquiring for the district of Pennsylvania, since such statement is consistent with the truth. *United States v. Wood,* 2 Wheeler, 325.*

§ 2180. **Names of witnesses.**—Where a statute requires the names of the witnesses to be indorsed upon the indictment in cases of misdemeanors, and such indorsement has been omitted, the attorney for the prosecution may make such indorsement at the trial with the permission of the court. *Territory of Wyoming v. Anderson,* 1 Wyom. T'y, 20.*

§ 2181. The fact that the names of the defendants in an indictment appear upon the indictment as witnesses before the grand jury will not sustain a motion to quash the indictment when there are other witnesses upon the indictment on whose testimony alone the indictment may have been found. *United States v. Brown,* 1 Saw., 531.*

§ 2182. In prosecutions in the federal courts it is not necessary that the names of the witnesses for the prosecution be indorsed on the indictment or information. *United States v. Shepard, 1 Abb., 431 (§§ 8195-99).*

§ 2183. **Name of prosecutor.**—It was not necessary at common law that the prosecutor's name should be written at the foot of the indictment. Nor is it necessary that it should appear there, under the laws of the United States, in order that the informer should be made liable for costs, since congress has enacted that, if the prosecution fails, the informer shall pay costs, without prescribing that his name shall be written at the foot of the indictment. Act May, 1792, cap. 33, § 5. *United States v. Mundell,* 6 Call (Va.), 245; 1 Hughes, 415; Fein v. Territory,* 1 Wyom. T'y, 376.*

§ 2184. It is not necessary that the name of the prosecutor should be written at the foot of an indictment found in a federal court. Although the laws of the state in which the court is sitting require it to be done where the prosecution is at the instance of an individual, for the purpose of rendering him liable for costs, yet that does not prevent the attorney for the government from preferring an indictment *ex officio*, or the grand jury from finding one

of their own accord. *United States v. Mundell*,* 1 Hughes, 415; 6 Call (Va.), 245; *United States v. Jameson*, 1 Cr. C. C., 62.

§ 2185. An act required the name and surname of the prosecutor and his residence to appear at the foot of every indictment before it was presented to the grand jury, but no provision appeared in the law as to the effect of an omission thereof. *Held*, on a general demurrer to an indictment, that such omission was not fatal. *United States v. Sandford*,* 1 Cr. C. C., 333.

§ 2186. The objection for want of the name of a prosecutor at the foot of the indictment as required by statute is too late after verdict. *United States v. Turly*, 4 Cr. C. C., 334; *United States v. Lloyd*, 4 Cr. C. C., 467.

§ 2187. When a presentment for a misdemeanor is made by a grand jury, without the name of the prosecutor indorsed thereon, the court will order the indictment sent up without the indorsement of the name of the prosecutor, upon the suggestion of the United States attorney that the case requires interposition. *United States v. Dulany*, 1 Cr. C. C., 510.

§ 2188. Where no name of a prosecutor was written at the foot of an indictment as required by a statute in Virginia; nor had the offense been presented by the grand jury, upon the knowledge of two of their body, nor upon the testimony of a witness called by the court, or the grand jury, according to the provisions of another statute of that state, the court would not compel the defendant to plead to the indictment until a prosecutor's name should be indorsed thereon. *United States v. Richard*, 2 Cr. C. C., 439.

§ 2189. Where a statute in Virginia required that the name of the prosecutor should be indorsed at the foot of every bill of indictment for trespass or misdemeanor, before it should be presented to the grand jury, the court quashed an indictment for misdemeanor which did not contain the prosecutor's name. *United States v. Helriggle*, 3 Cr. C. C., 179; *United States v. Shackelford*, 3 Cr. C. C., 287; *United States v. Hollingsberry*, 3 Cr. C. C., 645.

§ 2190. Action of district attorney.—Where the grand jury which found a certain indictment was impaneled and sworn and entered upon its duties during the life-time of the district attorney; and, on being sworn, it was charged by the court to inquire into the cases of all persons imprisoned for criminal offenses against the laws of the United States; and the prisoner was examined and committed by a commissioner after the decease of the district attorney, and the indictment found against him while the office of district attorney was vacant; and the new district attorney arraigned the prisoner on the indictment, and a trial was had and a verdict rendered, the court held that the grand jury was empowered to take cognizance of the case, and that the action of the new district attorney was an adoption of the sufficiency of the indictment, and evidence of his concurrence in the action of the grand jury, and of his prosecution of the prisoner in the name of the United States in pursuance of the directions of the statute. *United States v. McAvoy*, 4 Blatch., 418.

§ 2191. The signature of a district attorney constitutes no part of an indictment, and is only necessary as evidence to the court that he is prosecuting the offender conformably to the duty imposed on him by statute. *Ibid*.

§ 2192. Accessory.—An indictment for harboring a person who had been convicted of stealing certain articles was held bad on a motion in arrest of judgment because it did not charge that the principal was convicted of felony. *United States v. Williams*,* 1 Cr. C. C., 174.

§ 2193. Whenever an accessory is indicted before the principal has been convicted, it is necessary that the indictment against him, whether they are indicted separately or jointly, should allege the guilt of the principal, as the offense of the accessory, even when charged as such before the fact, depends upon the principal's guilt, and is never to be regarded as complete unless the principal offense was actually committed. After the conviction of the principal it is not necessary in an indictment against the accessory to aver that the principal committed the felony, but it is sufficient to recite with certainty the record of the conviction, because the court will presume that everything in the former trial was rightly and properly transacted. *United States v. Hartwell*, 3 Cliff., 230.

§ 2194. Presentment.—A paper, to be a presentment in contemplation of the constitution and law, must be made on oath. *United States v. Hill*,* 1 Marsh., 156.

§ 2195. An indictment is a formal accusation made by the grand jury charging a person with the commission of a public offense. A presentment differs from an indictment in that it wants the technical form, and is usually found by the grand jury upon their own knowledge, or upon evidence before them, without having any bill from the public prosecutor. *Charge to Grand Jury*,* 2 Saw., 667.

§ 2196. Where the grand jury makes a presentment of an offense, and on the following day the district attorney sends to the grand jury a bill of indictment founded upon the presentment, and the grand jury find it "a true bill," the court is of opinion that the presentment and the indictment are to be considered as the same act, and the second as an amendment

of the first; and that if a *nolle prosequi* is entered on the indictment, the presentment perishes with it. *United States v. Hill*,* 1 Marsh., 156.

§ 2197. It has been the usage of this country to pass over, unnoticed, presentments on which the attorney for the government does not think proper to institute proceedings. *Ibid*.

§ 2198. An order of the circuit court to certify a presentment to the district court is not essential to the verification of the presentment. The record, certified by the clerk, would be as authentic as if certified under an order of the court. Such a motion can only be made for the purpose of conveying to the district court the opinion of the circuit court that it is the duty of the former to proceed upon the presentment. The circuit court will not make such an order unless it is of opinion that the presentment is a legal ground for proceedings in the district court. *Ibid*.

§ 2199. Information.—The form of a criminal information acquiesced in for many years, and ever since the enactment of the law under which the prosecution is instituted, will not be held bad except on the clearest proof. *United States v. Ballard*,* 13 Int. Rev. Rec., 195.

§ 2200. It is no objection to an information filed in open court by the sworn assistant of the district attorney, that the signature of the district attorney attached to the information was written by such assistant by virtue of a general authority conferred upon him by the district attorney. *United States v. Nagle*,* 17 Blatch., 258.

§ 2201. An information may be filed by the district attorney in behalf of the United States, in the national courts, for misdemeanors committed against the laws of the United States. *United States v. Waller*,* 1 Saw., 701.

§ 2202. An information, like an indictment, must set forth the facts and circumstances constituting the offense, and the verification extends to every part of the charge. *District of Columbia v. Herlihy*,* 1 MacArth., 466.

§ 2203. A criminal information need not show upon its face either that a complaint has been laid before a commissioner and the defendant thereupon held to answer the charge set forth in the information, or that the charge has ever been found true by a grand jury. *United States v. Moller*,* 16 Blatch., 65.

§ 2204. Under the constitution of the United States all crimes except those which are capital or otherwise infamous may be prosecuted on information. *United States v. Shepard*, 1 Abb., 431 (§§ 3195-99). See XXIX. *infra*.

§ 2205. Before an information can be filed in a criminal case there must be a complaint supported by oath or affirmation showing probable cause, followed by an arrest and examination. *Ibid*.

§ 2206. Technical objections to an indictment are not of any force in the courts of the United States. *United States v. Patterson*, 6 McL., 466 (§§ 2470-73).

§ 2207. Where a technical word is used in an indictment it is to be presumed that it was used in a technical sense. *United States v. Clafin*, 13 Blatch., 178 (§§ 2548-54).

§ 2208. One section of a penal statute may declare a right and another section may define a punishment for its violation; and where the section declaring the right is referred to in the indictment for its violation by number, and with sufficient certainty to enable the accused, after trial, to plead the verdict rendered in bar to another indictment, it cannot be objected that no penalty is declared for the offense by the section declaring the right. *United States v. Crosby*, 1 Hughes, 448 (§§ 2285-89).

§ 2209. Where an act punishes an officer more severely than a private person for the same offense, it is not necessary that the officer should be charged as such, but he may be described and punished as a private person. *United States v. Boyden*, 1 Low., 266 (§§ 2294-93)

2. Joinder.

SUMMARY—Effect of section 1024, Revised Statutes. § 2210.—At common law, § 2211.—Where a part may be rejected as surplusage. §§ 2212, 2214.—Cured by a *nolle prosequi*, § 2213.—Election by prosecutor, § 2214.—Burglary and larceny, § 2215.—Charges of passing counterfeit coin at different times. § 2216.—Separate felonies of same degree, § 2217.—Depositing circulars in mail, §§ 2218, 2219.

§ 2210. The effect of section 1024 of the Revised Statutes is to permit separate offenses of the same class and growing out of the same transactions to be joined in one indictment in separate counts, provided they be such as may be properly joined. *Ex parte Peters*, §§ 2220-21. See § 2241.

§ 2211. By the common law there cannot be a joinder of two or more counts upon which the legal judgment would be different, and this rule has not been changed by statute in the courts of the United States. So a count for conspiracy cannot be joined with counts for

murder, the punishment of the former being fine and imprisonment, and of the latter, death. *United States v. Scott*, §§ 2222-27. See § 2233.

§ 2212. It seems that an indictment is not bad for duplicity or misjoinder when the part supposed to cause such duplicity or misjoinder is mere surplusage. *Ibid.*

§ 2213. It seems that duplicity or misjoinder of counts in an indictment may be cured by a *nolle prosequi* as to part of the counts. *Ibid.*

§ 2214. Where an indictment is bad for duplicity in charging more than one offense, the prosecution cannot elect to prosecute only for the first offense alleged and treat the rest as surplusage. A complete allegation of an offense cannot be rejected as surplusage. *United States v. Patty*, §§ 2230-31.

§ 2215. Burglary and larceny, committed at the same time, may be joined in one indictment in separate counts, and a conviction for both offenses will be legal. *Ex parte Peters*, §§ 2220-21.

§ 2216. Charges of passing counterfeit coin, purporting to be gold and silver pieces, at different times and on different occasions, may be joined in the same indictment. *United States v. O'Callahan*, §§ 2228-29.

§ 2217. There is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment against the same offender. *Ibid.*

§ 2218. An indictment which charges that on a certain day the defendant deposited in the mail a quantity of circulars relating to a lottery charges but one offense. *United States v. Patty*, §§ 2230-31.

§ 2219. An indictment which charges that on a certain day and on each secular day between that day and another day named, and on each secular day between that time and another time mentioned, the defendant deposited a certain number of circulars relating to a lottery in the mails, charges distinct and independent offenses on each of the days mentioned, and is bad for duplicity. *Ibid.*

[NOTES.—See §§ 2232-2:52.]

EX PARTE PETERS.

(Circuit Court for Missouri: 2 McCrary, 403-406. 1880.)

Opinion by McCRARY, J.

STATEMENT OF FACTS.—Petitioner was indicted in the United States district court for this district. The indictment contained four counts. The first count charged the petitioner with burglary in breaking and entering the building used as a postoffice at Bucklin, Linn county, Missouri, with intent to commit a larceny, on the 28th of October, 1874. The second count charged him with larceny committed at the same time and place by stealing from said postoffice a letter containing \$307.50. The third count charged him with burglary in breaking and entering the building used as a postoffice at Unionville, Putnam county, Missouri, with intent to commit larceny, on the 12th day of November, 1874. The fourth count charged him with larceny at the same time and place named in the third, by stealing from said postoffice two letters, one containing the sum of \$146.30 in money.

There was a plea of guilty upon all the counts, and the petitioner was sentenced to be imprisoned in the penitentiary of Missouri for the term of two years under each of the four counts; the first term to commence on the 8th of March, 1875, the second to commence on the expiration of the first term of two years, the third term to commence on the expiration of the second term of two years, and the fourth term to commence on the expiration of the third term of two years, and said four terms to constitute a continuous imprisonment of eight years. On the 18th of April, 1878, petitioner applied to this court for release on the ground that his imprisonment was illegal, and upon full consideration it was then determined that his sentence was valid at least for two terms of two years each, the court being of the opinion that at least two distinct offenses were charged, one in the first and one in the third count,

and that after conviction, by force of section 1024, R. S., these two offenses must be treated *in this proceeding* as having been "properly joined."

The question as to the validity of the remainder of the sentence was expressly reserved until it should be presented after the expiration of four years of imprisonment. See 4 Dillon, p. 169. The two terms of two years each having expired, the petitioner now renews his application for discharge, and we are called upon to determine whether the sentence as to the remaining four years is valid. The ground of the petitioner's application for discharge is thus stated in his petition now before us: "And your petitioner alleges that his present imprisonment is illegal, and that he is entitled to be discharged therefrom, in this, that he has fully served out the terms of imprisonment imposed upon him for the two burglaries charged in the indictment, and that the other two sentences of two years each were imposed for two separate larcenies, each of which is charged in said indictment to have been committed at the same time and place, and as part and parcel of a burglary whereof this petitioner was duly convicted and sentenced, and your petitioner avers the said sentences to be illegal in this, that the district court had no legal power to sentence this petitioner to imprisonment for a larceny charged to have been committed at the same time and place, and as part of the same act of burglary whereof he was convicted and sentenced."

I. There is no statute of the United States affecting this question, and we are therefore to adopt and follow the rule of the common law. Conkling's Treat. (5th ed.), 181.

II. The question tersely stated is, whether it was competent for the district court to sentence the petitioner for both burglary and larceny charged in separate counts, but both appearing to be part of the same act.

§ 2220. *Construction of statute. Under section 1024, Revised Statutes, separate offenses may be joined in the same indictment.*

Section 1024 of the Revised Statutes is as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them consolidated." The effect of this statute is to permit separate offenses of the same class and growing out of the same transactions to be joined in one indictment in separate counts, provided they be such as may "be properly joined." It makes no change in the law as it previously existed, except to permit offenses which might have been theretofore presented in separate indictments to be presented in separate counts of the same indictment. It leaves entirely open the question whether burglary and larceny, growing out of the same transaction, are such distinct offenses as to be properly joined in the same indictment and separately punished.

§ 2221. *Rule as to joinder of burglary and larceny in the same indictment.*

According to the great weight of authority, it may be regarded as settled that a person who breaks and enters a house with intent to steal therefrom, and actually steals, may be punished under separate indictments for two offenses, or one, at the election of the power prosecuting him. 1 Bish. Cr. L., sec. 1062, and cases cited. The case of *Josslyn v. Commonwealth*, 6 Mete. (Mass.), 236, is directly in point. See, also, *State v. Ridley*, 48 Ia., 370, and *Breese v. State*, 12 Ohio St., 146. The opposite view was ably stated by Waite, C. J., in his dissenting opinion in *Wilson v. State*, 24 Conn., 57, and his reasoning is so

strong that if it were a question of first impression I should be inclined to adopt his opinion. Looking, however, to the adjudicated cases, I find the law to be very well settled against the position assumed by the counsel for petitioner. I am the more inclined to follow these adjudications in this case because the punishment inflicted might, under the two counts admittedly good, have extended to ten years' imprisonment. R. S., secs. 5469, 5478. The prayer of the petitioner is denied.

KREKEL, D. J., concurs.

UNITED STATES v. SCOTT.

(District Court for Indiana: 4 Bissell, 29-34. 1865.)

Opinion by McDONALD, J.

STATEMENT OF FACTS.—The indictment in this case contains three counts. The first count, in general terms, charges that the prisoner conspired with divers persons named, to prevent the execution of three distinct acts of congress, the titles of which it recites. The second count charges a like conspiracy with the same persons with a like purpose, and alleges that, in pursuance of that purpose, the prisoner and his co-conspirators assaulted one Eli McCarty while "in the performance of his legal service" in relation to the due execution of said acts of congress, and murdered him. The third count charges that the prisoner, intending to prevent the execution of said acts of congress, assaulted said "McCarty, being then and there a person employed in the performance of service relating to the enrollment of the national forces duly ordered by the proper legally constituted authorities," and that while he was thus employed the prisoner murdered him. Counsel for the prisoner now move to quash the whole indictment for a misjoinder of counts. They also move to quash each count as being defective on its face.

§ 2222. *By the common law there can be no joinder of two or more counts, where the judgment on each would be materially different.*

I. As to the question of a misjoinder of counts. In examining this question, it is not important to consider whether each count in itself is either good or bad. In civil actions there may be duplicity, though a part be ill pleaded. Gould, Pl., 427. So, though some of the counts be defective in an indictment, there may be a misjoinder. This rule, however, would not prevail where the part supposed to produce the duplicity or misjoinder is mere surplusage. But that is not the case here. The first count in this indictment charges a mere conspiracy, which is only a misdemeanor, or at most a felony not punishable capitally. The second and third charge murder, a capital crime.

§ 2223. — *the common law not changed in this respect by acts of congress.*

At common law, the general rule is, that if the legal judgment on each count would be materially different, as in the case of a misdemeanor and a felony, there can be no joinder. Whart.'s Am. Cr. L., § 418. Here the judgment on the first count could only be fine and imprisonment. 12 U. S. Stats. at Large, 284. On the second and third counts, the punishment, on conviction, would be death. 13 U. S. Stats. at Large, 8. Judged, therefore, by the rules of the common law, there is plainly a misjoinder of counts in this indictment. The district attorney, however, insists that an act of congress on this subject cures this defect. The act referred to provides that "whenever there are or shall be several charges against a person or persons for the same act or transaction, or

for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined," the whole may be joined in one indictment. 10 U. S. Stats. at Large, 162. The latter provision of this act evidently does not alter the common law. *Weinzorpflin v. State*, 7 Black., 186; *State v. Smith*, 8 id., 489. And, in our opinion, the former part of the statute cited does not help the case. For we cannot see from any allegation in the indictment before us, either that all these counts refer "to the same act or transaction," or that they all are "acts or transactions connected together." Indeed, the contrary appears by the indictment itself; for the first and second counts charge a conspiracy between the prisoner and divers other persons; the third charges a murder committed by him alone. The indictment is plainly bad as having a misjoinder of counts. But as this defect may be cured by a *nolle prosequi* to some of the counts, we will examine the motion to quash the separate counts.

§ 2224. *A count in the words of the act is sufficient.*

II. The motion to quash each count as being defective on its face.

1. The first count charges, in general terms, a conspiracy between the prisoner and several other designated persons "to prevent, hinder and delay by force the execution" of three acts of congress relating to the military, and particularly designated in the indictment. The count is on the act of July 31, 1861, which declares that if two or more persons shall conspire together, by force, to prevent, hinder or delay the execution of any law of the United States, they shall be deemed guilty of a high crime, etc. 12 U. S. Stats. at Large, 284. The count is in the words of the act, which, as a general rule, is sufficient; and we think it sufficient in the present case. We hold the first count good.

§ 2225. *There can be no indictment in the federal courts for a murder which is exclusively cognizable in the state courts.*

2. The second count is, in our opinion, clearly bad. It substantially charges a combination between the prisoner and others to prevent, hinder and delay the execution of certain acts of congress, and that, in attempting to consummate this unlawful purpose, the prisoner murdered Eli McCarty. In the national courts there can be no indictment unless some act of congress authorizes it. There is no act of congress punishing murder committed under the circumstances stated in this count. Such killing is exclusively cognizable in the state courts.

§ 2226. *In indictments for murder, the utmost precision and certainty are required in the allegations.*

3. The third count charges that the prisoner did assault, hinder and impede one Eli McCarty while in the performance of his legal service, under and in pursuance of, and in relation to the due execution of, a law of the United States, etc., he, the said Eli McCarty, being then and there a person employed in the performance of service relating to the enrollment of the national forces, duly ordered by the proper and legally constituted authorities, in pursuance and by virtue of the laws aforesaid, and murdered said McCarty in that assault. The indictment states these facts with more formality than we have done; but the above is the substance of them. The act of congress under which this indictment is framed provides that whoever shall "assault, obstruct, hinder, impede or threaten any officer or other person employed in the performance of any service in any way relating" to the enrollment of the militia, shall be deemed guilty of murder, if, in such opposition to the officer or other

person, death shall ensue. 13 U. S. Stats. at Large, 8. We think the allegations in this count are not sufficiently particular and definite. In indictments for murder, the utmost certainty has always been required. Here it is not stated whether McCarty was an officer or not, or under what or whose authority he was acting. Nor is it stated what particular duties connected with the enrollment of the national forces he was performing at the time of the assault and murder. The indictment indeed alleges that McCarty was "a person employed in the performance of service relating to the enrollment." But it omits to state whether he was an officer or a mere servant of an officer. It says that he was "duly ordered by the proper legally constituted authorities" to perform these duties. But it fails to state who were those authorities. It avers that certain things were "legally" and "duly" done. But this is merely pleading matter of law. How they were legally and duly done ought to have been averred. All these are very vague allegations in an indictment for murder. Where a man was indicted for stealing coin, the indictment was held bad for not stating the species of coin stolen. *Rex v. Fry, Russ. & Ry.*, 482. Where an indictment charged that the accused "retarded" an officer in the discharge of his duty, it was held bad for not showing the *acts* by which the officer was retarded. *Rex v. How*, 1 Strange, 699.

§ 2227. *The rule that it is sufficient in an indictment to follow the words of the statute is subject to many exceptions.*

It is true that the third count follows the words of the act on which it is founded. This, we have already said, as a general rule, is sufficient; and we have applied this rule to the first count. But it is a rule seldom applicable to indictments for capital crimes; and it is subject to many exceptions even in lower offenses. It is, indeed, often difficult to determine when such a mode of pleading may be safely adopted. The supreme court of Indiana say, "as an approximation to a test," that where a statute defines the offense generally, and designates the particular acts constituting it, it is sufficient, in charging the crime, to follow substantially the language of the statute; but where the statute defines the crime generally without naming the particular acts which constitute it, it might be necessary to set out the acts done, so that it might appear to the court whether the acts done amount to the crime. *Malone v. State*, 14 Ind., 219. We are of opinion that this is a distinction worthy to be followed; and we think it applies even in cases not capital, and is strongly applicable to the case at bar. We are clear that the third count is bad.

UNITED STATES v. O'CALLAHAN.

(Circuit Court for Ohio: 6 McLean, 596-598. 1855.)

Opinion by the Court.

STATEMENT OF FACTS.—The defendant's counsel move to quash this indictment, on the ground that it contains several charges of distinct offenses. In point of law there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment against the same offender, and it is no ground either of demurrer or arrest of judgment. Upon this ground it has been holden that an indictment on 37 George 3, ch. 70, may, without any repugnancy, charge the double act that the defendant endeavored to incite a soldier to commit mutiny, and also to incite him in traitorous practices. Thus, too, in arson, counts at common law and on the statute may be joined, without danger; a count for a robbery may

be joined with another for stealing privately from the person; and burglary and theft, forcible entry and detainer, have been frequently united in the same proceeding. A count for embezzlement on the 39 George 3, ch. 35, may be joined with a count for a larceny on 2 George 2, ch. 25, because these offenses are felonies; and a count for embezzling bank-notes upon the 39 George 2, ch. 85, may be joined with a count for larceny at common law. 2 Hale, 173; 2 Leach, 1103; 12 Ward, 425; 8 East, 41; 3 Term R., 2, 106; Cro., 6, ch. 41; 8 Ward, 211; 1 B. & P., 180; 2 Leach, 799; 1 Leach, 473; 2 East, P. C., 935-6; 2 Leach, 1108; 3 M. & S., 539.

§ 2228. *The rule as to charging two or more offenses in the same count, and in different counts in the same indictment.*

In Archbold's Criminal Pleadings, pp. 55-6, he says, if a defendant be charged with two or more offenses in the same count of an indictment, the count will be bad for duplicity, except in one or two excepted cases. But he remarks, "as to charging a defendant with different offenses in different counts, it admits of a different consideration." A defendant, he says, ought not to be charged with different felonies in different counts of an indictment; as for instance, a murder in one count, and a burglary in another.

§ 2229. *The question as to joinder of different offenses in the same indictment settled by act of congress.*

But a late act of congress has a bearing upon this question and settles it. In the first section of the act "to regulate the fees and costs to be allowed clerks, marshals and attorneys of the circuit and district courts of the United States," etc., it is declared "that whenever there are or shall be several charges against any person or persons for the same act, or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and if two or more indictments shall be found in such cases the court may order them consolidated."

The distinct offenses, charged in the indictment before us, belong to the same class; it being a charge for passing counterfeit coin, purporting to be gold and silver pieces, at different times, and on different occasions. This may, perhaps, have been done to meet the proofs. But, however this may be, the act of congress referred to, with the view of saving costs, authorizes the charges as they are made; and if distinct indictments had been found, on the separate charges, the act of congress would authorize the court to consolidate them. I should be extremely reluctant, where an offense was committed, under a law, in several distinct ways, by the same transactions, to hold the defendant punishable under each. This would be contrary, it seems to me, to the genius of our laws, and to the humanity which characterizes them. Still it must be admitted, where offenses of the same class may be charged in the same indictment, committed at different times and under different circumstances, that the punishment, appropriate to each, must be inflicted. The motion to quash is overruled.

UNITED STATES v. PATTY.

(District Court, Eastern District of Wisconsin: 9 Bissell, 429-434. 1880.)

Opinion by DYER, J.

STATEMENT OF FACTS.—This is an indictment under section 3894, Revised Statutes, which provides that "no letter or circular concerning illegal lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning

schemes devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretenses, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail, in violation of this section, shall be punishable" as the statute prescribes.

The indictment contains three counts. The first count sets out at length the organization of a lottery scheme, by which the defendants undertook to dispose of a hotel at Fond du Lac, known as the Patty House, and charges that on the 1st day of November, 1879, and on each and every secular day in said month of November, and on each and every secular day between the 30th day of said month of November and the 10th day of February, in the year 1880, the defendants did knowingly, wrongfully and unlawfully deposit in the postoffice of the United States, at the city of Fond du Lac, and did send to the said postoffice, to be conveyed by mail, within the meaning of section 3894 of the Revised Statutes, a large number, to wit, five hundred printed circulars concerning said lottery, on each of said days, duly addressed and postpaid, directed to divers persons within and beyond the limits of this district; which circulars each and all were sent and conveyed by and through the mail.

The second count charges that on the 20th day of January, 1880, the defendants deposited in the postoffice at Fond du Lac one hundred printed circulars concerning said lottery, addressed to persons unknown to the grand jurors, and that they were deposited to be sent and were sent by mail. The third count is similar to the second, except that it charges the deposit in the postoffice at Fond du Lac, on the 1st day of December, 1879, for the purpose of conveyance through the mail, of five hundred circulars concerning said lottery. A motion is made to quash this indictment for duplicity, it being claimed that the first count charges forty-five thousand distinct, independent offenses, the second count one hundred, and the third count five hundred. Upon the argument stress was laid by counsel for the defendants upon the language of this section, which is that "no *letter or circular* concerning illegal lotteries . . . shall be carried in the mail. . . . Any person who shall knowingly deposit or send *anything* to be conveyed by mail in violation of this section shall be punishable," etc. And it was insisted that the deposit in the postoffice of a single circular to be carried in the mail constituted an offense. This position was controverted by the attorney for the United States, who urged that, under a proper construction of this statute, an indictment could hardly be maintained that charged the deposit or sending by mail of a single letter or circular relating to a lottery, and that it was deemed necessary to set out in the indictment the scheme in which the defendants were engaged, and by means of which they were seeking to dispose of certain property, and that each count of the indictment ought to be regarded as stating a single act, and therefore a single offense.

§ 2230. *An indictment under section 3894, Revised Statutes, charging that a specified number of lottery circulars were on a certain day deposited in the post-office, charges a single offense.*

It is true that the second and third counts do not specifically allege that on the 10th day of January, 1880, one hundred of these circulars were, *at one time and as one act*, deposited in the postoffice; nor does the third count in express terms allege the deposit, at one time and as one act, of five hundred of these circulars; but I think the allegations of each of these counts may be fairly construed to charge the commission of a single offense. To hold otherwise would involve a construction too restricted and technical; and I think there can be no doubt that, although it might, under this statute, be an offense to deposit a

single letter or circular concerning a lottery, in the postoffice to be carried by mail, if a number of deposits are charged as made at or about the same time, so that they consist of a single act, or of successive stages in a single transaction, then we may properly say that one offense has been committed, and that an indictment so charging is not obnoxious to the objection of duplicity. And as these counts charge that on a certain day the defendants deposited in the postoffice a certain number of circulars concerning this lottery, to be sent by mail, we may fairly say that there was intended to be and is charged the commission of but one offense in each count.

An interesting question, as may be readily seen, might arise upon the trial, if the proof should show that at different times during the day named, these circulars, in different quantities, were deposited in the postoffice, and it might be that the prosecutor would be required to elect upon which of the transactions he proposed to ask conviction; but without anticipating any such questions, I think these counts ought now to be considered as charging single offenses.

As to the view that should be taken of the first count I had little doubt at the argument. It is to be observed of this count that it does not charge that on a certain day, and on divers days between that day and the presentment of the bill, a quantity of letters and circulars concerning a lottery were deposited in the postoffice to be conveyed by mail, but it charges that on a certain day specifically named, and on each secular day between that day and another day named, and on each secular day between that time and another subsequent time mentioned, thus particularizing each of the days on which the deposits were made, five hundred circulars concerning this lottery were so deposited; and it seems quite impossible to say that here is an allegation of but one offense; and this count must be regarded as charging distinct and independent offenses committed on different and distinct days, for each of which offenses the defendants might be prosecuted.

§ 2231. *What is the distinction between an indictment bad for duplicity and one in which the matter objected to may be treated as surplusage.*

In reply, however, the attorney for the United States has urged that this count does properly charge the commission of at least one offense; that the other allegations may be treated as surplusage; and that if the count be open to the charge of duplicity, the objection may be obviated by holding that the count aptly charges one offense, and that the other allegations may be disregarded. The difficulty with the position thus urged is, that, if the objection can be thus obviated, I do not see why in every case where an indictment is bad for duplicity the defect may not be avoided by the selection of one of the offenses charged, and then holding the other allegations charging distinct offenses to be merely superfluous. I do not think the difficulty can be thus avoided. The true distinction between matter which makes an indictment bad for duplicity, and that which may be treated as mere surplusage, is stated by Mr. Bishop in his first volume on Criminal Procedure, sec. 440: "If an indictment describes one offense, and then adds such words only as *are in part* sufficient to describe another, it is not therefore double; to be so, it must set out each of the two offenses in adequate terms. The principle is that the allegation which is mere surplusage, and therefore void, does no harm. The like case has already been mentioned where an offense *not in its nature continuing* is charged to have been committed on more days than one; if *only one of the days is adequately alleged* the rest is surplusage and the indictment good."

Again at section 388 of same volume, the author says: "It is to be observed

‘hat we are now speaking of continuing offenses, properly laid under a *continuando*. . . . Though the offense is in its nature committed on a single day, and not continuing, if the indictment charges that the defendant did the criminal act on a day which it mentions, and, in general terms, on divers other days, without specifying the others, the latter clause, being in itself an *insufficient allegation* of time, may be rejected as surplusage. Thus, where the averment was that the defendants, to use the words of the report, did on ‘such a day, *et diversis aliis diebus et vicibus tam antea quam postea*, keep a common gaming house,’ this was held to be a good allegation of keeping the house on the one day mentioned. True, in this particular case, more days might have been laid, but the time is so uncertain as to all but one day that only forty shillings are recoverable. Where an indictment sets out that the defendant sold liquors, without license, on a day which it mentioned, and at divers times between this day and the finding of the bill, it is sufficient, because *the inadequate allegations of other days may be rejected as surplusage*. But, where a count in an indictment alleged that the defendant committed the crime on the 20th day of September, in a year specified, and on divers other days and times between that day and the 9th day of December, in a subsequent year specified, it was held to be insufficient. Here there were at least two distinct days adequately set out, and, whatever might be said of the rest, certainly the allegations of neither of these could be rejected as surplusage.”

Here we have a test of this question. And certainly it cannot be said that the offense which is charged in the indictment under consideration is in its nature continuing. The offense is one which may be committed to-day and as distinctly committed to-morrow, and the act of to-morrow may have no connection with that of to-day; and as this count does not merely describe one offense, and by inadequate allegation state in part another, so that the latter allegation may be treated as surplusage, but does charge in adequate terms distinct offenses committed on distinct days, I must, within the principles stated, hold this count bad for duplicity. The motion to quash as to the second and third counts will be overruled, and as to the first will be sustained.

§ 2232. In general.—In cases of misdemeanor, several offenses may be joined in different counts in the same indictment, and there is no right in such cases to compel the prosecution to rely on one transaction. *United States v. Devlin*,* 6 Blatch., 71.

§ 2233. At common law, several distinct misdemeanors may be joined, by separate counts, in the same indictment. *United States v. Nye*,* 4 Fed. R., 883. See § 2211.

§ 2234. Where a statute provides that offenses to the number of three may be united in the same indictment (§ 5480, R. S.), if an indictment be returned containing counts for five separate offenses, the court may permit a *nol. pros.* as to two of the counts. It was not permissible at common law to join two or more felonies in the same indictment, but such joinder did not render the indictment wholly bad; the court could require the prosecutor to elect. *Ibid.*

§ 2235. Where a statute makes two or more distinct acts, connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offense, they may be coupled in one count. Both the secreting and the embezzling of the letter may be charged in one count of an indictment based on the twenty-second section of the act of March 3, 1825, punishing any one who “shall secrete, embezzle or destroy any such mail, letter,” etc. *United States v. Sander*, 6 McL., 598 (§§ 894-897).

§ 2236. Section 1024, Revised Statutes, permits the joinder in a single indictment, in separate counts, of offenses created by section 5431, and an offense created by section 5434, the several charges being for the same transaction or for transactions connected together, committed at the same time and proved by the same witnesses, the offenses also being similar in character, the challenges being the same, and the punishment being alike in kind and only differing in degree. *United States v. Bennett*, 17 Blatch., 357 (§§ 2349-55).

§ 2237. Whether the joinder of several offenses in one indictment, in several counts,

under section 1024, Revised Statutes, is calculated to embarrass the prisoner, and therefore the offenses are not "properly joined" within the meaning of that section, is a question to be determined by the judge in his discretion, on a motion to quash or to compel an election. *Ibid.*

§ 2238. The statute, in permitting the joinder of different offenses in a single indictment, and even the consolidation of two or more indictments, by necessary implication authorizes a separate punishment for each offense proved. *Ibid.*

§ 2239. By the statute of February 26, 1853, providing that "whenever there are or shall be several charges against the same person or persons, for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts," one count of an indictment may charge the making of a false affidavit by one defendant on a certain day, and another count charge the making of a false affidavit on a different day by the other defendant, provided the two crimes grew out of the same transaction. *United States v. Wentworth*, 11 Fed. R., 52 (§§ 2345-48).

§ 2240. A count in an indictment is bad for duplicity where the offenses are either inherently repugnant, or so distinct that they cannot be construed as different stages of one transaction, or involve different punishments. *United States v. Nunnemacher*, 7 Biss., 129 (§§ 2394-99).

§ 2241. Under section 1024 of the Revised Statutes several offenses arising out of one transaction may be charged in the same indictment under separate counts, though some are designated felonies and others misdemeanors. *United States v. Jacoby*,* 12 Blatch., 491. See § 2210.

§ 2242. Offenses by two or more persons, which, in their nature, are several, cannot be joined in the same indictment. *United States v. Kazinski*,* 2 Spr., 9.

§ 2243. Every indictment with only one count, and each count in itself, ought to describe but one distinct offense; but where two offenses have been joined in one count, or in an indictment with one count, and a trial and conviction has been had of one or both offenses, the court will not generally sustain a motion in arrest of judgment, unless the offenses belonged to a different family or class of crimes. *United States v. Peterson*,* 1 Woodb. & M., 305.

§ 2244. An indictment alleging the sending of a false *writing* and *affidavit* to the pension office does not charge two offenses, where it appears from the indictment that there was but one instrument. *United States v. Corbin*, 11 Fed. R., 233 (§§ 2545-47).

§ 2245. An indictment founded on the act of March 3, 1823, charging the defendant with knowingly "transmitting false papers" to the pension office in support of applications for bounty land, under the ninth section of the act of March 3, 1855, and containing one hundred and thirty-eight counts, each one being for a distinct felony, was upheld on the act of February 25, 1853, declaring that "whenever there are or shall be several charges against any person or persons for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in several counts." *United States v. Bickford*,* 4 Blatch., 337.

§ 2246. *Aiding and abetting*.—It is not necessary that those who were simply present aiding and abetting an assault be indicted jointly, or with a *simul cum*, in order that they be made liable. *United States v. Hunter*, 1 Cr. C. C., 446.

§ 2247. *Joinder of different persons*.—An offense which is by law several only, and in which but one can participate, can under no circumstance be joint, and several persons committing such an offense cannot be joined in the same indictment. *United States v. Kazinski*,* 2 Spr., 7.

§ 2248. *Stealing goods of five different owners*.—Where the goods of five different owners were stolen at the same time, it was held that there were five separate offenses for which five separate indictments would lie; it was held doubtful whether, if the different offenses had been charged in different counts in one indictment, the prosecutor could not have been required to elect which offense he would prosecute. *United States v. Beerman*,* 5 Cr. C. C., 412.

§ 2249. *Riot and assault*.—Riot and assault and battery may be joined in the same indictment. *United States v. McFarlane*,* 1 Cr. C. C., 163.

§ 2250. *Same punishment*.—Distinct offenses may be joined in separate counts in the same indictment, when the judgment is the same for each offense. *United States v. Burns*,* 5 McL., 23.

§ 2251. Revenue officers and private persons cannot be indicted jointly for an offense against the revenue laws, the penalties being different for the same acts. The indictment will be held good, however, against either class, provided the district attorney will dismiss as to the other. *United States v. McDonald*,* 3 Dill., 543.

§ 2252. It is not a ground for arresting a judgment that two counts were included in one indictment for the same offense, describing it in each as of a different degree of turpitude so that it would be differently punished; and especially where the verdict is guilty as to one of the counts alone. *United States v. Stetson*, * 3 Woodb. & M., 164.

3. Conspiracy.

[See II, *supra*.]

SUMMARY — *Indictment of one of two*, § 2253. — *At common law*, § 2254. — *Certainty required*, § 2255. — *Need not allege the means to be employed*, §§ 2256, 2272; *contra, where the conspiracy is to defraud the government*, § 2257; *but the specific mode need not be stated*, § 2258. — *Acts constituting the offense must be averred*, § 2259. — *Averment of overt act in conspiracies to defraud the government*, § 2260. — *That the overt act was done "in pursuance of," etc.*, § 2261. — *Hindering persons from voting*, §§ 2262-2269. — *Defrauding government out of tax on spirits*, § 2270. — *Conspiracy with an officer of a national bank*, § 2271. — *Description of the offense to be committed*, § 2272. — *Conspiracy to conceal or destroy invoice, etc.*, § 2273. — *Averment as to acts done to carry out unlawful purpose*, § 2274.

§ 2253. An indictment of one of two persons for a conspiracy under section 5440 of the Revised Statutes is good. It is essential to charge that two or more persons conspired, but it is not required that indictments for conspiracy should be joint. *United States v. Miller*, §§ 2275-78.

§ 2254. At common law the offense of conspiracy was complete whenever the unlawful concert and agreement was entered into and concluded, though nothing was done in pursuance thereof, or to carry it into effect. The gist of the offense was the unlawful agreement, and no overt act was necessary to its consummation. *United States v. Walsh*, §§ 2279-82.

§ 2255. An indictment for a conspiracy, like all other indictments, "must inform the defendant of the nature and cause of the accusation" as required by the constitution of the United States, and must set forth the offense with clearness and certainty. *Ibid*.

§ 2256. An indictment for a conspiracy to do an unlawful act need not show what means were to be used, the offense of conspiracy being complete before the means to carry out the conspiracy are agreed upon. *United States v. Goldman*, §§ 2290-93.

§ 2257. In an indictment for a conspiracy to defraud the United States the means by which the fraud was to be effected must be described in some part of the indictment with certainty. *United States v. Walsh*, §§ 2279-82.

§ 2258. It is not necessary in an indictment for conspiracy to defraud the United States, under section 30, act of March 2, 1867, to set forth the specific mode agreed upon by which the fraud should be carried out. It is sufficient to aver that there was a conspiracy, and that, in pursuance of that conspiracy, a certain stated act was committed. *United States v. Dustin*, §§ 2283-84.

§ 2259. It seems that an indictment for a conspiracy, where no overt act is alleged, and where the conspiracy is for the doing of an act not criminal by common law or by statute, all the facts which constitute the conspiracy must be averred. *Ibid*.

§ 2260. In an indictment for a conspiracy to defraud the government under section 30 of the act of congress of March 2, 1867, the allegation of the overt act is not required to be as full and minute as in an indictment for fraud without any charge of conspiracy. *Ibid*.

§ 2261. In an indictment for conspiracy it is sufficient to charge that the overt act alleged was done "in pursuance" of the agreement formed by the conspirators, though the statute uses the language "to effect the object" of the conspiracy. *United States v. Boyden*, §§ 2294-98.

§ 2262. An indictment for unlawfully conspiring to violate section 1 of the act of May 31, 1870, declaring that "all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any state, . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude," need not give the names of the persons who were hindered and prevented from voting in pursuance of such conspiracy. The offense is complete when the conspiracy is formed, and no person need have been actually hindered or prevented from voting. *United States v. Crosby*, §§ 2285-89.

§ 2263. It is no objection that the conspiracy to violate the above provision was entered into before the day of election, to be carried into effect on election day. *Ibid*.

§ 2264. It cannot be objected to an indictment for this offense that it does not show whether the election was state or federal. This is immaterial. *Ibid*.

§ 2265. An indictment under the act of May 31, 1870, charging that the defendants "unlawfully did conspire together with intent to injure, oppress, threaten and intimidate Amzi Rainey, a citizen of the United States, with intent to prevent and hinder his free exercise and enjoyment of a right and privilege granted and secured to him by the constitution and laws of the United States, to wit, the right of suffrage, contrary," etc., is bad, because it does not allege that Rainey was qualified to vote; and also because it alleges the right of suffrage to be granted by the constitution and laws of the United States. Such a right depends on the laws of the state. *Ibid.*

§ 2266. A count in an indictment under the act of May 31, 1870, charging that the defendants "unlawfully did conspire together with intent to injure, oppress, threaten and intimidate Amzi Rainey, a citizen of the United States, because of his free exercise of a right and privilege granted and secured to him by the constitution and laws of the United States, to wit, the right of suffrage," is not sufficiently particular, and should also allege the fact of the qualification of Rainey. *Ibid.*

§ 2267. A count in an indictment under the act of May 31, 1870, alleging that on a certain date the defendants unlawfully did conspire together for the purpose of depriving Amzi Rainey of the equal protection of the laws, contrary, etc., is too indefinite. And likewise a count that on a certain day the defendants unlawfully did conspire together for the purpose of depriving Amzi Rainey of equal privileges and immunities under the laws, contrary, etc. *Ibid.*

§ 2268. Under the act of May 31, 1870, a count which charges that on a certain day the defendants did unlawfully conspire together to injure Amzi Rainey, a citizen of the United States, lawfully entitled to vote, in his person, on account of giving his support, in a lawful manner, in favor of the election of A. S. Wallace, a lawfully qualified person, as a member of the congress of the United States, contrary, etc., is held to be good. *Ibid.*

§ 2269. In an indictment for a conspiracy to prevent by force, intimidation and threats, any citizen entitled to vote from giving his advocacy and support in a lawful manner to a candidate for congress, it is not necessary to set out the acts of advocacy and support, for the crime of conspiracy may be complete before the form in which the advocacy and support is to be given is known to the conspirators, or even to the persons against whom the conspiracy is directed. *United States v. Golden*, §§ 2290-93.

§ 2270. In an indictment for a conspiracy to defraud the government out of certain taxes on distilled spirits, it is sufficient to use the words "distilled spirits," a more particular description being unnecessary. *United States v. Boyden*, §§ 2294-98.

§ 2271. An indictment charging that the accused and the cashier of a national bank did conspire together that the latter should embezzle and appropriate money belonging to the bank is good, though the accused, not being an officer, could not be guilty of a violation of the law which they are charged with having agreed to violate. *United States v. Martin*, §§ 2299-2304.

§ 2272. A charge of conspiracy to commit an offense need not set forth that offense with all the precision requisite in describing the offense itself. A general allegation that two or more persons conspired to effect an object criminal in itself, is sufficient, even though the indictment omits all charges of the particular means used. If the object of the conspiracy is an offense by statute only, the purpose must be so set forth as to show that it is within the terms of the statute. An indictment, therefore, based on section 5440, Revised Statutes, making it an offense "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose," and charging, as the offense conspired, that created by section 5443, Revised Statutes, which states facts showing that the defendants agreed to do a certain act, namely, to conceal and destroy certain papers, for a purpose designated; and that by section 5443 the destruction or concealment of papers of the description given, for the purpose stated, is made an offense against the United States, sets forth the conspiracy in such a manner as to show that it is within the terms of the statute, and is sufficient. *United States v. De Grieff*, §§ 2305-2307.

§ 2273. An indictment for conspiracy to commit the offense described by section 5443, Revised Statutes, which punishes "every person who wilfully conceals or destroys any invoice, book or paper relating to any merchandise liable to duty, which has or may be imported into the United States from any foreign port or country, after inspection thereof had been demanded by the collector, . . . or at any time conceals or destroys any such invoice, book or paper, for the purpose of suppressing any evidence of fraud therein contained," need not show that the matter in the papers destroyed would be a fraud upon the United States. This is a fact to be shown by evidence as to the terms of the agreement and the surrounding circumstances. (*United States v. Cruikshank*, 2 Otto, 542, cited.) *Ibid.*

§ 2274. Under an act punishing conspiracy to commit a crime against the United States, where one or more of the parties do any act to effect the object of the conspiracy, any form

of language which shows that such an act has been done to carry out the agreement is sufficient. An indictment which avers that the defendant "furnished and loaned" to certain persons a skiff, for the accomplishment of the unlawful purpose, is sufficient in this respect. *United States v. Sanche*, §§ 2308, 2309.

[NOTES.— See §§ 2310-2315.]

UNITED STATES v. MILLER.

(Circuit Court for Virginia: 3 Hughes, 558-557. 1878.)

Opinion by HUGHES, J.

STATEMENT OF FACTS.—The information is founded upon section 5440. That section makes the conspiring by two or more persons to defraud the government a punishable offense, and declares the commission of any act intended to effect the object of the conspiracy by any one of the conspirators to be a punishable offense in all of them. A preliminary question has been raised on this section 5440, whether it makes the conspiracy to defraud the United States the offense for which it prescribes the punishment named by it, or whether it makes the act committed to "effect the object of the conspiracy" that offense. It is very clear from a critical examination of the language of the section that the offense created by it is a conspiracy by two or more persons to defraud the United States. See *United States v. Donan*, 11 Blatch., 168. It is on this view of the law that the demurrer is founded.

§ 2275. *An indictment charging a conspiracy by two or more persons, under Revised Statutes, section 5440, but being an indictment of only one of such persons, is good on demurrer.*

The question raised by the demurrer is, whether the person who is alleged to have committed the act in furtherance of the conspiracy can be indicted separately; that is to say, whether it is not necessary to indict at least two persons charged with engaging in the conspiracy in order for the prosecution to be valid. There has been much loose writing on this question by some of the authors of text-books on criminal law, and they have confounded rather than enlightened us with their counsels. We may, therefore, have to cut loose from them, and resort to the authoritative decisions of the courts, and the teachings of reason in the decision of the question before us.

§ 2276. *Conspiracy defined.*

It may be worth while to say that conspiracy is the combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish a lawful purpose by some unlawful means. There can, therefore, be no conspiracy except by two or more persons. "If any two or more persons conspire" is the language of the statute upon which the present information is founded. It is, therefore, certainly incumbent upon the prosecution to prove a conspiracy here by two or more persons. The establishment of a conspiracy by proof is essential to a conviction. Nothing is more clearly settled than that the *proof* must show a conspiracy by two or more persons to do the unlawful act mentioned by the statute, whether or not the *indictment* be brought against more than one.

§ 2277. *Question as to joinder of parties engaged in a conspiracy.*

But whether or not two or more persons must be proceeded against jointly in the same indictment is another question. This information charges a conspiracy by three persons, one of whom, Lee, is dead, and another, Gettslick, is already under conviction in this court for an act committed in furtherance of the conspiracy charged. It is not the practice of the government to prosecute

any person to conviction for more than one of the same series of offenses. Hence there is no indictment here except against Miller, who is the last one of the three persons charged to have conspired to defraud the government who has not been convicted. The particular question arising on the demurrer, therefore, is, will an information against him alone lie without joining Gettslick? There is no doubt that if Gettslick were joined there could be a severance in the trial of the joint information. Nor is there any doubt that if there are three persons indicted for conspiracy one could be acquitted and the other two convicted; that is to say, that there could be a severance in the verdict. And it is equally clear that if the verdict be severed the judgment of the court upon the verdict must be several. It is true that where three or more are joined in an indictment for conspiracy, and some are acquitted by the jury, and others convicted, on motion for a new trial by one of the convicted, the court, if granting the motion of that one, would order a new trial for all the convicted. But that would be on principles of humanity, leniency and abundant caution, and not as a matter of strict right. *Regina v. Gompertz*, 9 Q. B., 824.

As there may thus be a severance in the trial, in the verdict and in the judgment, that is to say, in every part of the proceedings except the indictment, we may conclude that there may be also a severance in an indictment for conspiracy, unless there be some reason peculiar to such an indictment plainly making the several proceeding improper. I can see no such reason. It will not do to say that because two at least must be convicted of a conspiracy, and that any one person who should be the only one convicted must be discharged, therefore two at least must be joined in the indictment. But that same reasoning would forbid the severance of the trial, and deprive any one of the accused of his right to be tried alone. If it be conceded that there may be a severance in the trial of persons jointly indicted for conspiracy, it follows, so far as the reason just alluded to is concerned, that there may likewise be a severance in the indictment. Some of the text-writers say, arbitrarily, that indictments for conspiracy must be joint, but they give no reason, other than the one just stated, for their proposition, and it is difficult to find a reason. I do not think any sufficient reason exists.

We are, therefore, thrown back upon the decisions of the courts, and I do not find any decision requiring that indictments for conspiracy must in all cases be joint. In the case of *United States v. Cole*, in 5 McL., 513, there was an indictment of twelve persons named, charging a conspiracy by them and one other person who was alleged to be dead, and there was no averment that any persons other than the thirteen were concerned in the conspiracy. There the court charged the jury, virtually, that if they acquitted all those who were indicted save one, that one would go quit, even though they found him guilty. As that indictment did not charge that the persons named and other persons besides conspired, the charge was, of course, strictly in accordance with the law of the case. But that charge of the court does not intimate, and carries no authority for the proposition, that an indictment of each one of those accused persons severally would not have been good. The case of *People of N. Y. v. Mather*, 4 Wend., 229, is a celebrated one. The charge of the indictment was of a conspiracy to abduct William Morgan, who was supposed to have revealed the secrets of the Masonic fraternity. The indictment was of Mather alone, and the charge of the indictment was that Mather, with "other persons unknown," had conspired, etc., although it was a fact that many of the other persons were well known. There the court held that the

indictment against Mather alone was good, and there was a conviction, and a new trial was denied. The court said that "in a charge of conspiracy it seems no more necessary to specify the names of the defendant coadjutors than in an indictment for an assault and battery to name others besides the accused who were concerned in the trespass."

In the leading and early case of *Rex v. Kinnersley*, 1 Strange, 193, the information charged that two named persons, Kinnersley and Moore, had conspired. Moore was not found, and the trial proceeded on the information as against Kinnersley alone. Kinnersley was convicted, and a judgment, after review by *certiorari*, was given against him, before the arrest and trial of Moore. There was a similar judgment in the case of *Rex v. Nicholls*, reported in 13 East, 412, in note. There but one of two named conspirators was indicted, the other being dead. There was a verdict of guilty, and on review by *certiorari* a judgment of conviction. It was a single indictment. The latest and best of the text-writers on criminal law, Mr. Bishop, reviewing all the cases, lays it down as his conclusion that there need not be more than a single person made defendant in an indictment for conspiracy. 2 Bish. Cr. Pro., sec. 186. I think that is a true statement of the law of the subject.

§ 2278. *An information for conspiracy must charge two or more, and the proof must implicate two or more.*

But it is essential, as I stated in the beginning, that the information shall charge that two or more conspired, and, of course, it follows that the proof must implicate two or more persons. The language of the statute on which the information now under trial is founded is that "if two or more persons conspire," etc. Such is the charge in the present information, and I decide very confidently that the information is sufficient in law, and so the demurrer is overruled.

UNITED STATES v. WALSH.

(Circuit Court for Missouri: 5 Dillon, 58-64. 1878.)

STATEMENT OF FACTS.—Indictment drawn under section 5440, Revised Statutes. Motion to quash on the ground that the indictment was not sufficiently precise, specific and certain.

Opinion by DILLON, J.

We have examined all the cases cited in the arguments of the respective counsel, and many others, and we have considered the propositions they have advanced, and now proceed to announce, without much elaboration, the conclusions we have reached.

§ 2279. *No common law offenses against the United States. Conspiracy under the common law.*

At common law the offense of conspiracy was complete whenever the unlawful concert and agreement was entered into and concluded, although nothing was done in pursuance thereto, or to carry it into effect. The gist of the offense was the unlawful agreement. The offense of conspiracy at common law being complete without an overt act, it was one of the few cases in which the law undertook to punish criminally an unexecuted intent or purpose to commit a crime. But such is the settled doctrine of the common law, and hence, in an indictment for conspiracy at common law, it is not necessary to allege any overt act or to prove it, if it is alleged. It is a settled doctrine in our jurisprudence that there are no common law offenses against the govern-

ment of the United States. An act or an omission, to be criminally punished in the federal courts, must be declared to be an offense by an act of congress.

§ 2280. *Overt act necessary to complete the offense under the Revised Statutes, section 5440.*

It follows that the act of congress must constitute the sole basis of the offense of conspiracy, and the section (R. S., sec. 5440) on which this indictment is founded changes, in material respects, the offense of conspiracy as it existed at common law. This section not only makes the unlawful agreement to do the prohibited act essential to a completed offense, but also "that one or more of the parties to such conspiracy shall do some act to effect the object thereof." These considerations are important in determining the weight due to the English cases on the subject of the particularity and certainty necessary in indictments for conspiracy. The English courts have sustained indictments for conspiracy which were framed in the most general manner, and without alleging any overt acts. *Rex v. Gill*, 2 Barn. & Ald., 204. This laxity and departure from principle have been regretted in the more recent cases in that country, and have been sought to be remedied by giving to the defendant, where the count is general and the charge indefinite, the right to call for a "bill of particulars." Examples of this may be found in *Regina v. Stapylton*, 2 Cox, Cr. Cas., 69; *Rex v. Hamilton*, 7 Carr. & P., 448, and some other cases. We have no such anomalous practice in this country, and the settled doctrine of the American courts is, that an indictment for conspiracy, like all other indictments, "must inform the defendant of the nature and cause of the accusation" (Const. U. S., 6th amendment), and must set forth the offense with clearness and certainty.

§ 2281. *Requisites of an indictment under United States statutes.*

"Every ingredient of which the offense is composed must be accurately and clearly alleged." *United States v. Cook*, 17 Wall., 174 (§§ 2054-58, *supra*). And in the recent case of *The United States v. Cruikshank*, 92 U. S., 542, 557 (Const., §§ 898-911), these principles were applied by the supreme court of the United States to the case of an indictment for conspiracy. The judgment of the court in the case last cited was that the indictment was bad for vagueness and generality, and because it lacked the certainty and precision required by the established rules of criminal pleading. In delivering the opinion of the court the chief justice said: "The accused has, therefore, the right to have a specification of the charge against him, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; and the court, that it may determine whether the facts will sustain the indictment." And the supreme court cites and approves the decisions in *New Hampshire (State v. Parker*, 43 N. H., 83), *Vermont (State v. Keach*, 40 Vt., 118), *Michigan (Alderman v. People*, 4 Mich., 414), and *Maine (State v. Roberts*, 34 Me., 320), which reject the authority and soundness of the English decisions sustaining the sufficiency of vague and general counts in indictments for conspiracy. Among the cases cited by the supreme court of the United States was that of *State v. Parker*, 43 N. H., 83, in which the requisites of an indictment for conspiracy and the course of decisions in England are considered with care and ability. After commenting on the English decisions, Chief Justice Bell says: "We are constrained to regard these decisions, which are not authorities here, as of very little weight, because the reasons assigned for the leading case, on which all the others depend (if reasons they can be called), are weak and unsound, and none better have been suggested in any of those that followed, because it appears

by Lord Denman's opinion in *Queen v. Kendrick*, 5 Ad. & E. (N. S.), 49, that eminent judges have regretted the decisions as dangerous to the accused, because the courts have found themselves compelled to supply the defects of such indictments by bills of particulars, which is conclusive that, in the opinion of such judges, the indictments did not state the crime or offense so 'fully and plainly, substantially and formally' (N. H. Bill of Rights, sec. 15), that a party ought not to be put upon his trial until its defects were supplied. We infer from the repeated instances in which the courts have been called to reaffirm these decisions, that the judgment of the bar revolts at them as unsound, and we draw the same inference from the fact that, out of the decisions we have found since 1819, no less than four are in conflict with the cases we have here cited. These are: *Rex v. Richardson*, 1 Man. & R., 402, in 1825; *Rex v. Fowle*, 4 Carr. & P., 592, in 1830; *Rex v. Buis*, 1 Ad. & E., 327, in 1834; and *Regina v. Peck*, 9 Ad. & E., 686, in 1839. The same question has arisen in the courts of Massachusetts, Maine, New York and Michigan, and has been decided with reference to the English decisions, as we think, more in accordance with the general principles of the law."

The views of the supreme court of Vermont in the case of *State v. Keach*, 40 Vt., 113, cited by the supreme court of the United States, and of the supreme court of Massachusetts (*Commonwealth v. Hunt*, 4 Metc., 111; *Commonwealth v. Eastman*, 1 Cush., 189; *Commonwealth v. Shedd*, 7 Cush., 514), and of the supreme court of Pennsylvania (*Commonwealth v. Hartman*, 5 Barr), are to the same effect, and equally pointed and decisive. See, also, Archb. Cr. Pl. and Ev. (6th Am. ed.), 620, and cases cited.

The principles laid down by the supreme court of the United States in the case of *The United States v. Cruikshank*, *supra*, cover every question which arises as to the sufficiency of the second count of the indictment now under consideration. Let us turn to this count and see what it alleges against the defendants: This count is divisible into two parts; first, the conspiracy portion; second, the portion which charges what is termed the "overt act" — *i. e.*, "the act done" by the defendants "to effect the object of the conspiracy." The conspiracy to defraud the United States is alleged to consist in "certifying that certain false and fraudulent accounts and vouchers for material furnished for use in the construction of the said custom-house and postoffice, and for labor performed on said building, were true and correct." What can be more general and indefinite than this? It is not alleged that the conspiracy was to certify falsely all accounts and vouchers for material and labor for the building, but to certify "that certain false accounts and vouchers for material and labor were true and correct." This is all. But what accounts and what vouchers is not alleged. How does this advise the defendant so as to enable him to make his defense; what accounts or what vouchers are to be impeached? How can the court know, if a trial is gone into under this indictment, whether the accounts and vouchers offered in evidence by the government are the same ones in respect to which the grand jury found the bill of indictment. *Lambert v. People*, 9 Cow., 578. If the defendants are convicted or acquitted on an indictment so general and uncertain, how can they plead the judgment in bar of another prosecution? How does it appear that the accounts and vouchers were such as that an intent to defraud the United States can be predicated of them? No dates, sums, amounts, persons or materials are mentioned, and it does not appear that this could not be done, for the allegation is that the conspiracy related to "certain false and fraudulent accounts." We agree with

the supreme court of Pennsylvania in the case cited, that "precision in the description of the offense is of the last importance to the innocent," and hence the importance of the decision of the United States supreme court in the Cruikshank case, which settles the law for all the courts of the United States.

§ 2282. *The means by which the fraud is to be effected must be set forth in some part of the indictment.*

This indictment does not advise the defendants what they will have to meet, and they cannot tell from it which of the multitudinous vouchers and accounts they have certified will be relied on by the government to establish the charge. This is an indictment for conspiracy to defraud the United States, and the American decisions are uniform to the point that the means by which the fraud is to be effected must be described in some part of the indictment with certainty. *United States v. Ulrici*, 3 Dill., 532, 536 (§§ 2422-28, *infra*); *State v. Parker*, *supra*; *State v. Keach*, *supra*; *Commonwealth v. Hunt*, *supra*; *State v. Roberts*, *supra*. Nor is the uncertainty in the present indictment helped out by the averments with respect to the overt act. It is charged in this behalf that the defendants presented to the disbursing agent of the United States certain written and printed papers purporting to be true and correct pay-rolls of mechanics and laborers on the building for the month of November, 1874, which were vouchers for the payment of the sum of \$21,862.02. But it is not alleged that these pay-rolls were false or not true, and much less that the defendants knew them to be so. The averments in respect to the overt act do not show any criminal offense in connection with those pay-rolls, and hence we say that they cannot, in any view, aid the defects in the conspiracy portion of the count. *The Queen v. King*, 7 Ad. & E. (N. S.), sec. 782. We have gone into this matter thus fully, so that the counsel for the government should be advised of the views of the court to guide his further action.

Judgment accordingly.

TREAT, J., concurs.

UNITED STATES v. DUSTIN.

(Circuit Court for Ohio: 2 Bond, 832-835. 1869.)

§ 2283. *Motion to quash; when entertained.*

Opinion by the COURT.

In this case the counsel for the defendants have submitted a motion to quash the indictment. A motion to quash will not be sustained unless the indictment is bad beyond a reasonable doubt. This rule has been adopted in view of the fact that nearly all questions involving the sufficiency of the indictment may be available to the defendant, if a conviction follows, on a motion in arrest of judgment. It is true, if the indictment is so palpably defective that no judgment could be rendered on it after conviction, it is the duty of the court to sustain the motion to quash. In this case the decision is not of any great importance to the defendants, as it is now the practice in the courts of the United States, in the exercise of their criminal jurisdiction, where an indictment has been quashed, to hold defendant in custody to answer to a new indictment. If the present motion should be sustained, no reason is perceived why such an order should not be made.

STATEMENT OF FACTS.—The indictment is based on section 30 of the act of March 2, 1867, providing for the punishment of conspiracies to commit crimes against, or in any manner to defraud, the United States. The first count

charges that the eleven persons named, intending to defraud the United States, conspired together to evade the payment of a large amount of revenue due on distilled spirits; and, in pursuance of such unlawful agreement did aid and abet certain persons named in the removal to, and concealment of ten thousand gallons of distilled spirits in, a place other than a bonded warehouse. It is averred that such removal was from the distillery where the spirits had been distilled, without payment of the legal tax, and without giving bond as required by law.

§ 2283a. *In an indictment for a conspiracy it is not necessary to set out in full the mode by which its objects were to be effected.*

The objection to the count is, that it does not set out the specific means by which the defendants proposed to effect the fraud charged, or name or describe the distillery from which, or the place to which, the spirits were to be removed. The court is aware of no authorities requiring, in an indictment for a conspiracy under section 30 of this statute, that, in averring the fact that the defendants agreed together to commit a criminal act or perpetrate a fraud, the specific mode agreed upon, by which the object of the conspiracy was to be carried out, should be averred. The statute referred to is far reaching, and includes every conspiracy to "defraud the United States in any manner whatever." It is sufficient, in an indictment under this law, to aver that there was a conspiracy to defraud the United States of taxes legally due; and that, in pursuance of such conspiracy, the defendants committed a stated overt act. It is otherwise where a conspiracy is relied on as the criminal act, without any averment of an overt act, to effect the object of the conspiracy. In that case all the facts must be averred which constitute the conspiracy. This, too, is the law where the conspiracy alleged is for the purpose of doing an act not in itself criminal or in violation of a statute. 2 Bish. Cr. Pl., secs. 176, 179; 2 Archb. Cr. L., 1049; 7 Cush., 514, 515. Under these authorities the averments in this indictment as to the objects of the conspiracy are sufficient.

§ 2284. *It is sufficient, in an indictment for a conspiracy, to charge an overt act in violation of law.*

The law as to the description of the overt acts in the indictment seems to be the same as applicable to the averments of the conspiracy. The indictment alleges that, in pursuance of the conspiracy, the defendants proceeded to perpetrate certain acts of fraud in violation of law. These acts of fraud charged are the removal of a large quantity of spirits from the distillery where they were made, to a place other than a bonded warehouse, in violation of law and with intent to defraud the United States of the tax on the same. It is claimed by counsel for the defendants that these allegations of the commission of the overt act are defective for vagueness and want of particularity, for the same reasons urged and before noticed, as applicable to description of the conspiracy.

On this point there seems to be some conflict in the authorities. But the general doctrine is, that the allegations of the overt act are not required to be as full and minute in an indictment for conspiracy as in an indictment for fraud without any charge of a conspiracy. If an overt act in violation of law is charged as in pursuance of a previous conspiracy, it is sufficient. *United States v. Gooding*, 12 Wheat., 460; 7 Curt., 281, 293. In addition to points noticed, it has been strenuously argued that this indictment is bad for repugnancy and duplicity. These points are certainly not so clear of doubt as to require that the motion to quash should be sustained. If it shall be necessary, they may be more fully considered and decided hereafter. The court has not deemed it necessary separately to consider the grounds of the motion as applicable to the

second count. They are substantially the same as those urged in reference to the first count. One good count in an indictment will sustain a general verdict of guilty; and though there may be defective counts, it will afford no reason for quashing the whole indictment. Motion overruled.

UNITED STATES v. CROSBY.

(Circuit Court for South Carolina: 1 Hughes, 448-457. 1871.)

STATEMENT OF FACTS.—Indictment for a conspiracy to injure, oppress and threaten Amzi Rainey to hinder his exercise of the right of suffrage. The indictment contained numerous counts. There was a motion to quash.

Opinion by BOND, J.

After the prolonged and very able argument of counsel upon this motion to quash, we feel embarrassed, gentlemen, that, upon so little deliberation, we are to pass judgment upon the grave questions raised here. But the fact that so many persons are now in confinement upon these charges and that so many witnesses are in attendance upon the court, at great personal expense, makes it necessary that we should not delay longer.

§ 2285. *Declaration of a right, and penalty prescribed for its violation.*

And the first objection to the first count in the indictment is, that the section of the act of May 31, 1870, which this count charges the parties with conspiring to violate, declares no penalty for the offense. The first section of the act declares a right. It is referred to in this count by its number, and with sufficient certainty, it seems to us, to enable the parties charged, after trial, to plead the verdict rendered in this case in bar to another indictment. After declaring the right, the statute proceeds, in section 7, to define the punishment for its violation.

§ 2286. *It is not necessary that each section of a penal statute should disclose its penalty.*

It is not necessary, it seems to us, that each section of the act should contain or disclose the penalty for its infraction. That is often, as in this statute, referred to a later and generally to the closing section of the act defining the crime or offense, and is made applicable to all the antecedent sections. It is objected, moreover, that this count does not contain the names of the parties who, being entitled to vote, were to be hindered and prevented from the exercise of the elective franchise by the traversers. It must be remembered that this is not an indictment to punish a wrong done to individuals, against the peace and dignity of the United States, but for a conspiracy to do that wrong. The offense is completed the moment the compact is formed, whether any person, within the contemplation of the first section, has actually been hindered or not. If the traversers never committed any overt act, but separated and went home after the completion of the conspiracy, they have incurred the penalty which the seventh section prescribes. So it makes no difference what particular person the conspiracy when put in motion first reached. The act complained of is the conspiracy; and if it be true that any person was hindered or prevented from the exercise of the right granted by the first section, such hindrance and prevention is only proof of the conspiracy; and does not in any wise tend to make the crime more complete.

§ 2287. *How to charge a statutory offense.*

It is generally sufficient, in charging a statutory offense, to set it out in the words of the statute. If the statute uses a common law name for a crime

which it proposes to punish, the indictment must set forth the various ingredients of the crime which go to make up the offense at common law. But when the statute itself creates the offense and defines it, it is sufficient if the indictment uses the words of the statute, unless the words be indefinite and vague, ambiguous or general, in which case the indictment must so particularize the act complained of that the party charged shall be in no doubt of the offense alleged against him. The certainty required is that which will enable him to plead the verdict in bar of any future action. It is alleged, in this count, that this conspiracy was to go into operation at an election not yet held, to wit, the third Wednesday of October, 1872, and it is objected that this is not sufficient, that the right to vote is not a continuing right, but exists only at the time of its immediate exercise. It would be strange, indeed, if parties could not be punished, if it be necessary to punish them at all, for any offense but those committed against this act on election day, and in the direct exercise of the elective franchise.

The usefulness of the act of congress would be entirely frustrated by such requirement. A man may be so effectually intimidated weeks before the election that he would not dare to go within a mile of the polls, and all the mischief the act is intended to remedy would flourish, and no punishment could be awarded them, under this construction, because the right to vote is not a subsisting right, but one which recurs to the citizen on election day. We do not so hold. The uncertainty which the count leaves as to whether this was a state election or a federal is urged as fatal. The indictment charges that this was a conspiracy to violate the first section of this act. This section declares that all citizens shall be allowed to vote at all elections who are qualified by law to vote, without distinction of race, or color, or previous condition of servitude.

§ 2288. *Who prescribes the qualifications of voters.*

Congress has never assumed the power to prescribe the qualifications of voters in the several states. To do so is left entirely with the states themselves. But the constitution has declared that the states shall make no distinction on the grounds stated in this first section. And, by this legislation, congress has endeavored, in a way which congress thought appropriate, to enforce it. It is this act of appropriate legislation, and the first section of it, which the defendants are charged with violating, and we think it makes no difference at what election, whether it be state or federal, he is intimidated or hindered from voting because of his race, color or previous condition of servitude. Congress may have found it difficult to devise a method by which to punish a state which, by law, made such distinction, and may have thought that legislation most likely to secure the end in view which punished the individual citizen who acted by virtue of a state law or upon his individual responsibility. If the act be within the scope of the amendment, and in the line of its purpose, congress is the sole judge of its appropriateness.

The next objection, which is that the count does not set forth the qualification of the voter, is sufficiently answered, we think, in the remarks we have made respecting the requirements of indictments setting forth statutory offenses.

We are of opinion that the second count of the indictment is bad, because it does not allege that Amzi Rainey was qualified to vote; and for another reason, more fatal, that it alleges the right of Rainey to vote to be a right and privilege granted to him by the constitution of the United States. This, as

we have shown, is not so. The right of a citizen to vote depends upon the laws of the state in which he resides, and is not granted to him by the constitution of the United States, nor is such right guarantied to him by that instrument. All that is guarantied is that he shall not be deprived of the suffrage by reason of his race, color or previous condition of servitude.

The third count is a repetition of the second, with a clause setting out a charge of burglary. Concerning the court's jurisdiction over such charge the court is divided in opinion, and will, therefore, make no comment on it at this time.

The fourth count is obnoxious to the objection that neither the citizenship of Rainey nor the fact of his qualifications to vote is set out.

The fifth count repeats the charge contained in the fourth, with the additional clause contained in the third count, and the court refrains from noticing it, for the reasons given as to the first count.

The sixth count is intended to charge a conspiracy to oppress Rainey for having, prior to 1st February, 1871, exercised the right of suffrage; and would be good if it were drawn with the particularity of the first count, which charges a conspiracy to oppress, to prevent the future exercise of this right. It does not, however, contain any allegation of the fact of qualification, nor that the party was entitled to vote in York county, or anywhere else, or that he ever exercised his right to vote.

The seventh count is a repetition of the sixth, with the charge of burglary added, as in the third count.

§ 2289. *The right to be secure in one's house is not a right derived from the constitution.*

The eighth count alleges a conspiracy to prevent and hinder Rainey from the exercise of a right secured to him by the constitution of the United States, which is defined to be the right to be secure in his person and papers against unreasonable search. The article in the constitution of the United States, to enforce which this count is supposed to be drawn, has long been decided to be a mere restriction upon the United States itself. The right to be secure in one's house is not a right derived from the constitution, but it existed long before the adoption of the constitution at common law, and cannot be said to come within the meaning of the words of the act "right, privilege or immunity granted or secured by the constitution of the United States."

The ninth count is entirely too indefinite, and the defendants could not possibly know, from its language, with what offense they were charged; and the same objection is valid as to the tenth count.

The eleventh and last count of the indictment charges a conspiracy to injure Rainey because he had previously voted for a member of congress. We have no doubt of the power of congress to interfere in the protection of voters at federal elections, and that that power existed before the adoption of either of the recent amendments. It is a power necessary to the existence of congress, and this count seems to set forth the charge with sufficient perspicuity, and is not liable to the objections urged against it.

The motion to quash is overruled as to the first and eleventh counts of the indictment, and sustained as to the others, excepting such as the court is divided respecting.

UNITED STATES v. GOLDMAN.

(Circuit Court for Louisiana: 3 Woods, 187-199. 1878.)

STATEMENT OF FACTS.—This was an indictment for a violation of section 5520 of the Revised Statutes, and charged defendants with conspiring by force, intimidation, etc., to prevent certain persons named and others not named from voting for a named person for congress. It is added that to effect their object defendants assaulted and shot the parties who were to be prevented from voting. In the second count, it is charged that defendants conspired to prevent the obnoxious parties from holding public meeting, from speaking, etc., in support of their political views. The third count was of a like nature. To this indictment there was a demurrer.

Opinion by Woods, J.

We shall notice the objections to the indictment in the order above stated.

§ 2290. *Where in an indictment a conspiracy is stated and its object, it is not necessary to state the means to be employed.* (a)

1. With respect to the statements of the charge in an indictment for conspiracy, it may be observed that though it is usual to state the conspiracy, and then show that in pursuance of it certain overt acts were done, it is sufficient to state the conspiracy alone. And it is not necessary to state the means by which the object was to be effected, as the conspiracy may be complete before the means to be used are taken into consideration. *Rex v. Best*, 2 Ld. Raym., 1167; 3 Chit. Cr. L., 1143. This is the rule at common law when the conspiracy is to commit some offense known to the law. It is only when the conspiracy is to commit some act not an offense that the indictment must show some illegal act done in pursuance of the conspiracy. *Rex v. Seward*, 1 Ad. & E., 706. Thus, where an indictment charged that the defendants conspired together, by indirect means, to prevent one H. B. from exercising the trade of a tailor, and it was contended that it should have stated the fact on which the conspiracy was founded, the means used for the purpose, Lord Mansfield, C. J., said: "The conspiracy is stated and its object; it is not necessary that any means should be stated." And Buller, J., said: "If there be any objection, it is that the indictment states too much; it would have been good, certainly, if it had not added, 'by indirect means,' and that will not make it bad." Note to *Rex v. Turner*, 13 East, 231.

When the indictment charged that the defendant conspired by divers false pretenses and subtle means and devices to obtain from A. divers large sums of money, and to cheat and defraud him thereof, it was held that the gist of the offense being the conspiracy, it was quite sufficient to state the fact and its

(a) In *United States v. Dennee*,* 3 Woods, 47, Woods, J., ruled as follows: There is much conflict in the adjudged cases, on the point whether, in an indictment for conspiracy to cheat and defraud, it is necessary to aver the means agreed on to carry the conspiracy into effect. The affirmative of the proposition has been held in *Massachusetts*. *Commonwealth v. Hunt*, 4 Metc., 111; *Commonwealth v. Eastman*, 1 Cush., 189; *Commonwealth v. Shedd*, 7 Cush., 514; *Commonwealth v. Wallace*, 16 Gray, 221. It has also been so held in the following cases: *State v. Parker*, 43 N. H., 13; *State v. Roberts*, 34 Me., 320. In the case of *Lambert v. People*, 9 Cow., 578, the indictment being for a conspiracy to cheat and defraud, etc., without averring specifically the means to be used, the court for the trial of impeachments and errors was equally divided on the question whether the indictment was a good one or not, it was decided by the casting vote of the president that it was defective, and the judgment of the supreme court sustaining it reversed.

On the other hand, it is the settled English rule that the words "unlawfully, fraudulently and deceitfully did conspire, combine, confederate and agree together to cheat and defraud" one "of his goods and chattels," contain a sufficient allegation of conspiracy, without mention of any means intended. 2 Bish. Cr. L., sec. 220, and cases there cited. See, also, *Rex v. Gill*, 2 B. & Ald., 204; *Rex v. Seward*, 1 Ad. & E., 706. The same doctrine is held in the following American cases: *People v. Richards*, 1 Mich., 216; *State v. Younger*, 1 Dev., 357. A somewhat careful consideration of the authorities convinces me that the better reason is with those who deny the necessity of setting out the means by which the conspiracy was to be carried into effect.

object, and not necessary to set out the specific pretenses. Bayley, J., said: "When the parties had once agreed to cheat a particular person of his moneys, although they might not then have fixed on any means for that purpose, the offense of conspiracy was complete." *Rex v. Gill*, 2 B. & Ald., 204; *The State v. Bartlett*, 30 Me., 132. But when the act only becomes illegal from the means used to effect it, the illegality of it should be explained by proper statements. *Commonwealth v. Hunt*, 4 Metc., 111. These rules of pleading throw light upon the first objection made to the indictment.

The first and second counts of the indictment charge a conspiracy to prevent certain qualified voters from giving their support and advocacy in a lawful manner towards the election of a certain qualified person as a member of congress, and allege certain acts done in furtherance of the conspiracy. The law makes such a conspiracy an offense. Now, as the support and advocacy which the alleged conspirators sought to prevent were, as stated in the first and second counts, to be given in the future, it is clearly not necessary to allege what shape that support and advocacy was to take. The defendants could conspire to prevent the advocacy and support, in a lawful manner, by the voters, of the election to congress of the person named, without knowing by what means that advocacy and support were to be carried on, and even before the means were agreed upon by the persons by whom the support and advocacy were to be given. Might not the offense of conspiracy, as was said by Justice Bayley, be complete before it was possible to know or aver what was the manner in which the support and advocacy were to be given?

As an indictment for conspiracy to do an unlawful act need not show what were the means to be used, the offense of conspiracy being complete before the means to carry out the conspiracy are agreed on; so we say that a conspiracy to prevent by force, intimidation and threats any citizen entitled to vote from giving his advocacy or support in a lawful manner to the candidate of his choice, need not set out the acts of advocacy and support, for the crime of conspiracy may be complete before the form in which the advocacy and support is to be given is known to the conspirators, or even to the persons against whom the conspiracy is directed.

Suppose, for instance, three persons meet together and enter into a conspiracy, by which they agree, in order to prevent an influential person of the opposite political party from giving his support and advocacy to a particular candidate, to arrest him and restrain him of his liberty until after the election, and actually carry their purposes into execution. It is clear that the conspiracy forbidden by section 5520 would be complete, and yet it would be impossible to aver and prove what acts of support and advocacy by the person so restrained were contemplated by him, or were prevented by the conspiracy. We are of opinion, therefore, that the first count, which does not state the acts of advocacy and support which the defendants are charged with conspiring to prevent, is not defective in that particular; and as the second and third counts do set out the acts which the conspiracy was directed to prevent, without, it is true, giving details of time and place, that *a fortiori* they are not open to the objection under consideration.

§ 2291. *An indictment for a conspiracy is not bad because it states that a crime of higher grade (against the state) had been committed.*

2. In support of the second objection to the indictment it is said that, under the law of conspiracies, should an overt act result in murder, the conspiracy is lost in the greater crime. The indictment, it is said, alleges that in the execu-

tion of the conspiracy the conspirators shot the parties against whom the conspiracy was formed, and it is claimed that these allegations show a merger of the lesser crime in the greater, and so, on the face of the indictment, show a want of jurisdiction in this court. It is sufficient to say, in answer to this objection, that, in the first place, the indictment does not disclose any crime committed by the defendants of a higher degree than the conspiracy charged, and if it did, it would not follow that this court would be ousted of jurisdiction to try the accused for conspiracy. Even if it were shown that the defendants had been guilty of murder—that being an offense against the law of another sovereignty, and not against the laws of the United States, and therefore not triable in the federal courts—this court would not be ousted of jurisdiction merely because it was disclosed that an offense of a higher grade had been committed against the laws of the state.

§ 2292. *Congress has the constitutional right to protect electors in every state, duly qualified, in voting for members of congress.*

3. The third objection to the indictment, which was the one most earnestly pressed, is that the act upon which it is founded is unconstitutional—or, rather, to state the objection more precisely, that congress was without constitutional authority to pass the act. In the case of *Fletcher v. Peck*, 6 Cranch, 187 (CONSR., §§ 1805–12), Chief Justice Marshall said: “The question whether a law be void for its repugnancy to the constitution is at all times a question of delicacy which ought seldom if ever to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.”

And in the case of *Dartmouth College v. Woodward*, 4 Wheat., 625 (CONSR., §§ 2099–2117), the same eminent judge said, speaking in reference to the constitutionality of a legislative act: “On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the constitution.” Guided by these words of caution, we shall consider the question now to be passed upon. The clauses of the constitution of the United States which, it is claimed, empower congress to pass the act in question are section 2 of article 1, which declares that “The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature,” and section 4 of the same article, which provides that “the times, places and manner of holding elections for the senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators,” and the last clause of section 8, article 1, which declares that “congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.”

The question whether this legislation is supported by section 2 of article 1,

above quoted, depends on whether that section confers the right to vote for members of congress on such electors in the state as are qualified by its laws, as electors of the most numerous branch of the state legislature. If such a right is conferred, then it is a right which congress has power to protect by law. Rights and immunities created by, or dependent upon, the constitution of the United States, can be protected by congress. *United States v. Reese*, 92 U. S., 217 (Constr., §§ 1568-86); *United States v. Cruikshank*, id., 542 (Constr., §§ 898-911). It is true, and has been so said by the supreme court of the United States, that the constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the states. *Minor v. Happersett*, 21 Wall., 178 (Constr., §§ 806-815).

But this language refers solely to voters at an election for state officers, and so far as such elections are concerned, the United States has no voters of its own. In the case of *The United States v. Reese*, 92 U. S., 217, the supreme court expressly reserves any opinion on the effect of article 1, section 4, of the constitution in respect to elections for senators and representatives. The constitution does not describe a class who, independent of state laws, are entitled to vote for members of congress. But section 2 of article 1 declares in the most unmistakable terms that members of congress shall be chosen by the people of the several states, who shall have the qualifications requisite by the state laws for electors of the most numerous branch of the state legislature.

Now, the question is, has an elector who is qualified by state law to vote for the most numerous branch of the state legislature, a right conferred upon him by this clause of the constitution to vote for members of congress? To us it seems clear that he has. Suppose a state should attempt by law, though without distinction as to race, color or previous condition, to exclude a certain part of those having the qualifications requisite for electors of the most numerous branch of the state legislature from the right to vote for members of congress. Would such an act be constitutional? Clearly not. And it is clear also that it would deprive the excluded citizen of a right derived from the constitution of the United States, which says to him if you are qualified to vote for the most numerous branch of the state legislature you are qualified to vote for members of congress, and the house of representatives shall be composed of members chosen by electors such as you. It seems to be clear that the language of the section under consideration could not have been intended merely to give a basis of representation; that was provided for by other clauses of the constitution. If this be so, it must follow that it was intended as a declaration as to who of the people of the states should have the right to vote for representatives in congress. As, therefore, the elector qualified by state laws derives his right to vote for members of congress from the constitution of the United States, congress has the power to protect him in that right.

Section 4 of article 1, in effect, declares that the congress may at any time, by law, make regulations prescribing the time, place and manner of holding elections for senators and representatives, except as to the places of choosing senators. The purpose of conferring this power upon congress was that the country might not be in danger of having no congress through the indifference of the states or their hostility to the general government. It was to place it out of the power of the states to prevent the election of a congress by obstructive laws or in any other way. The ultimate right of regulating the time, place and manner of choosing representatives, and the time and manner of

choosing senators, was therefore given to congress, so that it might always be within the power of congress to secure the election of a senate and house of representatives. Story on the Constitution, sec. 817. The clause of the constitution under consideration does not confer rights or privileges upon the individual citizen. It is a clause framed to secure the existence of the government itself, and was made in the interest of all the people of all the states.

§ 2298. *The powers of congress to regulate by law the election of members of congress.*

Such being the object and scope, what is the power granted by it? It authorizes congress to regulate the time, place and manner of choosing representatives in congress. The terms "time and place" need no commentary. What is meant by the words "manner of holding elections?" An election is not simply the depositing of a ballot in a box. If the elector is forced to vote a certain ballot against his will it is not an election so far as he is concerned, and equally so if he is prevented by violence from voting at all. An election is the expression of the free and untrammelled choice of the electors. There must be a choice and the expression of it to constitute an election. Under our American constitution an election implies a free interchange and comparison of views on the part of the people who are voters, and finally an independent expression of choice. Any interference with the right of the elector to make up his mind how he shall vote is as much an interference with his right to vote as if he were prevented from depositing his ballot in the ballot-box after he had made up his mind.

It is conceded that congress may declare that the elections for representative shall be by ballot. Congress has so declared without objection or challenge from any quarter. R. S., sec. 27. What was the purpose of that enactment? Clearly that the elector might be free to vote according to his choice. If it is within the power of congress for such a purpose to regulate his method of voting, congress could adopt any other measures leading to the same result. It could say that armed men should not infest the vicinity of the polls; it could say that the voters should have the right of free interchange of views on the day of voting. All this would as clearly be regulating the manner of holding the elections as prescribing that the election should be by ballot. If congress could make such regulations for election day it could make them for any previous day. In short, in prescribing the manner of holding elections, it could protect the voter in making his choice, and afterwards expressing that choice at the polls, for both these things are included in an election. Suppose our method of elections was like that used in England, where the candidates appear upon the hustings and address the voters, and the vote is taken, as it often is, by a show of hands; would not an act of parliament making any violence offered to the candidates, while addressing the voters, a penal offense be a regulation of the manner of holding the election? With us the canvass sometimes lasts for weeks, but that does not change the principle. Any law the purpose of which is to enable the voter to make a free and intelligent choice, and to express that choice freely at the ballot-box, is a regulation of the manner of holding the election.

The act of congress under consideration was framed for that purpose in respect to elections for representatives in congress, and it seems to us is plainly warranted by section 4, article 1, of the constitution. The first and fourth sections of article 1, taken together, it seems to us leave no doubt upon the question. The first declares that representatives shall be elected by the people

of the states, and adopts the qualification of electors prescribed by the states for electors of the most numerous branch of the legislature. The second authorizes congress to regulate the manner of holding such elections. The two sections are intended to place the election of representatives in the ultimate power of congress, so as to secure at all times a house of representatives, first by preventing obstructive legislation by the states, and, second, securing to the voter the protection of the general government. We both concur in the opinion that the legislation under consideration is clearly within the constitutional power of congress, and our judgment is that the demurrer to the indictment should be overruled.

UNITED STATES *v.* BOYDEN.

(Circuit Court for Massachusetts: 1 Lowell, 266-270. 1868.)

STATEMENT OF FACTS.—The defendants were indicted for a conspiracy to defraud the government of taxes on spirits. There was a verdict of guilty and motions for a new trial and in arrest of judgment. The grounds laid were (1) that the description of the goods was insufficient as to the precise kinds, quantities, etc., of spirits; (2) that one of the defendants was an officer of the revenue, but not described as such in the indictment; (3) that the words of the statute were not followed, “in pursuance of” being substituted for “to effect the object.” Further facts appear in the opinion.

§ 2294. “*Distilled spirits*” is sufficiently descriptive in an indictment.

Opinion by LOWELL, J.

The goods are sufficiently described to show that they were liable to a tax. The internal revenue laws tax all distilled spirits as such, without further description, and with a few trifling exceptions, which are strictly exceptions, so that even in an indictment for distilling without due authority, it is not essential to describe the particular kind of spirits. The case of *Reg. v. Blake* is remarked upon by Sir W. Russell, in the late edition of his work on Crimes, vol. iii, p. 152, *n.*, on the ground taken at the argument of the case itself, that “certain goods” did not show that they were in fact dutiable. It was admitted in that argument that a description like the one in *Rex v. Everett*, 8 Barn. & Cress., 114, “certain goods and merchandises, to wit, spirituous liquors,” would have been well enough. A more accurate description is not required, because the corrupt agreement is the gist of the offense, and it may be, as was the fact here, that the parties had not the precise bales or packages of goods in view when they made the agreement. Quantity and quality are not important in a case of this kind, and the description used in the statutes imposing the tax is sufficient. In the case cited from 7 Q. B., the persons intended to be defrauded were merely described as certain liege subjects of the queen, being tradesmen. The simple mode of describing a person is to name him, or if he is unknown, to allege the fact, but to designate goods by their statutory and commercial name is enough.

§ 2295. *The rule of pleading, which requires a crime to be set out in the words of the statute, not applicable when the acts set out are no part of the offense, but mere inducement. Cases cited.*

The rule of pleading which requires a crime created by statute to be laid in the very words of the statute has perhaps been carried too far in some cases. But it has no proper bearing upon the second point taken here, because the acts set out are no part of the offense, and may in themselves be innocent.

The purpose of the law is that a mere agreement, however corrupt, shall not be punished as a crime, unless it has led to some overt act; and any form of language which shows that such an act has been done to carry out the agreement is sufficient. Thus in treason, the overt act is never charged to be an "open deed," nor is it usually alleged that the compassing, etc., were expressed in any "overt act or deed" in the exact language of 25 Ed. III., or 36 Geo. III., ch. 7. So in New York and New Jersey, where the statutes require some act to be done to "effect the object" of the conspiracy, indictments follow the more usual language adopted in this case, and charge the acts as having been done "in pursuance" of the agreement. *People v. Fisher*, 14 Wend., 9; *People v. Chase*, 16 Barb., 495; *State v. Norton*, 3 Zab., 33.

§ 2296. *It is competent to indict a revenue officer as a private person for a conspiracy to defraud the revenue.*

In *Cleaves' case*, the fact that he is an officer does not require the government to charge him as such. He is still a person, and if the government is content with the lesser punishment they may proceed under the general statute. It has been the practice in this court, under the postoffice acts, which punish clerks and other persons employed by the department much more severely for tampering with the mails than persons not under any such engagement, to proceed against clerks, where justice seemed to require it, without charging them in their official capacity. Under Stat. 52 Geo. III., ch. 143, a similar practice was upheld. *Rex v. Salisbury*, 5 Carr. & P., 155; *Rex v. Brown*, cited Russ. & Ry., 32, note *a*, and more fully 2 Russ. on Crimes (4th ed.), 570. So 7 & 8 Geo. IV., ch. 29, § 46, punishes very severely servants who steal from their masters; and it was held that a servant might be convicted of a simple larceny. *Reg. v. Jennings, Dears. & Bell*, C. C., 447. Where the act may be charged as an offense against two different statutes, as, for instance, where the conspiracy and the completed offense are separate crimes, or where the crime charged includes in its definition one of less magnitude, the conviction may be of either crime. *Bank Prosecutions*, Russ. & Ry., 378; *State v. Parmelee*, 9 Conn., 259; *Reg. v. Neale*, 1 Carr. & K., 591; 1 Denison, C. C., 37. Indeed, in one case it appears to have been held that a defendant who has by one act contravened two statutes may be convicted under both. *State v. Sonnerkalb*, 2 Nott & M'C., 280. Moreover, in this case the offense must be laid under the act of 1867, which is the only statute of the United States defining conspiracy. The statute of 1868, which punishes officers for that crime, does not define it, but leaves us to the common law or the statute of 1867 to ascertain what it is. It cannot be the common law, because this would make officers liable without an overt act, while the persons with whom they conspire are not guilty until something has been done to effect the object of the conspiracy; and this cannot be presumed to have been the intention of congress. So that the true construction of both statutes is that, if two or more persons conspire to defraud the United States, and either of them commits an overt act, and one of them is an officer, the latter is liable to a more severe punishment. But he must be indicted under the earlier act, or under both together, and this is at the option of the prosecutor. If he elects not to charge the defendant as an officer, he can ask only the lighter sentence.

I have fully considered the evidence and arguments bearing upon the motion to set aside the verdict against *Cleaves*. It is not denied that he did several acts which were contrary to his duty as an officer; but it is urged that these may not have been done as part of the conspiracy, and that he may have been

merely bribed. The acts being proved, and some of them having a tendency to aid the conspiracy, and no other probable or possible motive being shown but to aid it, the jury under the instruction that any act done in furtherance of the corrupt agreement, with knowledge of its existence, would make the person doing it a conspirator, were well warranted in finding as they did.

§ 2297. *Reference to caption.*

Upon referring to the caption of the indictment, it seems that the United States mentioned in the body of that instrument are the United States of America.

§ 2298. *An objection that a juror was asleep must be taken before verdict.*

If one of the jurors was asleep, the defendant should have called attention to the fact at the time. There is no suggestion that it is newly discovered, and I cannot now say that the defendant may not have thought his interests were promoted by the actual course of the trial in this respect.

Motions denied.

UNITED STATES v. MARTIN.

(Circuit Court for Massachusetts: 4 Clifford, 156-166. 1870.)

§ 2299. *Conspiracy at common law not cognizable by the federal courts.*

Opinion by CLIFFORD, J.

Authority to form associations for carrying on the business of banking, subject to certain conditions and regulations, is conferred by the act of congress entitled an "Act to provide a national currency," and the same act provides to the effect that every officer or agent of any such association, who shall embezzle, abstract or wilfully misapply any of the moneys, funds or credits of the association, or do any other of the prohibited acts enumerated in the same section, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished as therein provided. 13 Stat. at L., 100, 116. Conspiracy, as known at common law, not being defined in any act of congress as an offense against the authority of the United States, is not cognizable as such in any federal court, but section 30 of the act of March 2, 1867, provides that if two or more persons conspire, either to commit any offense against the laws of the United States, or to defraud the United States in any manner, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be liable, both to a certain penalty and to imprisonment. 14 Stat. at L., 484.

STATEMENT OF FACTS.—Martin was the cashier of the Hide and Leather Bank, an association formed pursuant to the act entitled "An act to provide a national currency," and having its place of business in this city, and he is correctly described as such in the introductory allegations of the indictment, and in each of the four counts which the indictment contains. Special reference will only be made to the first two counts, as they all present the same questions, and before doing so it should be remarked that Felton was not an officer or agent of that bank, nor of any other association formed under the first-named act, nor is he described as such in any one of the counts. Instead of that, the conceded fact is that he was neither an officer nor an employee of the association, and the charge in the first count is, that the defendants, Martin being described as the cashier of the bank, did, on a certain day, and at a certain place in this district, unlawfully conspire together to fraudulently and unlawfully abstract from said bank large sums of money, belonging to said bank, with intent to defraud said bank. Certain acts, alleged to have been done by the respective defendants, to effect

the object of the said conspiracy, are also set forth and described in the same count, as more fully exhibited in the record. Like the first count, the second alleges that the defendants on the same day, and at the same place, did unlawfully conspire together to commit an offense against the laws of the United States, to wit, that the said Martin, as cashier, should fraudulently and unlawfully misapply large sums of the money of said bank, as more fully set forth in the indictment. Appropriate allegations are also inserted in the same count, describing the acts performed by the respective defendants to effect the object of the conspiracy, as contemplated by the provision defining the offense, and prescribing the punishment for its commission. Set at the bar, and called upon to plead to the indictment, the defendant Felton demurred to the same, upon the ground that two persons cannot be guilty of a conspiracy to commit an offense against the authority of the United States, under the act "to amend existing laws relating to internal revenue," unless each can be guilty of a violation of the law which they are charged with having agreed to violate. Both defendants could not be convicted of the offense defined in section 55 of the act to provide a national currency, as the defendant before the court was neither an officer nor an agent of the bank, and the proposition submitted is that, not being such, he cannot be guilty of the offense of conspiracy as defined in the act to amend existing laws relating to internal revenue. His counsel concede that if any officer or agent of any such association shall embezzle, abstract or wilfully misapply any of the moneys, funds or credits of the association, that such officer or agent may be indicted, tried and convicted of a misdemeanor as defined in the act to provide a national currency, and that if two or more persons, being officers or agents of such an association, conspire to embezzle, abstract or wilfully misapply any of the moneys, funds or credits of the association, and any one of the number so conspiring shall "do any act to effect the object thereof," they may be indicted, tried and convicted of the offense of conspiracy as defined in the act on which the indictment is founded.

Stated in other words, the position assumed by the defendant before the court is, that inasmuch as he could not commit the offense defined in the act to provide a national currency, because he is not an officer or agent of any such association, he cannot be convicted and punished for the offense set forth in the indictment, although the charge in the second count is, that the defendants did unlawfully conspire together that the other defendant, "as cashier, should fraudulently" and unlawfully misapply large sums of the money of said bank, but the correctness of the proposition submitted must depend upon the construction of the provision on which the indictment is founded, as it would clearly be competent for congress to provide that any person so conspiring with an officer or agent of such an association to embezzle, abstract or wilfully misapply any of the moneys, funds or credits of the association, should be deemed guilty of conspiracy, and be subject to the same punishment as the offending officer or agent of the association.

Whatever is well alleged in the indictment is admitted by the demurrer, and in view of that rule of pleading, the only question is whether, by the true construction of the act of congress, it is declared to be an offense, if an officer or agent of such an association conspires with another person not an officer or agent of the bank, to embezzle, abstract or wilfully misapply any of the moneys, funds or credits of the association, including of course the other element of the offense which need not be repeated in this connection. Omitting unimportant words, the terms of the act are, "shall conspire to commit any offense against the

laws of the United States," and one or more of said parties to said conspiracy shall do any act to effect the object thereof. Beyond all controversy, it is an offense for the cashier to embezzle, abstract or wilfully misapply any of the moneys, funds or credits of the bank, and it seems equally clear to the court that if the cashier and the defendant before the court conspired together that the former should do those forbidden and unlawful acts, or any one of them, and that he, the cashier, as one of said parties, did any act to effect the object of the conspiracy, that both are equally guilty within the meaning of that provision.

§ 2300. *Indictments for statutory offenses must conform to the statute.*

Offenses created by statute often differ from offenses at common law, known by the same name, of which there are many examples in the acts of congress, besides the one under consideration, and in all such cases the pleader must conform to the requirements in the act of congress defining the offense, even though the allegations of the indictment may, in those respects, depart from the rules of the common law.

§ 2301. *Indictment for conspiracy at common law need not allege the performance of any act in pursuance of the unlawful agreement.*

Valid exception cannot be taken to an indictment for a conspiracy as known at common law, where the pleader sets forth a combination of two or more persons to accomplish, by some concerted action, some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by some criminal or unlawful means, even if the indictment does not allege that any act was done by any one of the parties in pursuance of the unlawful agreement, as the offense is complete when the unlawful combination is formed, though no act was done towards carrying the main design into effect. Commonwealth v. Hunt, 4 Metc., 111; Rex v. Seward, 1 Ad. & E., 185; Reg. v. Vincent, 9 Carr. & P., 91; Rose. Cr. Ev., 406; 3 Greenl. Ev., 93. Such an indictment would obviously be bad, if drawn upon section 30 of the act to amend existing laws relating to internal revenue, as it would omit one of the essential ingredients of the offense as defined in that provision.

§ 2302. *Every material ingredient of a charge must be set forth in the indictment.*

Indictable offenses, whether created by statute or recognized as arising at common law, usually contain more than one element or ingredient, and the rule is universal, that, unless every material ingredient of the charge is set forth in the indictment, the defect may be reached by demurrer, or the judgment may be arrested. Where the indictment is for an offense defined by statute, it is, in general, sufficient if the pleader follows the words of the statute, unless the statute employs some technical term or phrase or contains some word or words of compound signification. Evidently the offense set forth in the indictment under consideration contains three essential ingredients as defined in the act of congress. 1. That the persons named in the indictment did conspire together and enter into an unlawful agreement and combination, which is the legal signification of the word conspire as there employed. 2. That they so conspired together to commit an offense against the laws of the United States. 3. That one or more of said parties to said conspiracy did some act to effect the object of said unlawful combination and agreement.

§ 2303. *Sufficient indictment for conspiracy to embezzle from a bank.*

Objection is made, in the first place, that the defendant before the court cannot be regarded as falling within that allegation, as he cannot be held to have

conspired with another to commit an offense which he himself could not commit, but it should be borne in mind that the cashier of the bank is named in the indictment, as well as the defendant making the objection, and that the charge in the second count of the indictment is that they conspired together that the cashier of the bank should embezzle, abstract and wilfully misapply the moneys, funds and credits of the association. Examined in that point of view, as the case must be, it is quite evident that the circumstance that the defendant before the court is neither an officer nor an agent of the association, is no answer to the charge, as to adopt that theory would be to admit that it is not unlawful for the cashier of the bank and the objecting defendant to conspire together that the former shall embezzle, abstract and wilfully misapply the moneys, funds and credits of the institution, which cannot be admitted, as the alleged conspiracy is to do an act, which, if committed by him or even by the parties jointly, would render the cashier liable to an indictment and imprisonment for a term not less than five nor more than ten years. Viewed in that light, it is quite clear that the first ingredient of the offense is well pleaded, and that the defendant as a conspirator with the cashier of the bank falls within its terms. Suppose that it is so, still the defendant contends that he does not fall within the second ingredient as pleaded, as he insists that there cannot be a conspiracy unless two or more combine together by concerted means to accomplish the unlawful purpose, or to accomplish a purpose not in itself unlawful by criminal or unlawful means, and the argument is that, inasmuch as he could not commit the offense of embezzlement as defined in the act to provide a national currency, the two defendants cannot conspire together, in the legal sense, to commit that offense; but the allegation in the second count, as already explained, is that they conspired together that the cashier of the bank should embezzle, abstract and wilfully misapply the moneys, funds and credits of the bank, and it is clear to a demonstration that the cashier, as such officer, could commit the offense, and that, if he did commit it, he could be indicted, tried, and convicted of a misdemeanor, and be punished as therein provided. Tested by these considerations, it is the opinion of the court that the objections to the allegations setting forth the second ingredient of the offense are not well founded.

Extended remarks in respect to the allegation setting forth the third ingredient are unnecessary, as some one or more of the assignments in each count allege that the act or acts to effect the object of the conspiracy were done by the cashier of the bank as one of the parties to the unlawful agreement and combination, and in pursuance of the said conspiracy. Reduced to propositions, the several objections taken to the indictment amount to the same thing, as they are all founded on the theory that two persons cannot in any legal sense conspire to commit an offense unless, if they effected the object of the conspiracy, each could be indicted, tried and convicted of the offense, which is by no means correct as a universal rule. Examples to the contrary are put by the district attorney, and the authorities cited by him support his views. 1 Bish Cr. L. (3d ed.), § 629; 2 Bish. Cr. L., § 1090; 1 Hale, P. C., 629; 1 East, P. C., 446; 1 Hawk. P. C. (7th ed.), 308; 1 Russ. Cr. L. (ed. 1853), 676; Audley's Case, 3 How. St. Tr., 402. Other examples may be put of an equally apposite character. Two persons cannot be jointly indicted for perjury, as the offense is in its nature several, though the two persons may make the same false and corrupt statement in the same case and on the same day, so that it is

incorrect to say that two persons cannot commit the same act of perjury. Provision is made by section 18 of the principal crimes act, for the trial, conviction and punishment of persons committing wilful and corrupt perjury in any suit, controversy, matter or cause depending in any of the courts of the United States. 1 Stat. at Large, 116. Clearly no two persons can commit the same act of perjury under that provision, as the act of the respective parties would be several and not joint, and yet it would not be difficult to suppose a case where they might be jointly indicted as having conspired together that one should swear falsely in a cause pending in a federal court, in which both were interested, if it also appeared that the party designated to commit the offense had entered the witness stand and taken the necessary oath in pursuance of the unlawful agreement and combination, and was only prevented from testifying as he had agreed with his confederate to do, by sudden sickness. His confederate could not commit the crime which he with his confederate had conspired to commit, because if his confederate in turn entered the witness stand and made the same false statement as that contemplated by the conspiracy, it would be a different crime, and one for which the party committing it would alone be responsible.

Stress is also laid, in the arguments for the defendant, upon the introductory words of the section, which are "that if two or more persons conspire to commit any offense," and the argument is that the meaning of the phrase is the same as it would be if it read "conspire or" agree that they shall commit the offense, but the court is not able to adopt that construction of the section, as it would allow every person not an officer or agent of such an association to conspire with any such officer or agent to embezzle, abstract or wilfully misapply the entire moneys, funds and credits of the association with perfect impunity.

§ 2304. *Merger of the offense of conspiracy.*

Any argument to show that the offense of conspiring in this case is not merged in the completion of the object of the conspiracy is unnecessary, as the offense which the defendants conspired to commit is itself only a misdemeanor. *Rex v. Button*, 3 Cox, Cr. Cas., 237; S. C., 11 Q. B., 948; *State v. Noyes*, 25 Vt., 415; *People v. Mather*, 4 Wend., 265; *State v. Mayberry*, 48 Me., 218; *Commonwealth v. O'Brien*, 12 Cush., 84; *Elkin v. The People*, 28 N. Y., 177; *Reg. v. Neale*, 1 Carr. & K., 591. Much consideration has been given to the very able argument for the defendant, but the court is of the opinion that the demurrer must be overruled.

UNITED STATES *v.* DE GRIEFF.

(Circuit Court for New York: 16 Blatchford, 20-29. 1879.)

Opinion by BENEDICT, J.

STATEMENT OF FACTS.—This case comes before the court on a motion to quash the indictment. The provision of law under which the indictment is framed is to be found in section 5440 of the Revised Statutes, where it is provided that, "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than \$1,000 and not more than \$10,000, and to imprisonment not more than two years."

§ 2305. *Sufficiency of an indictment under section 5440, Revised Statutes, for a conspiracy to commit an offense against the United States.*

Under this section it is sought, by the present indictment, to charge the defendants with having conspired to commit one of the offenses against the United States which are created by section 5443 of the Revised Statutes. The language of that section is as follows: "Every person who wilfully conceals or destroys any invoice, book or paper relating to any merchandise liable to duty, which has been or may be imported into the United States from any foreign port or country, after an inspection thereof has been demanded by the collector of any collection district, or at any time conceals or destroys any such invoice, book or paper, for the purpose of suppressing any evidence of fraud therein contained, shall be punished by a fine of not more than \$5,000, or by imprisonment not more than two years, or both."

The first count charges that, at a certain time and place, the defendants conspired to commit an offense against the United States, that is to say, to wilfully conceal and destroy certain papers relating to certain merchandise called dress trimmings, liable to duty, which had been theretofore imported and brought into the United States and the port and collection district of New York, from a foreign port, by the firm of A. De Grief & Co., for the purpose of suppressing certain evidence of fraud against the United States, therein contained. Then follows a description of the papers referred to, coupled with the averment that said papers contained statements from the correspondents, consignors and purchasing agents of the said firm of A. De Grief & Co., addressed to and received by said firm in the due course of their business, showing and tending to show that said merchandise had been knowingly and fraudulently entered and passed through the custom-house, the office of the collector of the port and collection district of New York, upon a false classification thereof as to value, and by the payment of less than the amount of duty legally due to the United States, and which said papers were material and important evidence for the United States in any proceedings because of said fraudulent entry. Then follows a statement of various acts charged to have been done to effect the object of the conspiracy.

The second count begins with reciting the pendency of a suit *in rem* for the forfeiture and condemnation, to the use of the United States, of certain trimmings which had been imported as stated in the first count, for a violation of the laws of the United States, in the importation of said merchandise, and, also, of a suit against the defendants De Grief and Triacca, for the recovery of damages for a violation of the laws of the United States, in the said importation. It then charges a conspiracy, as in the first count, describing the papers as in the first count, and avers that said papers contained statements from the correspondents, consignors and purchasing agents of De Grief & Co., addressed to and received by said firm in the due course of their business, showing and tending to show fraud and violation of the laws of the United States, in the said importation, which papers were evidence for the United States in the prosecution of the suits aforesaid, and in any proceeding by the United States because of the violation of the laws of the United States, in the importation of said merchandise. Then follows a statement of acts done to effect the object of the said conspiracy, as in the first count.

The third count charges a conspiracy to commit an offense against the United States, that is to say, to wilfully conceal and destroy certain papers relating to certain merchandise, a full description of which is unknown, liable to

duty, which had been theretofore imported, for the purpose of suppressing certain evidence of fraud against the United States therein contained, following with a description of the papers, and a statement of acts done, as in the first count.

The fourth count, after reciting, in the language of the second count, the pendency of suits, charges a conspiracy to commit an offense against the United States, that is to say, to wilfully conceal and destroy certain invoices and papers relating to said dress trimmings, liable to duty, which had been theretofore imported, as stated in the first count, for the purpose of suppressing certain evidence of fraud upon the United States in said importation, following with a list of the said papers described, and averring that said invoices and papers contained statements from the correspondents, consignors and purchasing agents of De Grief & Co., addressed to and received by them in the due course of their business, showing and tending to show fraud against the United States, in the importation of said merchandise, and which said papers were important and material evidence for the United States in the prosecution of the said suits, and in any proceedings by the United States because of the violation of the laws of the United States, in the importation of said merchandise. A statement of acts done to effect the object of the conspiracy is then given, as in the first count.

The indictment concludes with the averment that, by the means aforesaid and in the manner aforesaid, according to the conspiracy, combination and agreement aforesaid, the defendants committed an offense against the United States.

To this indictment it is objected that it is bad for uncertainty, because it omits to state facts showing the commission of a fraud upon the United States in connection with the importation of the merchandise described, and because the contents of the papers are not so stated as to enable the court to see that they contained evidence of that fraud. In support of the objection that the indictment contains no facts showing the commission of a fraud, the argument made is this: Unless there was a fraud upon the United States in connection with the importation of the merchandise described, the papers described could not have contained evidence of such a fraud, and there could be no conspiracy to destroy what did not exist. The foundation of the charge, therefore, is a fraud upon the United States in connection with the importation in question, and facts must be stated to show the commission of such a fraud. The difficulty with this argument, when applied to a case like the present — for a similar argument has been made without avail in regard to indictments for receiving stolen goods and the like (*Roscoe, Cr. Ev.*, 867; *Archb. Cr. Pr.*, 939; *Rex v. Jervis*, 6 C. & A., 156; see, also, forms, *Archb. Cr. Pr.*, 441, 869),—is, that it proceeds upon the assumption that the substance of the offense charged is the fraud upon the United States in the importation of the merchandise described. But the indictment is for a conspiracy to commit an offense against the United States, not for a fraud upon the United States. The rule applicable to indictments of this character has been thus stated: "When looking at a charge of conspiracy to commit an offense, we do not require it (the offense) to be set forth with all the precision requisite in describing the offense itself." *Latham v. The Queen*, 5 Best & S., 635. The result of the cases upon the subject in this country is thus stated in *State v. Keach*, 40 Vt., 113, 117: "The adjudged cases uniformly recognize the rule, that a general allegation that two or more persons conspired to effect an object criminal in itself, as to commit a misde-

meanor or felony, is sufficient, even though the indictment omits all charges of the particular means to be used." In *State v. Parker*, 43 N. H., 83, 84, it is said: "If it" [the object of the conspiracy] "is not an offense at common law, but only by statute, the purpose of the conspiracy must be set forth in such manner as to show that it is within the terms of the statute." Judged by these rules, the present indictment is sufficient. It shows that the defendants conspired to commit an offense against the United States by averring that the object of the conspiracy was to conceal and destroy certain described papers relating to certain described merchandise liable to duty, and theretofore imported into the United States at the port of New York, from Paris, by the firm of De Grieff & Co., for the purpose of suppressing evidence of fraud against the United States, therein contained. The facts which are here stated consist of an act and an intent, *i. e.*, that the defendants agreed together to do a certain act, namely, to conceal and destroy certain papers, for a purpose designated; and, by section 5443, the concealment or destruction of papers of the description given, for the purpose stated, is made an offense against the United States. The indictment, therefore, sets forth the purpose of the conspiracy in such manner as to show that it is within the terms of the statute, and, accordingly, is within the requirement of the law, as stated in the cases above cited.

§ 2306. *Not necessary to set forth the circumstances of fraud attending a conspiracy, when.*

What it would be necessary to aver and prove if this were an indictment for the offense created by section 5443 it is unnecessary to determine on this occasion, but it may be remarked that a construction of the section that would require proof of a fraud as to which the papers destroyed contained evidence would nullify the statute in many cases, such, for instance, as where the papers destroyed contain the only evidence of a necessary link in the proof of the fraud. It could hardly have been intended that the successful result of the prohibited act should render its punishment impossible. But however this may be in the case of a prosecution for the offense created by section 5443, in a case like this, where the substance of the charge is an unlawful agreement made for the purpose of effecting a certain result, to require the circumstances attending the fraud to be set forth would be to require a statement of the evidence intended to be adduced to prove the facts averred. An objection which, in some cases of conspiracy, may be made, that, owing to the circumstances of the case, the indictment, although sufficient in law, fails to inform the particular defendant of the act intended to be proved against him, is, in such cases, met by the tender of particulars. That objection cannot be here made, for the reason that this indictment, in addition to stating the conspiracy with due particularity of time and place, gives a description of the papers sufficient to identify them, and as full as the circumstances will permit, and with as much particularity as can be asked, where, from the nature of the case, the papers are not under the control of the prosecution, points out the matter in the papers which it was the object of the conspirators to suppress, and thus fully informs the defendant of the charge upon which he is to be tried.

It is further objected that the indictment fails to show to the court that the matter in the papers would be evidence of a fraud upon the United States. There is no occasion to question the necessity, which this indictment assumes, of proving, in a case like this, that the result sought to be attained by the agreement to destroy these papers was the suppression of evidence of fraud contained in the papers. But that is a fact to be shown by evidence as to the

terms of the agreement and the surrounding circumstances. Whether those facts and circumstances will warrant the jury in saying that the result which the defendants sought to attain by this conspiracy was that charged in the indictment is to be determined when the evidence has been given at the trial. It cannot now be determined by the court. Plainly, it would be impossible for the indictment to show to the court that the matter contained in the letters destroyed tended to show that a fraud had been committed, unless it contained the evidence going to explain the statements in the letters, and their significance as bearing upon the question of fraud; and there is no ground to contend that such should be the contents of an indictment of this character. What has, in cases similar, been deemed sufficient for an indictment, may be seen by referring to the form of an indictment for conspiring to suppress evidence, given in 5 Cox's C. C., appendix, No. 3, p. 9.

The decision of the supreme court of the United States in *United States v. Cruikshank*, 92 U. S., 542 (Constr., §§ 898-911), has been pressed upon my attention, as a controlling authority adverse to the conclusion above indicated. But the indictment in *Cruikshank's* case was not for a conspiracy to commit an offense, and the determination in respect thereto cannot, therefore, be authority in a case like this. That indictment was under the sixth section of the enforcement act of May 30, 1870 (16 U. S. Stat. at Large, 141), now found, in a modified form, in section 5508 of the Revised Statutes, which makes it an offense against the United States to conspire to do certain described acts with a certain described intent. The ingredients of the offense are found in the provision creating it, and the court held that all those ingredients must be stated in the indictment with such specification of detail as to enable the court to see that the offense created by the enforcement act had been committed. The present indictment is for a conspiracy of a different character, made an offense by a different statute, and having different ingredients. By the section under which this indictment is drawn, a crime is committed when the agreement is to commit any offense against the United States, without regard to the result sought to be attained by making the agreement. It is true that the opinion of the supreme court in the case of *Cruikshank* deals, to a certain extent, with the general requisites of an indictment, but I fail to find there any indication of an intention to lay down a rule in regard to the requirements of an indictment like the present, or to state any rule at variance with the law declared in the cases from which I have above quoted. On the contrary, two of those cases are cited with apparent approval in the opinion of the court. The opinion, indeed, supports the present indictment, for, by way of illustration, it refers to a statute of Maine, similar in character to the statute upon which this indictment is drawn, where it is made an offense to conspire to commit any crime punishable by imprisonment in the state prison; but it points out that an indictment under the statute of Maine, to be good, must specify the crime charged as the object of the conspiracy, so as to enable the court to see whether it be one punishable by imprisonment in the state prison. The present indictment, so judged, is sufficient, for the charge made is not general, that the defendants conspired to commit an offense against the United States, but it descends to particulars and particularizes the act as being an agreement between the defendants to conceal and destroy certain described papers relating to the importation of certain merchandise, entered into by the defendants for the purpose of suppressing evidence of fraud in connection with that importation, contained therein. The act thus particularized is made by statute an offense

against the United States, and it thus appears that, if proved, it will support a conviction under section 5440. While, therefore, the determination in Cruikshank's case cannot control the determination in any case like this, the opinion there delivered is in harmony with the conclusion that the present indictment is sufficient in law to put the defendants upon their trial.

§ 2307. *No merger in crimes of equal rank.*

The remaining objection to be considered is, that, upon the showing of the indictment, the defendants should have been charged under section 5443, and cannot be charged under section 5440. This objection is not pressed upon the ground of merger. Clearly, it could not be pressed on that ground, for there is no merger in crimes of equal rank, such as misdemeanors. *United States v. McKee*, 4 Dill., 128. But it is supposed that a different ground is taken, by claiming that the facts stated in the indictment show that the conspiracy complained of forms part of an accomplished crime, made punishable by section 5443, and cannot, therefore, be made the subject of a prosecution under section 5440. But, if there be no merger, there is no force in this suggestion. It may well be that one who has been once tried upon a charge of an offense under section 5443 cannot be again tried under section 5440, for a conspiracy that formed an element of the offense already tried. No such question is here raised. Here, the question is, whether it is competent for the government to put the defendants upon trial for having done what by section 5440 is made an offense against the United States, they never having been before called in question for that act. That offense not having been merged in any other offense, there is no possible ground on which to decide that it cannot be prosecuted. The case of *McKee*, above cited, is an authority adverse to such a contention. The motion to quash is, for these reasons, denied.

UNITED STATES *v.* SANCHE.

(Circuit Court for Tennessee: 7 Federal Reporter, 715-720. 1891.)

STATEMENT OF FACTS.—Indictment for conspiracy with other persons to plunder a wrecked steamboat on the Mississippi river. Motion to quash.

Opinion by HAMMOND, J.

This is an indictment under Revised Statutes, section 5440, for a conspiracy to commit the offense denounced by Revised Statutes, section 5358, and the defendants move to quash it on two grounds. The first is that section 5440 does not make it indictable to conspire to commit a trespass against private persons or private property, although such trespass may be a violation of the criminal laws of the United States, but only punishes frauds against the government of the United States, and such offenses as are aimed at it by obstructing its operations or otherwise injuring it in its property or other rights. The section reads as follows: "If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc.

It is argued that the words "or to defraud the United States in any manner or for any purpose," found in this section, indicate what is meant by "any offense against the United States," as used in the preceding member of the same sentence; that this whole section was originally a part of a *revenue* law, and has been held to be still a crime against the *revenue* laws, although dis-

placed by the revision and put under the title "Crimes;" that as originally enacted the phrase "to commit any offense against *the laws* of the United States," has here been significantly changed; and that all the cases cited in the marginal notes to the second edition of the Revised Statutes are cases of the character designated in this objection to the indictment.

§ 2308. *A conspiracy to plunder a wrecked vessel within the maritime jurisdiction of the United States is an offense against the United States under Revised Statutes, section 5440.*

It is to be observed that the act of March 2, 1867, ch. 169, is entitled "An act to amend existing laws relating to internal revenue, *and for other purposes.*" The other purposes seem to be important amendments to the criminal laws of the United States, in no way especially connected with the revenue laws, that I can see, except that they are made by a single section in this act, all the other sections of which do indeed pertain to the revenue. This incongruity is not anomalous in our legislation, where most important subjects are disposed of in appropriation and other bills not at all germane to those subjects. That this section is of that character is plainly shown by another branch of it that makes an offense begun in one district and completed in another, triable in either. Act March 2, 1867, ch. 169, § 30; 14 St., 484; *id.*, 471. These provisions are undoubtedly useful in the administration of the revenue laws, but they are likewise necessary in any other branch of our criminal jurisprudence; and the mere fact that they are found in a revenue law under a title like this, with the legislative habit that I have mentioned, furnishes but slight, if any, indication of an intention to limit their operation, as suggested by the argument we are considering. I think this section 30 of the act of 1867 finds its proper place in the Revised Statutes, where it has been separated and codified at sections 731 and 5440, and that it was intended originally to incorporate into our laws a statute found in England and many of the states, and which has its root in the common law itself. Its object is to make it a crime to conspire to commit a crime, although the conspiracy be not fully consummated. In regard to the change of phraseology, it seems to me unimportant, and that the two phrases are synonymous. The revisers had no power to alter the law, while they might change the mere forms of expression; and unless something were shown that would demonstrate that congress, in enacting the revision, intended to alter the law by amending the phraseology, the proper rule of construction is to treat the language of the revision as synonymous to that of the original act, where the words are so much alike as they are here.

The case of *United States v. Fehrenback*, 2 Woods, 175, is not opposed to this construction. Under the rule prescribed in section 5600 of the Revised Statutes, it relegates section 5440 to its original place in the revenue act of 1867, and applies to a conspiracy to commit an offense against the revenue laws the same term of limitations that section 1046 of the Revised Statutes provides for all "crimes arising under the revenue laws." In other words, the case decides that a conspiracy to defraud the revenue is a crime arising under the revenue laws, in the purview of section 1046. But this does not involve a limitation of the scope of section 5440, either to conspiracies to commit frauds on the revenue, or to conspiracies injuring the United States as a government. A conspiracy to defraud the revenue would probably be held to be "a crime arising under the revenue laws," within the meaning of section 1046, whether found denounced in a revenue law, or elsewhere in the criminal code, more especially if the conspiracy charged were one to commit an act itself made a

crime. It is not the place where found in the statutes that impresses the crime with the characteristic of "arising under the revenue laws," but the fact that it is an offense against the *revenue*, and is so declared to be either expressly, or by necessary implication. I am of opinion, therefore, that we cannot, on the principle of that case, be required to restrict section 5440 to such "offenses" as operate to injure the government itself, but that it covers every conspiracy to commit an act made an "offense" or crime by any law of the United States, as well as an act that may defraud the United States in any manner whatever. The sections collated in the index of the Revised Statutes, under the title "Conspiracy," show that this is only one of many sections enacted—in the language of the learned judge in *United States v. Sacia*, 2 Fed. R., 754 (§§ 195–199, *supra*)—"to meet the party to the fraud on the very threshold of the perpetration of his crime, and to render him liable to its penalties before the consummation of the fraud." This was said of this statute in its application to a fraud against the government, but is equally applicable to all cases; and other sections, where special legislation seemed necessary, make it manifest that congress protects the rights and interests of the citizen as sedulously as it does those of the government, by punishing conspiracies to commit crimes within the jurisdiction of the United States.

§ 2309. *That a person "furnished and loaned" a skiff to others to use for an unlawful purpose is a sufficient averment of co-operation to support an indictment for conspiracy.*

Another objection urged to this indictment is that it does not allege any act of any one of the alleged conspirators to effect the object of the conspiracy. As I understand the objection, it is that the pleading should have alleged that the skiff was actually delivered to the parties mentioned for the purpose charged. It is said that only a verbal act is averred by the word "loaned," which is not sufficient to meet the statute. In *United States v. Donan*, 11 Blatch., 168, it is said that "The act which the statute calls for is not designated as an overt act, and was not intended to be made an element proper of the offense. The offense is the conspiracy. Some act by some of the conspirators is required to show not the unlawful agreement, but that the unlawful agreement, while subsisting, became operative. . . . If, then, an indictment correctly charges an unlawful combination and agreement as actually made, and, in addition, describes any act by any one of the parties to the unlawful agreement as an act intended to be relied on to show the agreement in operation, it is sufficient, although upon the face of the indictment it does not appear in what manner the act described would tend to effect the object of the conspiracy. It is sufficient if the act be so described as to apprise the defendant what act is intended to be given in evidence as tending to show that the unlawful agreement was put in operation, without its being made to appear to the court, upon the face of the indictment, that the act mentioned is necessarily calculated to effect the object of the unlawful combination charged."

In *United States v. Boyden*, 1 Low., 266, 263 (§§ 2294–98, *supra*), it is said: "The acts set out are no part of the offense, and may in themselves be innocent. The purpose of the law is that a mere agreement, however corrupt, shall not be punished as a crime, unless it has led to some overt act; and any form of language which shows that such an act has been done to carry out the agreement is sufficient."

The learned counsel for the defendants read this indictment as if it averred that the defendant named *agreed* to furnish and lend to the other parties this

skiff for the unlawful purpose named. And if this were a correct rendering of the language, it would not comply with this statute as interpreted by these authorities; but the language is "furnished and loaned," which necessarily implies, I think, the act of putting the skiff within their control, and answers the statute. Whether the act was one tending to effect the object of the conspiracy is a question for the jury on the proof, but certainly the pleading is sufficient. Overrule the motion.

§ 2310. *Conspiracy*.—An indictment for a conspiracy must allege time and place. *United States v. Soper*,* 4 Cr. C. C., 623.

§ 2311. An indictment for conspiracy, under section 80 of the act of March 2, 1867, is sufficient if it correctly charges an unlawful combination and agreement as actually made, and, in addition, describes any act by any one of the parties to the unlawful agreement as an act intended to be relied on to show the agreement in operation, although, upon the face of the indictment, it does not appear in what manner the act described would tend to effect the object of the conspiracy. *United States v. Donan*,* 11 Blatch., 168.

§ 2312. Section 5520, Revised Statutes, makes it an offense to conspire to prevent by force, etc., any citizen, etc., from giving his support or advocacy, in a legal manner, toward or in favor of the election of any legally qualified person as an elector for president or vice-president. An indictment for this offense which alleges, not that the support or advocacy to be prevented was of the election of the persons named as electors, but of the persons themselves, is bad. *United States v. Butler*,* 1 Hughes, 457.

§ 2313. It is not sufficient to allege generally a conspiracy to defraud; but the nature of the fraud, and the manner in which and the means by which it was to be effected, must be averred. *United States v. Crafton*,* 4 Dill., 145.

4. Counterfeiting and Forgery.

[See III, *supra*.]

SUMMARY—*Must set out exact copy*, § 2314.—*Must state number of bills forged*, § 2315.—*Variance as to number of bill*, § 2316; *as to kind of currency*, § 2317; *as to denomination of bill*, § 2318.—*Particularity of description; immaterial variances*, § 2319.—*One good count sufficient*, § 2320.—*Having counterfeit bank-notes in possession*, § 2321.—*Instrument set out in hæc verba; purport clause not necessary*, § 2322.—*Averment of existence of bank not necessary*, § 2323.—*Obligation or security of the United States*, § 2324.—*Description of counterfeit paper currency*, § 2325.—*Setting forth offense in language of statute; knowingly*, § 2326.—*Averment of intent to defraud, necessary*, § 2327.—*Making, etc., false affidavits, etc., with intent to defraud the government*, § 2328.—*Notes of national banks without seal of treasury*, § 2329.—*Stating that note purported to have a seal*, § 2330.

§ 2314. An indictment for forgery must not only set out, but must profess on its face to set out, an exact copy of the thing forged; and an indictment setting out the forged instrument, "in substance as follows," is insufficient. *United States v. Fidler*, §§ 2331-33. See § 2358.

§ 2315. An indictment for having forged notes or bills in possession is bad unless it states a definite number. The word "divers" is insufficient, though it seems the number laid need not be strictly proved. *Ibid*.

§ 2316. On an indictment for uttering a counterfeit bill a variance in respect to the number of the bill is fatal. *United States v. Mason*, §§ 2334-36. See § 2360.

§ 2317. Where an indictment charges the uttering of a national currency circulating note, and the note set up is a United States note, the count is bad. *Ibid*.

§ 2318. Where an indictment charges the uttering of a bill purporting to be of the denomination of \$20, and describes a fifty-dollar bill, the count is bad. *Ibid*.

§ 2319. Under an indictment for uttering a counterfeit bill, the description of the bill, though needlessly particular, must conform to the instrument given in evidence. Variances, however, which do not make a word different in sense and grammar, and which in substance have sound and sense the same, will be held merely literal and not fatal. *Ibid*.

§ 2320. If any one count of an indictment for uttering a counterfeit note is sustained by the note offered in evidence, a conviction on the indictment can be sustained, no matter whether the other counts are good or bad. *Ibid*.

§ 2321. An indictment under the tenth section of the act of June 30, 1864, for having counterfeit national bank-notes in possession, with intent to use them as genuine, need not charge that they purported to be the bills of a certain bank. *United States v. Williams*, §§ 2337-39.

§ 2322. Where an indictment sets out, *in hæc verba*, a forged instrument, it is not necessary that a "purport clause" be added. *Ibid.* See § 2362.

§ 2323. In an indictment for having in possession forged and counterfeit national bank-notes, it is not necessary to aver the politic and corporate existence of the bank, for the federal courts take judicial notice of the existence of such banks. *Ibid.*

§ 2324. In an indictment under the tenth section of the act of June 30, 1864, which punishes the keeping in possession of any forged and counterfeit "obligation or other security" of the United States, it is not necessary, where the instrument alleged to be forged is fully set out, to aver that it is an "obligation or security of the United States." *United States v. Trout*, §§ 2340-43.

§ 2325. In describing counterfeit paper currency in an indictment, it is not necessary to allege that it is made in resemblance of the genuine. *Ibid.*

§ 2326. Under section 5431, Revised Statutes, by which it is enacted that "every person who, with intent to defraud, passes, utters, publishes or sells any falsely made, forged, counterfeited or altered obligation or other security of the United States, shall be punished," etc., an indictment which sets forth the offense in the language of the statute, without further alleging that the defendant knew the instruments to be false, forged, counterfeited and altered, is insufficient after verdict. *United States v. Carll*, § 2344.

§ 2327. Where the intent or purpose is made a part of the offense, as by the act of April 5, 1866, an intent to defraud the United States is made a part of the offense of making false affidavits in certain cases, the indictment must allege the intent to defraud, but need not allege the means, circumstances or methods by which the fraud was to be effected. *United States v. Wentworth*, §§ 2345-49. See § 2363.

§ 2328. The act of April 5, 1866, reciting "that if any person or persons shall falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered or counterfeited, or wilfully aid or assist in the false making, altering, forgery, or counterfeiting, any bond, bid, proposal, guaranty, security, official bond, public record, affidavit or other writing, for the purpose of defrauding the United States," such person or persons shall be punished, etc., is aimed at forgery and not perjury. In case of making false affidavits, it is not necessary, under this statute, to allege or prove that the justice of the peace before whom they were sworn was qualified to take affidavits. The crime defined by this statute being forgery, it is necessary that the indictment set forth, and profess to set forth, the affidavits literally. A failure to do so is fatal to the indictment. *Ibid.*

§ 2329. Circulating notes of a national banking association may be valid contracts, and therefore the subject of forgery, without the seal of the treasury. *United States v. Bennett*, §§ 2349-55.

§ 2330. Where, in an indictment for forgery, it is unnecessary, in setting forth the counterfeit notes, to set forth the seal, stating that the note purported to have a seal cannot affect the validity of the indictment. *Ibid.*

[NOTES.— See §§ 2356-2372.]

UNITED STATES v. FISLER.

(District Court for Indiana: 4 Bissell, 59-61. 1865.)

Opinion by McDONALD, J.

STATEMENT OF FACTS.— This is an indictment for the felonious possession of forged United States treasury notes and forged United States postal currency, with intent to pass them. The prisoner was tried by a jury at the present term, and a verdict of guilty was returned against him. He now moves in arrest of judgment, on the ground that the indictment is materially defective.

There are two counts in the indictment. The first count charges the felonious possession of forged postal currency; the second avers the felonious possession of forged treasury notes. In other respects the counts are alike. In the first count it is charged that, on the 15th of November, 1864, in this district, the prisoner "unlawfully and feloniously did have and keep in his possession, and conceal, with intent to pass, utter and publish as true, divers false, forged and

counterfeit fractional notes commonly called postal currency, in imitation of the postal currency which, before the day and year aforesaid, had, by the secretary of the treasury of the United States, been furnished to the assistant treasurers and other depositories of the United States by him selected, called and known as fifty-cent stamps of the postal currency of the United States — which said false, forged and counterfeited fractional notes, commonly called postal currency, each of them are in substance described as follows:” Here is pasted on the indictment one of the supposed forged fractional notes. The second count, in the same language as the first, charges the felonious possession of “divers false, forged and counterfeit treasury notes, and each of them is in substance described as follows, that is to say:” Here is pasted on the indictment one of the supposed forged treasury notes.

§ 2231. *Indictments for the forgery of fractional and treasury notes must profess to set out exact copies of the notes forged.*

It is objected that both these counts are bad, because they profess to give the substance of the notes only. And it is insisted that, in charging forgery, the indictment must not only set out, but must profess on its face to set out, an exact copy of the thing forged, or must state some valid reason for not doing so. This objection is fatal to the indictment. There is nothing better settled than that the rule in such cases requires exact copies of forged instruments to be given, and to purport on the face of the indictment to be given. The indictment in such cases generally employs such language as this: “to the tenor and effect following;” or, “in the words and figures following;” and it will never do to say “in substance as follows.” *State v. Atkins*, 5 Blackf., 458; Whart. Cr. L., §§ 306, 308, 1468.

§ 2232. — *the number of such forged notes should also be set out in the indictment, at least approximately. Certainty required in indictments.*

It is also urged as a ground for arresting the judgment that both the counts are defective for not stating the number of the forged notes mentioned. Indictments ought to be characterized by a reasonable certainty of allegation. They should at least be as certain as a declaration at common law should be. It is a rule in civil pleading at common law, that, when the action concerns different things, they must be described by quality, quantity and number. Stephen, Pl., 296. Unquestionably a declaration in trespass for taking or destroying divers chattels — for example, divers horses or cows — would be bad as not stating the *number* of them. Surely the reason is equally strong for requiring that the number of these forged instruments be stated. Yet the indictment does not attempt to give the number. It only says “*divers* false, forged and counterfeit fractional notes” — “*divers* false, forged and counterfeit treasury notes.” It is not pretended that in either civil or criminal pleading the evidence must strictly conform to the allegation of number. In most cases we may aver one number and prove another without a fatal variance. But some number must, in such cases, be stated.

§ 2233. *Whether pasting the original forged instrument on the indictment as a substitute for a copy is sufficient.*

To say the least, it is doubtful whether to paste the original forged instrument on the indictment as a substitute for a copy, as was done in this case, does not render the indictment defective. It is a slovenly, unlawyerlike practice, not to be encouraged by courts. It is held good in England only by virtue of the act of 7 Geo. 4, not in force here. *Rex v. Harris*, 7 Carr. & P., 429. But, at any rate, the attaching of the forged instrument does not aid the state-

ment that it is "in substance as follows." The judgment must be arrested. The prisoner must be held in custody or on bail to answer to a better indictment.

UNITED STATES v. MASON.

(Circuit Court for New York: 12 Blatchford, 497-501. 1875.)

§ 2334. *A variance in respect to the bill number which is placed upon all bills is fatal to an indictment for counterfeiting.*

Opinion by BENEDICT, J.

The indictment in this case displays such extreme carelessness on the part of the draughtsman that any attempt to try it would be expected to raise questions of variance. As found, the indictment contains eight counts, some charging the uttering, others the possession with intent to utter, counterfeit bills particularly described in each count. Several of the counts were necessarily abandoned because the bills therein described, although set out with extreme detail, were incorrectly described in respect to the bill number,—a variance in respect to the bill number, which is placed upon all bills for the purpose of identifying the bill, being held to be fatal. In consequence of this ruling, no evidence could be produced in support of the first, fifth and sixth counts. The fifth and sixth counts contained the additional defect of charging the uttering of a national currency circulating note where the bill set out at length in the count was a United States note. The fourth count also fails, inasmuch as it charges the uttering of a bill purporting to be of the denomination of \$20, while at the same time it describes a fifty-dollar bill. The charges are, therefore, reduced to those contained in the second, third, seventh and eighth counts, and, in regard to each of these, the bill offered to support it presents a question of variance. The objections taken to these bills were overruled at the trial, with leave to argue the question more deliberately, upon a motion for a new trial, in case of conviction. The jury having found the accused guilty of the offenses set forth in the second, third, seventh and eighth counts, a motion for a new trial has accordingly been made, upon the ground that the bills admitted in evidence do not conform to the descriptions given in the indictment.

§ 2335. *Under an indictment the description set forth, though needlessly particular, must conform to the instrument given in evidence. Merely literal variances are not fatal.*

In each of the counts under consideration the accused is charged in respect to a particular bill which the count states to be "as follows," and then adds, with absurd particularity, what is intended for a copy of every word and figure both on the face and on the back of the bill. The words "which is as follows," in these counts, are equivalent to the words "words and figures following," and must be held to mean that the tenor of the bill is given. Under such an indictment, the rule is that the description set forth, although needlessly particular, must conform to the instrument given in evidence. By this, however, is not meant that a mere literal variance will be fatal. Variances which may be fairly considered to be merely literal, which do not make a word different in sense and grammar, which leave the sound and sense, in substance, the same, are not considered material variances within the rule. *United States v. Hinman*, 1 Bald., 293. The rule, of late, has been much relaxed. *May v. Ohio*, 14 Ohio, 466.

§ 2336. *Variances which were held immaterial.*

As respects the bill offered in support of the second count, it appears that the

abbreviations of certain Latin words which form an inscription upon the seal of the treasury, as stamped on all genuine bills, are incorrectly given in the indictment. In the indictment, letters appear upon what is intended to be a copy of the seal, but those letters do not form the abbreviations found in the bill offered, nor do they form any word, Latin or English. Another variance appears on the back of the bill. In the indictment, the phrase is, "except on duties." In the bill, it reads "except duties." In another place, the words of the indictment are "counterfeited bill," while the bill reads "counterfeit bill."

In the third count, similar discrepancies in respect to the inscription on the seal appear, while the words "hard labor," found on the back of the bill, do not appear in the indictment; also, the words "its full value" read, in the indictment, "is full value." In the fourth count, errors in respect to the inscription on the seal also appear, and, in addition, the word "counterfeited," found in the indictment, does not appear upon the bill offered in evidence. In the seventh and eighth counts, the inscription on the seal is not correctly set forth, and the word "other" is omitted in setting forth the indorsements on the bill.

If these various discrepancies were all to be found in each count, it would be impossible to disregard them. But they are distributed among several counts, and, inasmuch as each count contains a separate charge in respect to a different bill, it becomes necessary to consider each count by itself. If any one count be supported by the bill offered in evidence under it, the conviction upon that count can be sustained, whatever might be the result as to the other counts. I consider, then, the second count. Here the variances are in the inscription on the seal; the omission of the word "to;" the insertion of the word "on;" and the addition of the letters "ed" to the word "counterfeit." As respects the defect in setting forth the abbreviations which form the inscription on the seal, I think they may be disregarded, as being a mere variation in letters. The inscription on the bill contains no complete word, and the letters set forth in the indictment, as the inscription, do not form any word, either Latin or English. It is impossible, therefore, to say that any word has been omitted or incorrectly given. The variation is in respect to letters. The next defect is the omission of the word "to" from the phrase "pay to the bearer." But this defect is not such as changes the sense in any way. The contract stated remains the same. Such a variance is not deemed material. In *Quigley v. People*, 2 Scam., 301, the word "or" was omitted from the phrase "B. Aymer or bearer." The variance was held unimportant. See, also, *May v. Ohio*, 14 Ohio, 466. The next defect consists in inserting the word "on" before the word "duties," in the sentence "all other dues to the United States, except duties." Here, too, the insertion makes no change in the sense, and, if the word "or" could be omitted from the phrase "B. Aymer or bearer," the variance in question is, certainly, unimportant. The remaining defect is in the addition of the termination "ed" to the word "counterfeit." This is merely literal. No word different in sense and grammar is made. In *Comm. v. Parmenter*, 5 Pick., 279, upon a question of variance, it is said: "'I promised' would be construed to mean 'I promise.'" See, also, *Butler v. State*, 22 Ala., 48. In respect to all these differences, I also remark, that no request was made to have them submitted to the jury — a course suggested by the court in *United States v. Hinman*, 1 Bald., 293. My conclusion, therefore, is, that in admitting the bill offered to support the second count I went no further than other courts have gone, and as to this count I hold that the conviction must stand.

As to the other counts, I do not feel called on to express an opinion, inas-

much as the requirements of justice will be satisfied if judgment be entered upon the second count alone. Sentence will accordingly be pronounced upon the second count alone.

UNITED STATES v. WILLIAMS.

(District Court for Indiana: 4 Bissell, 302-306. 1869.)

Opinion by McDONALD, J.

STATEMENT OF FACTS.—At the present term of the court, the prisoner was found guilty on an indictment for the felonious possession of a counterfeit national bank-note. And he now moves in arrest of judgment on the ground of certain supposed defects in the indictment.

The indictment charges that, on the 30th of October, 1868, in the district of Indiana, the prisoner “unlawfully, feloniously and knowingly did then and there have and keep in his possession, and conceal, with intent then and there to pass, utter and publish as true to some person or persons to the grand jurors aforesaid unknown, one certain false, forged and counterfeit national bank-note, which said false, forged and counterfeit bank note is as follows, to wit:

| | | |
|----|----------------------------|----------|
| 0. | National Currency. | A. 20. |
| | This note | \$9,838. |
| | is secured by bonds of the | |
| | United States, | |

deposited with the U. S. Treasurer at Washington.

L. E. Chittenden, Register of the Treasury.

F. E. Spinner, Treasurer of the United States.
Philadelphia, Pa., March 7th, 1864.

The National Bank of Philadelphia will pay twenty dollars to Bearer on demand.

Samuel S. MacMattox, Cash'r.

Wm. P. Hamm, Presid't.

with intent then and there thereby to defraud some person or persons to the grand jurors aforesaid unknown, he, the said Charles Williams, then and there well knowing the said national bank-note to be false, forged and counterfeit, contrary to the form of the statute,” etc.

The indictment contains a second count; but it is in all respects substantially the same as the one above copied.

§ 2337. *There is nothing in the tenth and thirteenth sections of the act of June 30, 1864, requiring the insertion of a purport clause in the indictment.*

1. It is objected to this indictment that it does not contain what is called “the purport clause.” It is common in charging felonies relating to forged bank-notes, to allege that the forged instrument purported to be a note on a designated bank. And in indictments on statutes which employ this language, such an allegation may be necessary. But where no such language is found in the act on which the indictment is framed, it is, to say the least, more doubtful whether the allegation is necessary. The indictment in question is founded on the tenth and thirteenth sections of the act of congress of June 30, 1864. 13 U. S. Stats. at Large, 221, 222. The tenth section of this act, so far as it relates to the case at bar, simply provides that every person, who “shall have or keep in possession, or conceal, with intent to utter, publish or sell, any false, forged, counterfeited or altered obligation or other security of the United States,” shall be punished, etc. And the thirteenth section enacts that “the words ‘obligation or other security of the United States,’ used in this act, shall be held to include and mean all bonds, coupons, national currency,” etc. In these sections there is not a word about forgeries *purporting* to be national

currency or anything else. So far, therefore, as the language of the act on which the indictment is founded is concerned, there is clearly nothing in it requiring the insertion of the "purport clause" in the indictment.

§ 2338. *In indictments for forgery, an averment that the forged note purported to be the note of any designated national bank need not be inserted.*

Let us, then, inquire whether any principle in criminal pleading requires the insertion of the clause in question in describing a forged instrument in an indictment. It is a general rule that all the facts necessary to constitute the crime should be plainly stated, and that nothing else is requisite to a good indictment. In all indictments relating to forgery, the general rule is that the pleading must copy the forged instrument. The copy, therefore, being in the indictment, and being part and parcel of it, speaks for itself. Of course, it *purports* to be what its language expresses. Thus in the present case, the copy set out in the indictment plainly purports to be a copy of a bank-note executed by the National Bank of Philadelphia. On the face of the indictment, this is unquestionably the purport of the forged instrument. And the copy indicates its purport more certainly and satisfactorily than any mere allegation of its purport could possibly do. Of what use, then, could be an averment in the indictment that the forged instrument purported to be a national bank-note? Certainly none at all. I conclude, therefore, upon principle and reason, that in no case of an indictment describing a forgery and setting out the forged instrument *in hæc verba*, is it necessary to superadd the "purport clause." In the forms given by Archbold of indictments for forgery and uttering Bank of England notes, the "purport clause" is omitted. Archb. Cr. Pl. and Ev., 534 *et seq.* And that the clause is unnecessary seems to be the opinion of a learned American writer on criminal law. 2 Bish. Cr. Pro., § 431. On the whole, I am satisfied that the omission of the "purport clause" in this indictment does not vitiate it.

§ 2339. *Federal courts take judicial notice of the existence of national banks; hence an averment that they are bodies politic and corporate need not be inserted in the indictment.*

2. It is contended that the indictment in question is bad, because it does not aver that the National Bank of Philadelphia is a body politic and corporate. It is certain that the act of June, 1864, providing for the incorporation of national banks, is a public act of which all courts must take judicial notice. But it is not so certain that courts must take judicial notice of the organization and incorporation of every national bank existing under that law. If in fact there never existed any corporation known as the National Bank of Philadelphia, it is clear that the prisoner ought not to be punished under the indictment. For, in that case, he could not be guilty of the felonious possession of a forged national-bank note, but only of the possession of a spurious note, against which there is no law. It should seem to follow that, unless this court can take judicial notice that what is called the National Bank of Philadelphia is a corporation under the act authorizing the incorporation of national banks, the indictment is bad for not averring that the National Bank of Philadelphia is a corporation under that act.

In the case of a public act incorporating a single designated body politic, there can be no doubt that courts must judicially take notice of the existence of the artificial person thereby created. But the case of the national bank act is somewhat different. It did not of itself create any corporation. It merely provided, under certain conditions, that an indefinite number of voluntary

associations might become incorporations under that act. In the case of an act establishing a single corporation, however, its mere passage does not usually *ipso facto* create the corporation. To effect that there must generally be afterwards an organization under the act; and the thing does not become a body politic till such organization is complete. Now, if the act of congress had only provided for the incorporation of one bank, no one would doubt that, when such bank was fully organized, its corporate existence should judicially be noticed by all courts. Can the fact that the act provided for the organization and incorporation of an indefinite number of banks make any difference. I am inclined to think that it cannot. And I am the more strongly impelled to this conclusion by the consideration that the act puts all these national banks under governmental control and supervision; that their articles of association must be deposited among the national archives; that their capital, consisting of registered bonds, must be deposited with the treasurer of the United States; that, before the bank enters upon the transaction of business, a certificate of the comptroller of the currency, to the effect that the bank has fully complied with the provisions of the act so as to become a corporation, shall be published in the newspapers; that every such bank shall make quarterly reports to the government; and that these banks may be made fiscal agents of the United States. In fine, the various and numerous provisions of the act providing for the incorporation of national banks indicate that they are to be regarded as public institutions, of the existence of which all the departments of government must officially take notice.

Therefore, as it is a rule that neither in civil nor criminal pleading is it necessary to allege any fact of which the court will judicially take notice, I conclude that no averment in this indictment of the existence of the National Bank of Philadelphia as a corporation was necessary. The motion in arrest is overruled.

UNITED STATES v. TROUT.

(District Court for Indiana: 4 Bissell, 105-107. 1867.)

Opinion by McDONALD, J.

STATEMENT OF FACTS.—At the present term, the defendant Trout was indicted for having in his possession three counterfeit United States treasury notes, of the denomination of \$50, with intent to pass them. On a plea of not guilty, the jury found him guilty as charged in the indictment. His counsel now move in arrest of judgment on this verdict.

There are three counts in the indictment on three several counterfeit treasury notes. *First*, it is contended that the judgment ought to be arrested, because the conclusion of each of the counts is bad. The first and second counts conclude "contrary to the form of the acts of congress in such case made and provided." The conclusion of the third is the same, except that *act*, instead of "acts," is employed.

§ 2340. *Where an offense is prohibited by several independent statutes, the indictment may conclude in the singular.*

It is urged that there is but one act of congress on the subject of this indictment; and that therefore the conclusion, "contrary to the *acts*," in the first and second counts, is bad. "The rule given in the old writers is, that where an offense is prohibited by several independent statutes, it was necessary to conclude in the plural; but now the better opinion seems to be that a conclusion in the singular will suffice." Whart. Am. Cr. L., § 412. The old doctrine

has been followed in Indiana. *State v. Moses*, 7 Blackf., 244; *State v. Hunter*, 8 id., 212; *Francisco v. State*, 1 Ind., 179. But I think the weight of authority is against these Indiana decisions. And if even I am wrong in this view, it would not follow that an indictment on a single statute concluding in the plural is bad. Indeed, the supreme court of Indiana has held that an indictment on a single statute concluding in the plural is good. *Carter v. State*, 2 Ind., 617.

§ 2341. *Where there is one good count in an indictment, and a verdict of guilty is rendered on all the counts, the fact that one count has a wrong conclusion will not arrest the judgment.*

But be all this as it may, it is certain that if there be one good count in this indictment the judgment cannot be arrested. Here the first and second counts conclude in the plural, and the third in the singular; and there is a general verdict of guilty on all. Under these circumstances, it is impossible to arrest the judgment on the ground that the counts conclude wrong; for one of them at least must conclude right.

§ 2342. *In an indictment for forging treasury notes it is not necessary to allege the name of such instruments.*

Secondly, in support of the motion in arrest, it is urged that, as the indictment is framed on the tenth section of the act of June 30, 1864, which provides for the punishment of persons who "shall have or keep in possession or conceal any false, forged, counterfeited or altered obligation or other security" of the United States, with intent to pass the same, the indictment ought to have alleged in terms that the forged notes in question are such "obligations or securities." The thirteenth section of the act declares that "the words 'obligation or other security of the United States,' used in this act, shall be held to include and mean all bonds, coupons, national currency, United States notes, treasury notes," etc. 13 U. S. Stats. at Large, 222. The tenth section of this act, therefore, undoubtedly reaches the forged notes in question. These, as copied in the indictment, on their face purport to be United States treasury notes,— "securities of the United States." There is, therefore, no use in alleging in the indictment the name of these instruments. No name need be given them. Yet in fact the indictment does describe them as "false, forged and counterfeit treasury notes;" and it copies them. This surely is enough, without adding, in the language of the tenth section of the act, that they were "obligations or other securities of the United States."

§ 2343. *An indictment for forging paper money need not allege that the forged instrument was made in resemblance of the genuine.*

Thirdly, it is insisted in support of this motion that the indictment ought to have averred that these counterfeit treasury notes were made in the resemblance of the genuine ones. In describing counterfeit coin it is usual to aver that it is made in the likeness and resemblance of the genuine. And, in that case, such an averment may be necessary; though there are some English precedents to the contrary. Archb. Cr. Pr. and Pl., 571. But in charging a forgery of paper money, I have found no precedent containing the averment in question. On the contrary, there are many precedents not containing it. Archb. Cr. Pr. and Pl., 289; Whart. Prec., 313. This view of the question has been sustained by the supreme court of Illinois. *Swain v. People*, 4 Scam., 178. The motion in arrest is overruled.

UNITED STATES *v.* CARLL.

(15 Otto, 611-613. 1881.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—Indictment charging that defendant, “with intent to defraud, did pass, utter and publish a falsely made, forged, counterfeited and altered obligation of the United States.” After conviction there was a motion in arrest of judgment, and the judges were divided in opinion on the question whether it was necessary to allege in the indictment that the defendant knew that the paper was counterfeit, etc.

§ 2344. *An indictment for passing a forged or counterfeit note, without alleging that the defendant knew it to be such, is bad after verdict.*

Opinion by MR. JUSTICE GRAY.

In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. *United States v. Cruikshank*, 92 U. S., 542 (CONSTR., §§ 893-911); *United States v. Simmons*, 96 id., 360 (§§ 2410-14, *infra*); *Commonwealth v. Clifford*, 8 Cush. (Mass.), 215; *Commonwealth v. Bean*, 11 id., 414; *Commonwealth v. Bean*, 14 Gray (Mass.), 52; *Commonwealth v. Filburn*, 119 Mass., 297.

The language of the statute on which this indictment is founded includes the case of every person who, with intent to defraud, utters any forged obligation of the United States. But the offense at which it is aimed is similar to the common law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object. This indictment, by omitting the allegation contained in the indictment in *United States v. Howell*, 11 Wall., 432 (§ 258, *supra*), and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a “defect or imperfection in matter of form only,” within the meaning of section 1025 of the Revised Statutes. By the settled rules of criminal pleading, and the authorities above cited, therefore, the question of the sufficiency of the indictment must be answered in the negative.

UNITED STATES *v.* WENTWORTH.

(Circuit Court for New Hampshire: 11 Federal Reporter, 52-56. 1882.)

Opinion by CLARK, D. J.

STATEMENT OF FACTS.—Two indictments were found against these respondents at the May term of this court, 1870, for violation of the act of congress of April 5, 1866, entitled “An act more effectually to provide for the punishment of certain crimes against the United States.” 14 St. at Large, 12.

1. The first indictment contained two counts, and each count described a separate offense. The first count alleged the false making of the false affidavit of James A. Roberts on the 11th day of February, 1868; and the second count alleged the false making of the false affidavit of Hannah Smith on the 25th day of November, 1868. The second indictment contained but one count, and that count alleged the false making of the affidavit of Hannah Smith on the 11th day of February, 1868. The district attorney proposed to proceed with the trial of the respondents upon the first indictment. Thereupon the counsel for the respondents objected that the indictment contained two counts, each count charging a distinct and substantive felony, and that the two could not be joined in the same indictment, and moved the court to quash the indictment. This motion the court denied. The counsel then moved the court to compel the attorney to elect upon which count he would proceed to trial, and this motion the court denied. Thereupon the counsel for the respondents requested the court to order that the two indictments be consolidated and tried at the same time, and the court did so, and the trial proceeded.

§ 2345. *Joinder of several offenses in different counts in the same indictment.*

The counsel now objects that the court erred in refusing to quash the first indictment, and in refusing to direct the attorney to elect upon which count he would proceed to trial, and moves in arrest of judgment. Did the court err? The acts charged are respectively felonies by the statute, each in itself. 1 Chit., 253, cited by the respondents' counsel, says: "No more than one distinct offense or criminal transaction at one time should regularly be charged upon the prisoner in one indictment." And so Archb., in Pl. & Ev., 55, says: "A defendant ought not to be charged with different felonies in the same indictment." But what if they are? The court may, in its discretion, quash the indictment, or compel the prosecutor to elect on which charge he will proceed (1 Chit. Cr. L., 253; Archb. Pl. & Ev., 55; Roscoe, Cr. Ev., 231); but it is no ground for demurrer or in arrest of judgment. Roscoe, Ev., 231, and cases cited; 1 Chit., 253; 1 Whart., 415. "For, in point of law," says Chitty, and Roscoe agrees with him, "there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment against the same offender." *Ubi supra*. The statute of February 26, 1853 (10 St., 162), expressly provides for cases of this kind. It is this:

"Whenever there are or shall be *several charges* against the same person or persons for the *same act or transaction*, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may properly be joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and if two or more indictments shall be found in such cases they may be consolidated."

In this case the two counts of the indictment charged respectively an offense of the same class or kind, and these crimes grew out of the same transaction and were properly joined. The joinder in no way, that the court can see, embarrassed the respondents in the trial, and the denial of the motions of the respondents' counsel was a proper exercise of the discretion of the court, and is no ground for a new trial.

§ 2346. *When the intent with which an offense is committed must be alleged and proved.*

2. Both these indictments charged an intention to defraud the United States, without stating the means, circumstances or methods by which the fraud was

to be effected, and this the respondents' counsel contend is insufficient. Where the intent or purpose is made a part of the offense, as in this case, the intent should be alleged in the indictment, and must be proved. 1 Chit. Cr. L., 233; 1 Whart., 302, § 297; Archb. Pl. & Ev., 46; State v. Card, 34 N. H., 510. But the means of effecting the criminal intent, or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to the jury to demonstrate the intent, and not necessary to be incorporated in the indictment. 1 Whart., 294. The particular manner in which a thing is to be done need not generally be alleged. In an indictment for an assault with intent to kill, it is not necessary to state the instrument or means used to effectuate the murderous intent. 1 Whart., 292. The point made in this case was expressly decided in *Powell's Case*, 2 East, P. C., 989; to be found, also, in 2 Russ., 384.

§ 2347. *Evidence admissible to prove intent.*

3. The application of Hannah Smith for a pension was properly admitted in evidence as showing the use to which the false affidavits were to be applied by the respondents, and their purpose to obtain for her a pension improperly, and thus defraud the government. It was necessary to prove this purpose or intent. Archb., 98; 1 Whart., 631.

§ 2348. *What is necessary to constitute the offense declared by Revised Statutes, section 5418.*

4. The district attorney offered in evidence, in succession, the three affidavits mentioned in the indictments, to the introduction of each of which the respondents objected on the ground of immateriality, and because it was not alleged or attempted to be proved that the justice of the peace before whom they were sworn to was qualified to take affidavits or administer oaths. To decide this point intelligently and correctly it is necessary to examine the statute on which these indictments are founded, and to ascertain its scope, meaning and intent. If "the false making" there mentioned be false swearing, and the offense be in the nature of perjury, then very clearly it should have been averred in the indictment that they were sworn to before a person competent to administer an oath, naming such person or court; but if the false making be forgery then it was not necessary to allege anything about the oath. The crime might have been completed without taking any oath at all. The signatures of the party and magistrate, and the jurat, might all have been forged and the offense completed,—the false making accomplished.

What, then, is this statute? What is the offense described in it? Is it perjury or forgery, or both? It is in these words: "That if any person or persons shall falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered or counterfeited, or willingly aid or assist in the false making, altering, forgery or counterfeiting, any bond, bid, proposal, guaranty, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States," etc.

The indictments in this case seemed to have been framed upon the idea that the *false making* mentioned in the statute was in the nature of perjury, because, after reciting the affidavits, they go on to allege in what particulars they are false. But we are satisfied that it is not the true construction of the statute. A little analysis and attention to its language makes this quite apparent. It says, "if any person shall falsely make, alter, forge or counterfeit." Now the arrangement and connection of these words, putting the "false making" with other apt words to describe forgery, to wit, altering, forging, counterfeiting, in-

dicating its true intent and meaning—that it is aimed at forgery and not at perjury. Again, “if any person shall falsely make, alter, forge or counterfeit any bond,” bid, etc. Now, what is the false making of a bond or bid? Certainly not taking a false oath, because the execution of a bond or bid requires no oath. To falsely make an affidavit is one thing; to make a false affidavit is another. A person may falsely make an affidavit, every sentence of which may be true in fact. Or he may actually make an affidavit, every sentence of which shall be false. It is the “*false making*” which the statute makes an offense, and this is forgery as described in all the elementary books. Hawkins says (chapter 70, § 1): “Forgery, by the common law, seemeth to be an offense in *falsely and fraudulently making or altering any matter of record*,” etc. Chitty follows Hawkins (vol. 3, p. 1022): “Forgery may be defined to be the ‘false making.’” Blackstone defines it to be the *fraudulent making*. Vol. 4, p. 245. Russell (vol. 2, p. 318) says not only the fabrication and false making constitute the crime, but the alteration, etc. Wharton quotes Blackstone and East, and calls it the *false making*. 2 Whart., § 1418. Roscoe, the same. Cr. Ev., 487.

The allegation and proof required by the respondents’ counsel was not necessary, for it is quite evident an affidavit might be falsely made when no oath whatever might have been taken. But it is also contended, by the respondents’ counsel, that these indictments are bad because they profess to set out the affidavits only in their substance, and not in words and figures, or other apt words to indicate that they are literally copied. The words of the indictment are: “Which said false and fraudulent affidavit and writing was then and there of the *substance* following,—that is to say;” and the court think that is not sufficient. The offense described in the statute on which these indictments are founded is forgery, and it has always been held necessary in such cases to set out literally the paper alleged to be forged. The statute (2 & 3 Wm., p. 4, ch. 123) would seem to have obviated that necessity in England, but it has no effect here. The authorities are very numerous and uniform. Archb. Cr. Pl. & Ev., 42, and cases there cited; 2 Whart., 1468; 1 Whart., 306; 2 Russ., 374; 1 Chit., 230; State v. Bryant, 17 N. H., 323; Commonwealth v. Houghton, 8 Mass., 107; State v. Parker, 1 Chit., 293; People v. Kingsley, 2 Cow., 522; United States v. Britton, 2 Mason, 464.

There are some cases where the instrument need not be set out, as when the prisoner has it in his possession or has destroyed it. Commonwealth v. Houghton, 8 Mass., 107; United States v. Britton, 2 Mason, 464. Wharton says (vol. 1, § 307): “Where the indictment fails to *claim* to set out a copy of the instrument in *words and figures* it will be invalid.” And, again (vol. 2, § 1468): “The indictment should not only set forth the tenor of the bill or note forged, but it should *profess* to do so.” The obvious reason is that the court may see, on inspection of the indictment, that an offense has been committed, if the facts be proved. This objection is well taken, is fatal to these indictments, and the judgments must be arrested. Defendants discharged.

UNITED STATES v. BENNETT.

(Circuit Court for New York: 17 Blatchford, 357-363. 1879.)

Opinion by BENEDICT, J.

STATEMENT OF FACTS.—The prisoner was tried upon an indictment containing six counts. The first five counts are framed under section 5431 of the Revised

Statutes of the United States, and the sixth under section 5434. Having been convicted he now moves for a new trial and in arrest of judgment.

§ 2349. *It is no variance that an indictment does not exhibit a seal of the treasury, and the notes given in evidence show such a seal.*

The main question presented on the motion for a new trial is raised by an exception to the admission in evidence of the counterfeit notes offered to prove the several charges in the indictment, on the ground of variance; first, because each note exhibits what purports to be the imprint of the seal of the treasury, while the notes set forth in the indictment exhibit no such imprint. It is contended that the provision in section 5172, authorizing the issue of circulating notes by a banking association, which declares that the notes shall "express upon their face that they are secured by United States bonds deposited with the treasurer of the United States, by the written or engraved signature of the treasurer and register, and by the imprint of the seal of the treasury," renders the imprint of the seal a part of the contract, necessary to its validity, and, therefore, necessary to be set out, and proved as laid. But it is evident from the language of the statute, just cited, that the imprint of the seal of the treasury is simply intended to be evidence in regard to the security of the contract and forms no part of the contract itself. An indictment of this character is sufficient if it sets forth so much of the note as contains the evidence of the contract, and so much is set forth in this instance. To that extent the notes admitted in evidence correspond exactly with the notes in the indictment, and prove the substance of the charge, although they exhibit, in addition, what purports to be the imprint of the seal of the treasury.

§ 2350. *It is no variance that the indictment describes "circulating notes of a banking association" as "national bank currency notes."*

It is next contended that there is a fatal variance because the notes admitted in evidence are circulating notes of a banking association, while the notes set forth in the indictment are styled therein national bank currency notes. Here, the argument is, that section 5413, which provides that the phrase, "obligation or other security of the United States," shall be held to mean (among other things) "national bank currency," has been modified by the use, in section 5434, of the words "any obligation or other security of the United States, or circulating note of any banking association organized or acting under the laws thereof," and that a distinction must now be drawn between the circulating notes issued by a banking association and national bank currency. Section 5431 is claimed to be no longer applicable to such circulating notes, and it is urged that the notes admitted in evidence do not correspond with the description given in the indictment. Upon this question our opinion is that there was no intention to create a distinction between national bank currency and the circulating notes issued by a banking association, by the language employed in section 5434, and that section 5413 is not modified by section 5434. The words "or circulating note," etc., in section 5434, were inserted through excess of caution, no doubt. If there had been the intention to modify section 5413, and thereby to change the scope of section 5415 and section 5431, it may be presumed that such an intention would have been plainly expressed, and not left to follow from a doubtful implication. The notes were, therefore, correctly designated as national bank currency notes, that being the designation of such notes in section 5413. Besides, the notes are set out at length in the indictment, and show on their face that they are circulating notes of a banking association organized under the laws of the United States. The designation of

their legal character, given in the indictment, becomes, then, immaterial. *Regina v. Williams*, 2 Den. C. C., 61; *United States v. Trout*, 4 Biss., 105 (§§ 2340-43, *supra*).

§ 2351. *Variances held immaterial.*

Several other points of variance were made at the trial, viz.: that the numbers—the figure 5 in the corner—the words, “printed by the bureau of engraving and printing, treasury department,”—the words, “Act approved June 30,”—the words “New York” and “U. S.,” over the seal,—and the word “Excelsior,”—which appear on the notes admitted in evidence, do not appear on the notes set forth in the indictment. But these differences have not been relied on here and are immaterial. *Comm. v. Stevens*, 1 Mass., 203; *Comm. v. Bailey*, 1 Mass., 62.

§ 2352. *A question of evidence. Order of proof.*

The only remaining question presented by the motion for a new trial, and calling for attention, arose as follows: At the close of the evidence for the prosecution, a request was made in behalf of the defendant that the court instruct the district attorney to call, as a witness in behalf of the government, one McGuire. The request was refused, and McGuire was not then called. Subsequently, and when the evidence for the defense had been given, the district attorney offered McGuire as a witness to give evidence in rebuttal. Objection was taken to the witness' being allowed to testify, which was overruled, and the witness then gave evidence in rebuttal. To these rulings exception was taken.

The only ground upon which the request for the instruction to the district attorney, and the subsequent objection to the witness McGuire, were placed is that injustice would be done to permit this witness to be informed of the testimony of the prisoner, and then to go upon the stand and contradict him. The case shows that when the instruction to the district attorney was prayed, evidence had been given that McGuire was the person who communicated the fact of the possession of these notes by the prisoner; and that he had said that the prisoner had given him a five-dollar counterfeit note on the day of his arrest. Whether this evidence had been drawn out by the defendant or the prosecution does not appear in the case; but the absence of any objection from the defendant shows that, if not called out by the defense, no point was made in regard to its admission. Whether it was in the power of the district attorney to produce McGuire while the case was with the prosecution does not appear.

The ruling objected to seems to relate simply to the order of proof, but, without intending to admit that a ruling of that character is subject to review, we may say that we are unable to see, from the case, that any injustice was done to the defendant by the course pursued. Whether the evidence of McGuire was necessary to make out a case for the prosecution belonged to the district attorney to determine for himself. If McGuire was the bad person supposed by the defense, the district attorney was justified in avoiding, if possible, presenting him to the jury as a witness to establish the case for the government. What the defendant would testify to could not be foreseen, and, when the defendant's testimony compelled the production of evidence in rebuttal, the right of the prosecution to present such evidence by the testimony of any witness able to testify to the facts is not open to question.

§ 2353. *Absence of seal of treasury.*

There remain to be considered the points made in support of the motion in

arrest of judgment. It is said that the notes set forth in the indictment are not valid contracts, owing to the absence of the seal, and, therefore, not the subject of forgery. To this there is one sufficient answer, that, as already stated, the seal of the treasury forms no part of the contract. Again, it is contended the indictment is bad because it avers that the forged note purported to bear the imprint of the seal of the treasury, but omits to give a copy of the seal. It is said that, while it would, perhaps, be unnecessary to say anything about the devices, yet when they are described a *fac simile* or copy must be given. But if, as has been seen, it was unnecessary in setting forth the note to set forth the seal, stating that the note purported to have a seal cannot affect the validity of the indictment.

§ 2354. *Particularity of description. The subject-matter of a former trial may be proved like any other fact.*

It is further contended that the indictment is insufficient because, by omitting the numbers on the bills, it renders the record unavailable as a bar to a subsequent prosecution for the same offense. The case does not show that the numbers upon any one of the notes admitted in evidence would identify the note. On the contrary, several of the notes exhibit the same numbers. Nor is it necessary that the indictment be so particular that the record will, upon its face, and without extrinsic evidence, identify the subject-matter of the charge. The subject-matter of a former trial is always a matter of evidence and may be proved like any other fact. The books show many cases where such a particularity of description as is here contended for has been held unnecessary.

§ 2355. *Different offenses are properly charged in different counts of the indictment under the acts of congress.*

Lastly, it is contended that judgment must be arrested because the indictment charges different offenses, for which different punishments are prescribed by statute; and Tweed's case (*People v. Liscomb*, 60 N. Y., 559) is cited in support of the objection. An examination of the doctrine declared in that case would be out of place here, because this is a prosecution instituted under a statute of the United States, which permits the joinder of separate and distinct offenses in one indictment, in separate counts. No doubt is entertained that section 1024 of the Revised Statutes permits the joinder in a single indictment, in separate counts, of offenses created by section 5431 and an offense created by section 5434, notwithstanding the fact that the punishment prescribed by section 5431 is a fine of not more than \$5,000, and imprisonment at hard labor not more than fifteen years, and the punishment prescribed by section 5434 is imprisonment at hard labor not more than ten years, or a fine of not more than \$5,000, or both. It would seem, from the case, that, in this instance, the several charges are for the same transaction, or for transactions connected together. They appear to have occurred at the same time and were proved by the same witnesses. But, if not, the offenses are similar in character, the challenges are the same, and the punishments alike in kind, differing only in degree, and they are, therefore, of "the same class of crimes" within the meaning of section 1024. Whether the joinder was calculated to embarrass the prisoner, and, therefore, the offenses not "properly joined," within the meaning of the statute, was a question to be determined by the judge in his discretion, on a motion to quash or to compel an election. *Comm. v. Birdsall*, 69 Penn., 482.

No difficulty in regard to the judgment to be entered arises from the differ-

ence between section 5431 and section 5434 in respect to the punishment prescribed. The prisoner has been convicted of the several offenses charged in the indictment. Each count, charging a separate and distinct offense, is, in legal effect, a separate indictment, and a conviction thereon may be followed by a sentence imposing such punishment as the statute has prescribed for that offense. The statute, in permitting the joinder of different offenses in a single indictment, and even the consolidation of two or more indictments, by necessary implication authorizes a separate punishment for each offense proved. Otherwise, a conviction of offenses permitted to be joined would be the same, in effect, as an acquittal. We have now considered all the points in behalf of the prisoner that can be claimed to be worthy of notice, and find no ground upon which to grant a new trial or arrest the judgment. The motions are therefore denied.

§ 2356. **Draft — Right to draw.**— Upon an indictment for the forging of a draft under the act of Maryland of 1799, using the words "draught for the payment of money, or delivery of goods, or other valuable articles," it was considered no objection that the indictment did not aver that the person whose name was forged as drawer had a right to draw. *United States v. Bates*, 2 Cr. C. C., 1.

§ 2357. **Indorsements.**— In an indictment for forging a bill in the name of a fictitious drawer and indorser, it is not necessary to set out subsequent indorsements. *United States v. Peacock*,* 1 Cr. C. C., 215.

§ 2358. **Setting out a note.**— An indictment for forging a note must set forth the note clearly and accurately. Where, in the indictment, the signature to the note was written "W. Marbury," and the signature to the note was "Wm. Marbury," the court refused to allow the note to be given in evidence. *United States v. Smith*, 2 Cr. C. C., 111. See § 2314.

§ 2359. **Alteration.**— An indictment charging the defendant with having falsely and fraudulently altered a certain abstract of account by obliterating certain words is not a sufficient indictment for forgery, where it does not contain the technical term "forged" or "counterfeited." (CRANCH, C. J., dissented.) *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 2360. **Bank order — Variance.**— Where an indictment for passing a counterfeit bank order charges the order to purport to be drawn on the cashier of the corporation of the president and directors of the Bank of the United States; and the order is drawn on the cashier of the Bank of the United States, the indictment will be held good, if it follows the language of the statute, and the order will be received. The cashier of the bank is the cashier of the corporation, and an order drawn on him is drawn on the corporation. *United States v. Hinman*,* 1 Bald., 292. See § 2316.

§ 2361. **Expiration of charter of corporation.**— An indictment may be good, under the penitentiary act for the District of Columbia punishing any person who shall pass, utter or publish as true "any falsely made, uttered, forged or counterfeited paper writing, or printed paper, to the prejudice of the right of any other person, body politic or corporate," although the charter of the bank whose notes are charged to have been forged had, at the time of the alleged forgery, expired by its own limitation, the bank being still in existence under a provision in its charter that, "notwithstanding the expiration of the term for which the said corporation is created, it shall be lawful to use the corporate name, style and capacity for the purpose of suits; for the final settlement and liquidation of the affairs and accounts of the corporation; and for the sale and disposition of their estate, real, personal and mixed." *United States v. Noble*,* 5 Cr. C. C., 371.

§ 2362. **Purport of note or bill.**— An indictment under the eighteenth section of the charter of the Bank of the United States, declaring that "if any person shall pass, utter or publish, or attempt to pass, utter or publish, as true, any false, forged or counterfeited bill or note purporting to be a bill or note issued by order of the president, directors and company of the said bank," he shall be adjudged guilty, etc., will be held to be bad if it does not aver that the forged note purported to be a bill or note issued by the order of the president, directors and company of the said bank. *Ibid.* See § 2322.

§ 2363. **Intent.**— Where one was convicted upon trial of an indictment based on section 5463 of the Revised Statutes, charging him with having forged a material indorsement upon a postoffice money order, with intent to defraud A. B., it was held that the intent to defraud is the element of the offense, and the indictment need not have alleged an intent to defraud the United States. *United States v. Morris*,* 16 Blatch., 133. See § 2327.

§ 2364. Under the nineteenth section of the charter of the Bank of the United States, punishing any person "who shall have in his custody or possession any blank note or notes, bill or bills, engraved and printed after the similitude of any notes or bills issued by said corporation, with intent to use such blanks, or cause or suffer the same to be used, in forging or counterfeiting any of the notes or bills issued by said corporation," there is no objection to an indictment using the language of this section, one count of which charges an intent to defraud the corporation, and the other with intent to defraud the person or persons to whom the same should be uttered and passed. *United States v. Noble*,* 5 Cr. C. C., 371.

§ 2365. The intent to pass, etc., constitutes no part of the crime of falsely making, forging or counterfeiting the coin of the United States, as defined by the act of congress of 1825. An indictment which charges, in the language of the statute, that the defendant "did falsely make," etc., is sufficient without alleging any intent to pass or defraud. The intent to pass as true, and to defraud, which is made an ingredient of a distinct offense defined by the same act, viz., the passing, etc., or bringing into the United States with intent to pass as true, knowing the same to be false, with intent to defraud, does not relate to the offense of false making. *United States v. Peters*,* 2 Abb., 494.

§ 2366. An indictment for forgery must allege the offense to have been committed with the intention of defrauding some person or corporation, and this allegation must be proved as laid. This is the general rule, but it must be taken with this qualification: If a person in whose name a forged note, bill, order or check is drawn, or the one on whom it is drawn, would, if genuine, be bound to pay it, the law infers and takes, as proved, the intention to defraud and injure such person, from the act of forging, or knowingly passing such paper. It is not necessary that any actual injury be sustained or fraud practiced in fact, on the person who was the subject of meditated fraud or injury. This part of the offense consists in mere intention, and if that intention can be consummated, the offense is complete. *United States v. Shellmire*,* *Bald.*, 370.

§ 2367. Name of person to whom counterfeit was passed.—Section 2 of the act of May 16, 1866, and section 21 of the act of March 3, 1825, provide, in substance, that if any person shall forge or counterfeit a five-cent piece, composed of copper and nickel, or shall pass any such forged or counterfeited coin with intent to defraud any body politic or corporate, or any other person or persons whatsoever, he shall be deemed guilty of a felony. An indictment under these acts for uttering and passing, etc., which charges the intent to defraud a certain person, naming him, need not aver the name of the person to whom the counterfeit coin was passed. *United States v. Bejandio*,* 1 Woods, 294.

§ 2368. Averment as to prejudice.—Under the penitentiary act for the District of Columbia, declaring that "every person duly convicted of having passed, uttered or published, or attempted to pass, utter or publish, as true, any such falsely made, uttered, forged or counterfeited paper writing, or printed paper, to the prejudice of the right of any other person, body politic or corporate, or voluntary association, knowing the same to be falsely made," etc., "with intent to defraud such person, body politic," etc., "shall be sentenced," etc., an indictment must allege the act to have been done to the prejudice of the right of another person, etc. *United States v. Noble*,* 5 Cr. C. C., 371.

§ 2369. An indictment under the eleventh section of the penitentiary act of March 2, 1831, declaring "that every person duly convicted of having uttered as true any such falsely made, altered, forged or counterfeited paper writing or printed paper, to the prejudice of the right of another person," etc., "knowing the same to be falsely made," etc., "with intent to defraud such person," etc., "shall be sentenced," etc., which charges the common law offense, and also describes the offense according to the act of Maryland of 1799, ch. 75, need not charge in the exact language of the act that the uttering was "to the prejudice of the right of any other person." Nor need the indictment state that the check uttered was "a paper writing or printed paper." (CRANCH, C. J., dissented.) *United States v. McCarthy*,* 4 Cr. C. C., 304.

§ 2370. Certificate issued by an officer.—An indictment for forgery, under the nineteenth section of the act of March 3, 1825 (4 Stat. at L., 120), in altering a particular certificate authorized to be issued under the law of March 2, 1799 (1 Stat. at L., 659), by the supervisor of a port, alleged that the certificate in question was issued by the collector, by virtue of his office. *Held*, that the indictment was bad notwithstanding the law of March 3, 1803 (2 Stat. at L., 243), which gave the president power to designate some other officer to perform the duties of supervisor, and although the collector was performing these duties, for if designated the indictment should have alleged that it was issued by the collector acting in his capacity as supervisor. *United States v. Schoyer*,* 2 Blatch., 59.

§ 2371. No allegation of forgery.—An indictment making the offense to consist in having, "ostensibly for the public service, but falsely and without authority, caused and procured to be issued from the navy department of the United States," a certain requisition, admits the

requisition to have been a true one, and, containing no allegation that the defendant forged and counterfeited it, does not charge the crime of forgery. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 2372. **Charging an erasure.**—An allegation that an erasure was made by the defendant as a false pretense for obtaining money is not good, where the indictment itself shows that the erasure was made after the money was received. An avowment that the erasure was made in order to enable the defendant to keep the money is likewise of no value, where the offense charged is not the keeping of the money, but the obtaining it by false pretenses. An allegation that the erasure was made in order to consummate the fraud is worthless, where the indictment shows that the fraud had been consummated before the erasure. That the erasure was made with intent to conceal the fraud is a worthless averment, where the charge is for perpetrating, and not concealing, the fraud. *Ibid.*

5. Violation of Internal Revenue Laws.

[See VIII, *supra*.]

SUMMARY—*Removal of spirits; duplicity*, § 2373; *avowment that taxes were not paid*, § 2374; *need not allege time of removal*, § 2375.—*Defrauding government of tax*, § 2376.—*Carrying on business of retail liquor dealer without a license*, § 2377.—*Dealing in tobacco without paying special tax*, § 2378.—*Keeping billiard table without payment of tax*, §§ 2379, 2380.—*Negating exceptions in statutes*, § 2381.—*Unlawfully using a still*, §§ 2382, 2385; *charging the intent*, §§ 2384, 2390, 2391.—*Need not allege special acts of keeping distillery*, §§ 2385, 2386.—*Proof as to strength of spirits distilled*, § 2387.—*New law going into operation*, § 2388.—*Executing a fraudulent bond*, § 2389.—*Acts showing attempt to defraud should be alleged, when*, § 2391.—*Failure to cancel stamps*, § 2392.—*Partners making a false return*, § 2393.

§ 2373. Where an indictment under section 3296 of the Revised Statutes charges the removal of spirits on which the tax has not been paid to a place other than the distillery warehouse, and the concealment thereof, the indictment is not bad for duplicity, for the concealment charged is only of the spirits removed, and the whole thing is but one transaction. *United States v. Nunnemacher*, §§ 2394-99.

§ 2374. An allegation in an indictment that the tax on certain spirits fraudulently removed had not been paid is a sufficient showing that the taxes were, at the time of such removal, due and owing. *Ibid.*

§ 2375. In an indictment for fraudulently removing spirits from a distillery to a place other than a distillery warehouse, without payment of the tax thereon, it is not necessary to allege the time when the spirits were distilled. *Ibid.*

§ 2376. Under an indictment charging the defendant in one count with defrauding the government of the tax on spirits distilled by him, and under the other with engaging in the business of distiller with the unlawful intent to defraud the government of the tax on such spirits, the prosecution is not confined to the first act of selling it attempted to prove, but all acts, however numerous, which show, either that the accused defrauded the government of the tax, or carried on the business with that intent, are admissible. Each such separate sale is not a distinct offense, but together they show the design and the intent, and are acts by which the fraud was perpetrated. *United States v. Staton*, §§ 2400, 2401.

§ 2377. An indictment which charges the defendant, in the language of the statute, with carrying on the business of a retail liquor dealer at a certain place and between certain dates, without having paid the special tax or license, is sufficient. It need not state how or the means whereby he became such a dealer. *United States v. Howard*, §§ 2402-2406.

§ 2378. All persons dealing in tobacco not being liable to pay a special tax, an indictment for being a dealer in tobacco without payment of the special tax must state some particular circumstances necessary to make the defendant liable to pay a dealer's tax. *Ibid.*

§ 2379. Under a statute prescribing a penalty for keeping a billiard table without first paying a special tax, any person who appears to be, and for the time being is, in possession and control of a place or building where a billiard table is kept for public use, is *prima facie* the proprietor of the billiard room, and liable to pay this special tax; and this, although the general property and the ultimate control of the place and table be in some one else. *Ibid.*

§ 2380. An allegation that the defendant "carried on the business and occupation of keeping and running a billiard table" in a particular building is equivalent to an allegation that he carried on the business, etc., of keeping a billiard room, and that he was, for the time being, the proprietor thereof. *Ibid.*

§ 2381. The last clause of section 78 of the act of congress of July 2^d, 1868 (15 Stat. at L., 159),

contains no exception which must be negatived in an indictment founded upon it. *United States v. Imsand*, §§ 2407-2409.

§ 2382. It is not necessary in an indictment for unlawfully using a still and other distilling apparatus to allege that the spirits distilled were alcoholic, where it is charged that the apparatus was used "for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States." *United States v. Simmons*, §§ 2410-14.

§ 2383. Where an indictment charges the defendant with causing to be procured certain apparatus for the distillation of liquors, it is not necessary to set forth the means whereby the unlawful use of such apparatus was procured. *Ibid.*

§ 2384. An indictment charging a person with carrying on "the business of a distiller . . . with the intent to defraud the United States," etc., is sufficient. It sufficiently alleges an unlawful act, and it is not necessary to set out the particular means by which the United States was to be defrauded, nor to set out the different acts by which the intent charged was manifested. *Ibid.*

§ 2385. An indictment for carrying on a certain trade or business, as that of distiller, without having first paid the special tax, need not set forth the particular acts which make up the trading or the keeping of a distillery. To charge the acts as having been done on divers days between two certain days is sufficient. *United States v. Fox*, §§ 2415-18.

§ 2386. "Then and there distilling and manufacturing spirits to a very large amount, to wit, the number and amount of one thousand gallons of proof spirit," is a good allegation that the defendant did then and there distill. *Ibid.*

§ 2387. An allegation in an indictment for being engaged in distilling, that the defendant distilled one thousand gallons of proof spirit, does not confine the government to show the manufacture of a spirit at the exact strength of first proof, as established by another part of the statute, that is, one-half alcohol. The expression "gallons of proof spirit" is not intended to be descriptive of the kind or strength of the spirit distilled, but only of the quantity according to the statute standard. *Ibid.*

§ 2388. An indictment charging the defendant with carrying on the business of distiller from September 1, 1866, to December 10, 1866, without paying the tax required by the act which went into effect on September 2, 1866, should allege that the defendant began business under the new law, or that he was not licensed under the old law, under which licenses ran from May to May, or that, having been so licensed and having been assessed an additional fee under the new law, he had not paid it. *Ibid.*

§ 2389. An indictment under the forty-second section of the act of July 13, 1866 (14 Stat. at L., 162), charged the defendant with executing, procuring to be executed, and conniving at the execution of, a fraudulent bond by which the payment of certain taxes was evaded. *Held*, that it was not necessary to set out the particulars in which the bond was fraudulent, or the manner in which the taxes were evaded, or the manner in which the defendant executed the bond or procured or connived at its execution. *United States v. Henry*, §§ 2419-21.

§ 2390. An indictment charged that the defendant did engage in and carry on the business of a distiller, etc., with intent then and there to defraud the United States of the tax due on each and every gallon of one thousand gallons of proof spirits thereafter to be distilled by him. *Held*, that it was not necessary to set out facts showing the intent of the defendant, but that the allegation was sufficient. *United States v. Ulrici*, §§ 2422-23.

§ 2391. An indictment charged in one count that the defendant, being engaged in the business of distilling at a certain place, did, while so engaged, attempt to defraud the United States out of taxes imposed by law. Nothing was said as to the intent of the defendant or as to the way in which the defendant attempted to defraud the government. *Held*, that some acts showing the attempt should have been specified, and that the count was bad. *Ibid.*

§ 2392. It is a crime for any person not to cancel the stamps on any package of distilled liquors emptied by him, and an indictment for that offense need not charge that the failure was wilful and intentional. *Ibid.*

§ 2393. Where two persons composing a partnership make and sign a false return to the assessor of internal revenue in the firm name they may be indicted jointly. *United States v. McGinnis*, §§ 2429-30.

[NOTES.—See §§ 2431-2476.]

UNITED STATES v. NUNNEMACHER.

(Circuit Court for Wisconsin: 7 Bissell, 129-141. 1876.)

STATEMENT OF FACTS.—Proceedings had under an indictment charging the defendants with unlawful removal of spirits. Defendants now moved to quash the indictment for duplicity. In the first count of the indictment it is alleged

that defendants, on the 18th of December, 1874, removed, and abetted the removal of, three thousand five hundred proof gallons of spirits from the distillery of one Guenther to a place other than the distillery warehouse of the said Guenther, the tax on the same not having been paid, and that they concealed, and abetted in the concealment of, said spirits. In the second count it is alleged that three thousand gallons of spirits were removed and concealed by them on the 21st of December, 1874.

Opinion by DYER, J.

The statute, section 3296, provides that, "whenever any person removes, or aids or abets in the removal of, any distilled spirits, on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable" to certain penalties.

The two counts mentioned are based upon the first general division of this section, and a motion is made to quash these counts on the ground of duplicity, it being claimed that the removal and concealment of spirits as mentioned in the statute, and according to the terms of the statute, are distinct and independent offenses, which cannot be properly joined in one count. It will be noticed that the section of the statute in question contains two general divisions: 1st, the removal of distilled spirits to a place other than the distillery warehouse provided by law, or the concealment of spirits so removed; 2d, the removal of distilled spirits from a distillery warehouse, or other warehouse authorized by law, in any manner other than is provided by law, or the concealment of spirits so removed. I have had some doubt whether each of these divisions of the section was not intended, on its face, to express substantially one offense. But I am not willing to rest the question absolutely on such a construction.

§ 2394. *A count in an indictment charging two distinct offenses is bad.*

It is a general rule that a count in an indictment which charges two distinct, independent offenses is bad, and should be quashed on motion. Whart. Cr. L., § 382. A capital offense and a misdemeanor cannot be charged in the same count. *United States v. Sharp*, 1 Pet. C. C., 131. An indictment for forgery, stating two distinct offenses, as the forging of a mortgage and of a receipt indorsed thereon, and requiring different punishments, has been held bad. 1 Whart. Cr. L., § 382. A count charging horse stealing and ordinary larceny, for which offenses different punishments are imposed, cannot be sustained. *State v. Nelson*, 8 N. H., 163. The general rule that the joinder of two or more distinct offenses in one count is not permitted is elementary. The point of difficulty is what are two or more offenses within the rule.

§ 2395. — *the rule and its exceptions.*

There are certain exceptions to the rule in the case of particular offenses, as in burglary, adultery, etc., where the specific accusation includes an offense of an inferior degree (1 Whart. Cr. L., §§ 383, 384), but these are not material here. Recognizing the rule on this subject as general and elementary, I find as the result of my examination of the numerous cases where the principle has been enforced, that the prevailing feature of these cases is, that the offenses charged in the same count were either inherently repugnant, or so distinct that they could not be construed as different stages in one transaction, or involved

different punishments. These I think are the main characteristics of the class of cases in which the rule is asserted. *Greenlow v. State*, 4 Humph., 25, 26; *Commonwealth v. Symonds*, 2 Mass., 161-2; *United States v. Sharp*, 1 Pet. C. C., 131; *State v. Nelson*, 8 N. H., 163; *Miller v. State*, 5 How. (Miss.), 250.

§ 2396. — *where the offenses are not inherently repugnant, and were committed at one time, the union of them in one count of an indictment will not render that instrument bad for duplicity.*

There is a class of cases, where, although offenses appear, by the use of the disjunctive in statutes declaring the offenses, to be distinct and separate, it is nevertheless held that they are in effect but one offense and may be stated conjunctively in one count. As where a person is charged with doing the thing which constitutes an offense, and causing it to be done, it being held that it is the same in law to cause a thing to be done as to do it. *Bish. Cr. Pro.*, § 434. For example, to charge a person with falsely making, forging and counterfeiting, and with causing and procuring to be falsely made, forged and counterfeited, is not objectionable, although each of the acts may be stated in the disjunctive in the statute, because the whole is in law one offense. *Rasnick v. Commonwealth*, 2 Virg. C., 356; *State v. Hauseall*, 2 Rice's Dig., 346; *Mackey v. State*, 3 Ohio St., 363; *State v. Morton*, 1 Will. (Vt.), 310. So a charge that the defendant administered and caused to be administered poison. *Ben v. State*, 22 Ala., 9. Of this class of cases is *Commonwealth v. Eaton*, 15 Pick., 273, where it was held that although a statute forbade a person to sell or offer for sale a lottery ticket, it was proper to charge that the defendant offered for sale and sold such a ticket, for the reason that a sale, *ex vi termini*, includes an offer to sell, and there is actually but one offense. So in *Commonwealth v. Twitchell*, 4 Cush., 74, where the statute imposed a penalty on any person who should set up or promote an exhibition without license, it was held that setting up and promoting constituted one offense and could be alleged as such, conjunctively in one count. In this class of cases, the offenses, though disjunctively stated in the statutes creating them, constitute essentially one offense, and as argued by counsel for defendant, they do not reach the precise point we have here.

Let us now go a step further. Mr. Bishop says, vol. 1, Criminal Procedure, § 436, that if a statute declares "that the doing of this or that, or the other thing, shall subject the doer to a punishment which it specifies, plainly a man may incur the penalty by doing any one of the three things. And by doing the three things at different times and as separate transactions, he incurs the penalty three times, and three times he may be punished. But suppose instead of this, he does the three things at once and as one transaction, the doctrine appears to be that he incurs the penalty but once, the same as though he had done only one of them. Whence we have the general proposition that, subject perhaps to exceptions depending upon the peculiarities of cases and the particular language employed, if a statute forbids several things in the alternative, it thereby creates but one offense; and since the offense may be committed in different ways, distinguished in the statute from one another by the disjunctive 'or,' 'or committed by combining more than one or all the ways in one transaction, an indictment upon the statute may, in a single count, charge the defendant with all the acts, using the copulative 'and' where the statute employs the disjunctive 'or.'"

Following this principle, it has been held that a person may be indicted for the battery of two or more persons in the same count. *Rex v. Benfield*, 2

Burr., 980, 984. "In felonies, also, the indictment may charge the defendant in the same count with felonious acts with respect to several persons, as in robbery, with having assaulted A. and B., and stolen from A. one shilling and from B. two shillings, if it was all one transaction." 1 Bish. Cr. Pro., § 437. Wharton says (vol. 1, Cr. L., § 390): "Where a statute . . . makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled they may be coupled in one count." "Setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table and inducing others to bet upon it may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet when both are perpetrated by the same person at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted." *Hinckles v. Commonwealth*, 4 Dana, 518.

In the case of *State v. Murphy*, 47 Mo., 275, cited on the argument, it was held that, "when a statute in one clause forbids several things, or creates several offenses in the alternative, which are not repugnant in their nature or penalty, the clause is treated in pleading as though it created but one offense, and they may be united conjunctively in one count." In the case of *State v. Fletcher*, 18 Mo., 425, a distinction is taken on this question between misdemeanors and felonies. A statute declared that no person should set up or use any gambling device for the purpose of gaming, etc. The count in the indictment charged that the defendant set up and used and permitted games of chance to be played on the gambling device. A motion to quash for duplicity was sustained at the circuit, but overruled by the supreme court.

Our own supreme court, in the case of *Byrne v. The State*, 12 Wis., 525, uses this language: "The rule is well settled where a statute makes either of two or more distinct acts connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes, when each shall have been committed by different persons or at different times, they may, when committed by the same person at the same time, be coupled in one count, as constituting altogether but one offense. In such case the several acts are considered as so many steps or stages in the same affair, and the offender may be indicted as for one combined act in violation of law; and proof of either of the acts mentioned in the statute and set forth in the indictment will sustain a conviction."

Now it is not to be denied that a person may violate the statute in question by simply removing distilled spirits on which the tax has not been paid to a place other than the distillery warehouse, and without concealing the spirits. From the peculiar language of the statute it would seem that, to make a case of concealment, there must have been a removal. Admit that the statute provides for two distinct acts, indictable separately and as distinct crimes where each shall have been committed by different persons or at different times, the question remains whether a count is double when it charges the commission of both acts by the same person as one transaction and at the same time. The words of the statute are "removes or conceals." For both the acts the same measure and kind of punishment are imposed. Are those acts inherently repugnant to each other, especially in the light of the language of the statute, "conceals or aids in the concealment of any spirits so removed?" Are the acts of such a character that they cannot, under the allegations of the indictment, be construed as different stages in one transaction? I can have no doubt

upon the point. The counts in question charge that on a certain day the defendants removed a certain quantity of distilled spirits from a certain distillery to a place other than a distillery warehouse, and did then and there conceal the spirits so removed. Here are two things, which were done at different times, and, as separate transactions, involve two penalties, but, when done as one transaction, the penalty is but once incurred as for one offense. There is a combination of the acts of removing the spirits and concealing the same spirits so removed. It has been said that there may be removal without concealment, which is true. It has also been said that concealment does not involve removal. But the words of the statute are "conceals any spirits so removed," which imply a removal and then concealment. So that the charge in the indictment may be regarded, if it were necessary, as a charge of concealment. But in this view it is contended that the charge should be that the defendants concealed spirits which had been removed to a place other than the distillery warehouse, etc.; thus first affirmatively alleging the concealment. But in the reasonable use and connection of words, it would seem that an allegation of removal of spirits on which the tax had not been paid, to a place other than the distillery warehouse, and the concealment thereof, is equivalent to alleging the concealment of spirits which had been removed, etc., and on which the tax had not been paid. My conclusion is that the first and second counts are not bad for duplicity.

Another objection urged to these counts is, that it is not alleged that the tax on the spirits removed was due and owing. The allegation is that the defendants removed certain distilled spirits on which "the tax then and there due and owing to the United States, and required by law to be paid, had not been paid." It is conceded that if the words "which was" had been inserted before the words "then and there" the allegation would have been complete. It is alleged affirmatively that the tax had not been paid, and, I think, the reasonable construction of the sentence is that the tax was due and owing. In the case of *The United States v. Hesing*, in the northern district of Illinois, one of the overt acts charged in the indictment to have been done to effect the object of a conspiracy was the unlawful removal of certain spirits to a place other than a distillery warehouse, upon which spirits the tax imposed by law had not been paid, and this, it would seem from the opinion of Judge Blodgett, was the whole allegation in relation to a tax due and unpaid. It was held that the indictment, in all its parts, conformed to the requirements of the law in regard to what an indictment should contain.

§ 2397. *An indictment for removing distilled spirits need not allege the time the spirits were distilled.*

I do not regard the objection well taken that the time is not stated when the spirits mentioned in these counts were distilled. It is alleged that the tax on the spirits had not been paid; that they were removed from a distillery to a place other than a distillery warehouse. The time when the spirits were distilled is not material. The statute forbids the removal of any distilled spirits, on which the tax has not been paid, to a place other than a distillery warehouse provided by law. It makes no allusion to the time or place when or where the spirits are distilled.

§ 2398. *The exact words of the statute charging the offense need not be used if their precise equivalent is expressed.*

To the fourth count, which is a count for conspiracy, it is objected that the overt acts charged are not alleged to have been done to effect the object of the

conspiracy set forth in the count. The allegation is that the defendants, "in execution and pursuance of and according to said conspiracy, combination and agreement had as aforesaid, did produce and distill," etc. The words of the statute are "and one or more of the parties do any act to effect the object of the conspiracy," etc. It is insisted that the pleader should have employed the precise words of the statute, "to effect the object of the conspiracy," instead of the words "in execution and pursuance of and according to said conspiracy," etc. A ruling upon this point such as is insisted on by counsel for defendant would require unnecessary exactness. While a particularity and clearness are required which will inform a defendant of the charge he has to meet, and the court of the offense claimed to have been committed, so that it may pronounce judgment if there be a conviction, the validity of indictments should not depend upon too great niceties of language. I do not understand that the exact words of the statute must be used, if their precise equivalent is expressed. The words "in execution and pursuance of" are equivalent in meaning to the words "to effect the object of," as the respective definitions of the terms given by Webster show. The case of *United States v. Boyden*, 1 Low., 236 (§§ 2294-98, *supra*), was cited by the attorney for the United States on this point. It was there held that "the overt acts need not be laid as having been done 'to effect the object' of the conspiracy, although these are the words of the statute; it is enough to say that they were done 'in pursuance' thereof, which are the usual words in conspiracy;" and Judge Lowell, in his opinion, refers to cases in New York, and a case in New Jersey, where the statutes require an act to be done to "effect the object" of the conspiracy, and says indictments follow the more usual language, charging the acts as having been done "in pursuance of" the agreement.

§ 2399. *It is sufficient if the indictment sets forth the particular acts and circumstances constituting the offense charged with such clearness as that the defendant may be advised of the nature of the offense and prepare for trial.*

Another, and the last, objection to the fourth count is that the object of the alleged conspiracy is not stated with sufficient certainty. It is alleged in substance that the defendants, intending to defraud the United States of large sums of money in respect of the taxes upon distilled spirits, on the 18th of December, 1874, conspired together by producing and distilling large quantities of distilled spirits; and to ship, transport and remove said distilled spirits from the distillery of Christian Guenther, and out of this collection district, without payment of the tax and taxes required by law to be paid on distilled spirits to the United States; unlawfully to defraud the United States of the tax on said spirits; to cheat and defraud the said United States of divers large sums of money in respect of the taxes upon distilled spirits; and to commit divers offenses against the said United States and against the internal revenue laws thereof. Then followed the overt acts which relate solely to the production, distillation and removal, without payment of the tax required to be paid by law, of certain quantities of distilled spirits at certain times. The objection is urged that the language of the count "to commit divers offenses against the said United States and against the internal revenue laws thereof," is too general, neither the time, place nor particular character of these offenses being stated. If this were the sole allegation in relation to the object of the conspiracy, clearly the count would be bad. For to simply allege the intent or object of a conspiracy to be to commit divers offenses, without specifying any particular offense, is repugnant to the elementary principles of criminal plead-

ing. But here it is stated as an object of the alleged conspiracy, that the defendants conspired to defraud the United States of the tax on the spirits before mentioned, and of large sums of money in respect of the taxes upon distilled spirits. Here are specific, particular objects alleged. Does the further statement "and to commit divers offenses," etc., vitiate the count?

"The general rule is that the charge must be laid in the indictment, so as to bring the case within the description of the offense as given in the statute, alleging distinctively all the essential requisites that constitute it." *United States v. Staats*, 8 How., 44 (§§ 2542-44, *infra*). "All matters necessary to constitute the offense must be pleaded." *United States v. Prescott*, 2 Biss., 326. An indictment must set forth the particular facts and circumstances constituting the offense charged. *Allen v. State*, 5 Wis., 335; *Fink v. Milwaukee*, 17 Wis., 26; *Commonwealth v. Hunt*, 4 Metc., 125. These are elementary principles. The allegations of the count wherein are set forth the particular purpose or object of the alleged conspiracy, namely, to defraud the United States of the tax on the spirits described, and to cheat and defraud the United States of divers large sums of money in respect to the taxes upon distilled spirits, are beyond question sufficient. This, with the alleged overt acts following the conspiracy clause, points out with sufficient clearness the offense charged, so that the defendants can be advised of the nature of the offense, and prepare for trial. In *Stoughton v. State*, 2 Ohio St., 562, Judge Thurman holds the true rule, "that unreasonable strictness ought not to be required, and where an indictment clearly charges a crime and fairly advises the defendant what act of his is the subject of complaint, the principal object of pleading is attained. The highest degree of certainty is not required. Certainty to a common intent is sufficient." The statement of one of the objects of the conspiracy as being "to cheat and defraud the United States of divers large sums of money" is sanctioned by the precedents and by the highest authority. 4 Whart. Prec., 638. We have then a count containing apt allegations covering a statutory offense, and then an added allegation of a further purpose of the alleged conspiracy, namely, "to commit divers offenses," without enumerating them. Does the whole count fall because of the insufficiency of the last mentioned averment?

In the case of *United States v. Clark*, 1 Gall., 497, cited by defendant's counsel, the indictment charged one offense, perjury; and the entire charge failed because the indictment did not throughout allege the offense to have been committed in any court of the United States, nor in any deposition taken pursuant to its laws. There was a failure to allege any offense whatever within the purview of any statute.

In *Rex v. Fowle*, 4 Carr. & P., 592, the indictment simply charged the defendants with conspiring "to cheat and defraud the just and lawful creditors of W. F." That was all. There was no further statement of the conspiracy nor of any overt act, and the case is radically dissimilar to that at bar.

Hartman v. Commonwealth, 5 Penn. St., 65, would be an authority supporting strongly the position of defendant's counsel, if no statutory offense, as the object of the conspiracy, were particularly set forth in the indictment.

The case of *United States v. Bettilini*, 15 Int. Rev. Rec., 32, also cited, is a strong authority to the point that an indictment should embrace "a certain description of the crime of which the defendant is accused; and a statement of the facts by which it is constituted;" and upon this elementary principle there can be no controversy. As I have said, if this indictment simply charged

a conspiracy to commit divers offenses against the United States and the internal revenue laws thereof, it would be unquestionably bad. No evidence can be permitted to be given under that allegation in this count. Why may it not be rejected as surplusage, when precise and specific offenses are previously alleged as among the purposes of the supposed conspiracy?

Mr. Bishop, vol. 1, Cr. Proc., § 497, says that "if an indictment is founded on a statute, and it contains allegations covering all the terms of the statute and making a complete offense, and then if it adds something by way of making the offense appear more enormous, the latter matter may be disregarded as mere surplusage." Again he says, section 480, "suppose there is matter in the indictment defectively alleged; yet if rejecting all this, enough remains to meet the requirements of the law, the indictment is good; the surplusage passes for naught." The case cited by counsel for the government, of *Commonwealth v. Bolkom*, 3 Pick., 231, upon this question, seems to be in point. In that case it was held that in an indictment charging an inn-holder with suffering persons "to play at cards and other unlawful games, the words 'unlawful games' might be rejected as surplusage." In the case of *Commonwealth v. Arnold*, 4 Pick., 251, where an indictment charged the defendant with permitting persons to play "at the game of cards," it was held that the words "the game" might be rejected. Of course where the rejection of an allegation would vitally impair the structure of an indictment, or render it meaningless, such allegation cannot be disregarded as surplusage. So where the averment is essentially descriptive of the sole offense charged, as in the case of *United States v. Thomas*, 2 Abb., 114. The motion to quash will be denied.

UNITED STATES v. STATON.

(Circuit Court for Tennessee: 2 Flippin, 319-324. 1878.)

Opinion by HAMMOND, J.

STATEMENT OF FACTS.—This is a motion for a new trial and in arrest of judgment. The defendant stands convicted upon two counts of an indictment, which are as follows:

1. "The grand jurors represent that William Staton, etc., on, to wit, the 1st day of March, 1877, . . . in the district aforesaid, was a distiller, and was then and there engaged in carrying on the business of a distiller, by then and there producing distilled spirits, and by then and there brewing, and by then and there making mash, wort and wash fit for a distillation and for the production of spirits, and by then and there making and keeping mash, wort and wash, having also then and there in his possession and use a still; and that being so then and there engaged in carrying on the business of a distiller as aforesaid, he, the said William Staton, did then and there unlawfully, with force and arms, defraud and attempt to defraud the United States of the tax on the spirits so then and there distilled by him, the said William Staton, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

2. "The grand jurors aforesaid, etc., do further present, that said William Staton, etc., on, to wit, the day and year aforesaid, in the district aforesaid, etc., unlawfully, with force and arms, was carrying on the business of a distiller by then and there producing distilled spirits, and by then and there brewing, and by then and there making mash, wort and wash fit for distillation and for the production of spirits, and by then and there making and keeping mash,

wort and wash, and having also then and there in his possession and use a still, then and there with intent of him, the said William Staton, to defraud the United States of the tax on spirits, so then and there distilled by him, the said William Staton, as such distiller, as aforesaid, contrary to the form," etc.

The proof shows that the defendant gave bond and otherwise complied with the law regulating distillation of brandy made exclusively from apples, peaches or grapes, known as a fruit distillery, then being in possession of about two hundred and seventy gallons of spirits distilled by him; the casks containing it were gauged by the proper officer, and the spirits were subsequently sold by the defendant without paying the tax upon them required by law.

A new trial is asked on the ground that the defendant objects to and moved to exclude all testimony showing more than one sale, and because the government was not confined in its proof to the first unlawful transaction it undertook to prove. This objection proceeds on the idea that each separate sale was a separate offense, and that the government must elect on which one it will try the defendant. The defendant was not indicted for unlawfully selling the spirits without paying a special tax therefor, but under one count for defrauding the government of the tax on spirits distilled by him, and under the other count for engaging in the business of a distiller with the unlawful intent to defraud the government of the tax on such spirits. Any acts, no matter how numerous, which would show, either that he defrauded the government of the tax or carried on the business with that intent, were admissible. These were the circumstances which evinced the design with which the act was done and demonstrated the intent, and were the acts by which the fraud on the revenue was committed. The motion for a new trial should therefore be overruled. The motion in arrest of judgment is based on the alleged insufficiency of the indictment in not describing the offense charged so as to give the defendant notice of the violations of the law he is required to meet and defend.

The first count is drawn under section 3257, and the second under section 3281 of the Revised Statutes of the United States. Section 3257 enacts that, "Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery, etc., and shall be fined not less than \$500, nor more than \$5,000, and be imprisoned not less than six months nor more than three years."

§ 2400. *Where a statute does not so describe the offense as to give the defendant notice of the offense charged, the indictment must do so. Construction of Revised Statutes, section 3257.*

This section does not in itself so describe the offense as to give the defendant notice of the nature and cause of the accusation. It was held in the case of *United States v. Simmons*, 96 U. S., 360 (§§ 2410-14, *infra*), that it is sufficient, under section 3281 of the Revised Statutes, to charge the violation of the law in the very language of the statute, because it describes the offense as an intent to defraud the United States of the tax on spirits distilled, *by the act of engaging in and carrying on the business of a distiller*. This accusation in itself apprises the accused of the act for which he is arraigned, namely, carrying on the business of a distiller with the unlawful intent. The facts and circumstances by which the intent is demonstrated need not be alleged in the indictment and are only matters of proof. But suppose that, disconnected with this act of carrying on the business of a distiller, it were simply charged that the defendant had defrauded, or attempted to defraud, the United States of the tax on

certain spirits; is it not plain that the defendant would have no notice of the act for which he is called to account? Now, this is the distinction between the two sections 3257 and 3281; the first makes all acts of a distiller, whereby he defrauds, or attempts to defraud, the United States of the tax on spirits distilled by him, offenses, but does not attempt to designate any of them, while the second describes and defines one particular act as an offense, namely, engaging in the business of a distiller with a particularly described intent.

§ 2401. *Where a statute so describes the offense as to give the defendant notice of the charge against him, the indictment need go no further than the statute.*

And I think, after a careful consideration of the cases on the subject, that this will be found to be the true test between those where it is sufficient to allege the offense in the language of the statute, and those where it is not. If the statute itself so defines the act or acts constituting the offense as to give to the offender information of the nature and *cause* of the accusation, the indictment need go no further than the statute; but if it does not of itself do this, the averments necessary to secure the constitutional right to such information must be added. It makes no difference whether the crime be a felony or a misdemeanor, the constitution secures to the defendant, "in all criminal prosecutions," the right "to be informed of the nature and cause of the accusation." U. S. Const., Amendment VI; *United States v. Cruikshank*, 92 U. S., 542, 557, 558 (Const., §§ 893-911); *United States v. Simmons*, 96 U. S., 360 (§§ 2410-14, *infra*); *State v. Kilgore*, 6 Humph., 44; *State v. McElroy*, 3 Heisk., 69.

In all the cases cited by the learned counsel for the government it will be found either that the statute gave sufficient information, or that the averments themselves did so. In *United States v. Henry*, 3 Ben., 29 (§§ 2419-21, *infra*), the fraudulent bond was pointed out. In *United States v. Ballard*, 13 Int. Rev. Rec., 195, the particular entry of "one brown horse" was designated. In *United States v. Fox*, 1 Low., 199 (§§ 2415-18, *infra*), as under section 3281, in *United States v. Simmons*, 96 U. S., 360, the statute described the act denounced as that of carrying on the business of a distiller without having paid the special tax therefor, and it was held that by analogy to common law indictments for being a common barrator, scold, etc., it was sufficient to allege a general carrying on of a certain trade, where that was the crime charged. But even in that case, the allegation was that the business was carried on between two designated dates, which was held sufficiently to describe the act to give the defendant notice. In *United States v. Gooding*, 12 Wheat., 460, the particular ship and time and place were given, so that the defendant knew what he was called to answer.

In the case now under consideration, by the first count of the indictment, the defendant is left without any circumstance of time, place or occasion, to indicate to him the act he is called to defend. The particular spirits or packages are not described, the place where found, or where distilled by him; and no clue is given to the particular act of his which is alleged to have been either a fraud or an attempt at a fraud upon the revenue. He cannot read this count of the indictment and say from it what act of his is called in question. It is clearly too indefinite and vague to apprise him of the cause of the accusation. The judgment upon this count will be arrested.

The second count, for reasons already stated, is sufficient, and the case of *United States v. Simmons*, *supra*, directly sustains it. The motion in arrest as to that count is, therefore, denied.

UNITED STATES *v.* HOWARD.

(District Court for Oregon: 1 Sawyer, 507-511. 1871.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—On March 9, 1871, the grand jury of this district found two indictments against the defendant. One of them contains one count and the other two, and they will be considered as one indictment with three counts. The first count charges that the defendant, at Corvallis, Oregon, on May 1, 1870, and continuously thenceforth to February 14, 1871, “did exercise and carry on the business of a retail liquor dealer without having paid the special tax” therefor, as required by law. The second one charges that the defendant, at the place, and continuously between the dates aforesaid, “did exercise and carry on the business of a dealer in tobacco without having paid the special tax” therefor; and the third one charges that the defendant, at the place, and continuously between the dates aforesaid, did “exercise and carry on the business and occupation of keeping and running a billiard table open to the public and for the use and accommodation of the public aforesaid, in a building on Second street, without having paid the special tax” therefor.

The defendant demurs to the indictments because: I. Of a misnomer as to his Christian name therein. II. The facts stated do not constitute an offense; and III. The acts constituting the offense are not stated therein.

§ 2402. *Objection on account of misnomer.*

Misnomer cannot be taken advantage of by demurrer. For aught that appears G. B. Howard is the true name of the defendant. If not, he must so allege by a plea in abatement, and at the same time state what his name is. This is the course of proceeding at common law. Under the code the matter is simplified, and no objection can be taken to an indictment on the ground that the defendant is not truly named therein. Or. Code, 458. If he is misnamed he must correct the mistake when called upon to plead. So far as appears, the second and third clauses of demurrer are substantially the same. The difference between is merely a verbal one. In support of this cause of demurrer it is maintained by counsel for defendant that it is not sufficient to allege that the accused was engaged in the business of a tobacco dealer or retail liquor dealer, but that the indictment should also state how or the means whereby he became such dealer. That a special tax is not required of all dealers in tobacco, and that, therefore, it is necessary to allege in the indictment, not only that the defendant was a dealer in tobacco, but that he was such a dealer or a dealer under such circumstances as required the payment by him of a special tax. That it does not appear from the third count that the defendant was proprietor of a billiard room, or that he even kept a billiard room, but only a table.

The provisions of the statutes bearing upon the question are substantially these: Section 73 of the act of June 30, 1864 (13 Stat., 248), under which the indictments are found, provides that: “Any person who shall exercise, or carry on any trade, business or profession, or do any act hereinafter mentioned, for the exercising, carrying on or doing of which a special tax is provided by law, without payment thereof, as in that behalf required, shall, for every such offense, . . . be subject to a fine or penalty of not less than \$10 nor more than \$500. And if such person shall be a manufacturer of tobacco, snuff or cigars, or a wholesale or retail dealer in liquors, he shall be further liable to imprisonment for a term not less than sixty days and not exceeding two years.” By section 44 of

the act of July 20, 1868 (15 Stat., 1848), the punishment for retailing liquor without payment of the special tax was changed to a fine of not less than \$500 and imprisonment not less than six months nor more than two years. By section 59 of the same act (id., 150) a special tax of \$25 was imposed upon retail dealers in liquors and \$100 upon wholesale dealers. This latter section also defines a retail liquor dealer to be one who sells or offers for sale spirits, wine or malt liquors of any kind, and whose annual sales, including those of all other merchandise, do not exceed \$25,000. By act of March 10, 1869 (16 Stat., 42), this definition was amended so as to make any one "who sells or offers for sale" spirits, etc., "in less quantities than five gallons at the same time," a retail liquor dealer, without regard to the amount of his annual sales.

§ 2403. *Necessary allegations to identify the accusation.*

Ordinarily, an indictment should not only contain a certain description of the crime of which the defendant is thereby accused, but also of those necessary circumstances by which it is constituted, so as to identify the accusation. But to this general rule there are some exceptions. In the case of barratry, or being a common scold, or keeping a bawly house, where the crime consists of a repetition of frequent acts, it is sufficient to charge the defendant in general as a common barrator, etc. Bouvier Dic., Verb. Indict.; 4 Bac. Ab., 310, 312.

§ 2404. *An indictment for carrying on "the business of a retail liquor dealer," etc., is sufficient without stating the circumstances.*

Now, the first count in this indictment charges the defendant, in the language of the statute, with carrying on the business of a retail liquor dealer at a certain place and between certain dates. The circumstances which constitute him such a dealer between May 1, 1870, and February 14, 1871, may be various and oft repeated, but their essential character is necessarily implied in this description of the offense. One dealer may sell spirits, another wine, and another beer; the first may sell by the drink, the second by the bottle, and the third by the gallon; but these are mere accidental differences, and in no wise affect the essential and legal character of the transactions. The material circumstance is the sale, or offer to sell, of either kind of liquor in any quantity less than five gallons at the same time. The identity of the act is sufficiently established by the circumstances of time and place. Indeed, it is probable that the distinction between wholesale and retail dealers is only made in the statute for the purpose of graduating the special tax according to the business of the dealer, and that it need not be noticed in an indictment. Be this as it may, there are no circumstances under which any one can sell, or offer to sell, distilled spirits, wine or malt liquors, in less quantities than five gallons at once, without thereby becoming a retail dealer in liquor, and liable to the payment of the special tax in that behalf provided. In this respect, I think the indictment is sufficient.

§ 2405. — *otherwise where one is charged with being "a dealer in tobacco without payment of the special tax."*

The charge of being a dealer in tobacco without payment of the special tax, as stated in the second count, is not a certain description of any crime known to the law, for, as I read the statute upon the subject, it is not every one who deals in tobacco that is required to pay such special tax. For instance, neither a person whose annual sales of tobacco amount to only \$100 or less, unless such person is also a "general retail dealer, liquor dealer, or keeper of a hotel, inn, tavern or eating house;" nor one who deals in leaf tobacco of his own production or that of his tenant, received for rent; nor one who sells tobacco of his own manufacture, is liable to a dealer's special tax. "An indictment charging

a man with nuisance, in respect of a fact which, lawful in itself, as the erecting of an inn, etc., and only becomes unlawful from particular circumstances, is insufficient, unless it set forth some circumstances that make it unlawful." 4 Bac. Ab., 311. So here, the indictment should state the particular circumstances necessary to make the defendant, being a dealer in tobacco, liable to pay the dealer's tax. As it is, for all that appears, he may or may not have been such a dealer, and therefore it is uncertain whether he committed a crime or not by the commission of the act charged. The demurrer to this count must be sustained.

§ 2406. *The words of the statute need not be followed if the indictment contain terms of equivalent import.*

The words of a statute need not be followed in describing an offense, but it is sufficient if an indictment contain terms or expressions of substantially equivalent import. It is also to be remembered, that these acts are parts of a revenue system and that this provision is remedial in its nature — intended to aid in the collection of a tax — and therefore not to be strictly construed, but otherwise. In my judgment, any person who appears to be, or for the time being is, in the possession and control of a place or building where a billiard table is kept for public use, is *prima facie* the proprietor of a billiard room and liable to pay this special tax; and this is so, although the general property and ultimate control of the place and table, or either of them, may be in some one else. In this view of the matter, I think the language of the indictment, although unskilful, is sufficient. An allegation that the defendant "carried on the business and occupation of keeping and running a billiard table" in a particular building is equivalent to an allegation that he carried on the business, etc., of keeping a billiard room, and that he was, for the time being, the proprietor thereof.

UNITED STATES *v.* IMSAND.

(Circuit Court for Alabama: 1 Woods, 581-595. 1839.)

STATEMENT OF FACTS.—Motion in arrest of judgment because the indictment fails to negative an exception in the statute.

§ 2407. *Rule of pleading in case of exceptions in statutes.*

• Opinion by Woods, J.

The rule requiring exceptions in a statute to be negatived in an indictment has been well expressed in these words: "If there is an exception in the enacting clause, the party pleading must show that his adversary is not within the exception, but if there be an exception in a subsequent clause or subsequent statute, that is matter of defense, and is to be shown by the other party." 8 Am. Jur., 234.

For example, the statute, 19 Geo. II., ch. 30, part 1, enacts that no mariner who shall serve on board any privateer employed in the British sugar colonies in the West Indies, nor any mariner being on shore in said colonies, shall be liable to be impressed by any officer of a ship of war, unless such mariner shall have before deserted from an English ship of war. A penalty of £50 was given by the same statute to any person who should sue therefor against any officer who should impress a mariner contrary to its provisions. In an action on this statute, judgment was arrested because the declaration did not allege that the mariner had not previously deserted from any of his majesty's ships of war. *Spieres v. Parker*, 1 Term R., 141. In this case it was said that the penalty was not imposed for impressing a mariner in the sugar colonies, but for

impressing a mariner there who had not previously deserted; that the word *unless*, in the statute, had precisely the same sense and operation as if it had been in so many words enacted that the penalty should be inflicted on any officer who should impress a mariner who had previously deserted. So in *Gill v. Scrivens*, 7 Term R., 27, Lord Kenyon said, "the writ ought to state all the circumstances that entitled the plaintiff to execution;" and Lord Mansfield said, "the plaintiff must aver a case that brings the defendant within the statute."

A statute of Massachusetts forbids labor and traveling on the Lord's day, except from necessity or charity. Labor or traveling merely is not forbidden, but unnecessary labor and traveling, and labor and traveling not required by charity. The exception is in the enacting clause, and the absence of necessity and charity is a constituent part of the description of the acts prohibited, exactly as if the statute had *in totidem verbis* forbidden unnecessary labor and traveling, and labor and traveling not demanded by charity. An English statute makes it a penal offense for any person other than those employed in his majesty's mint, to make or mend any instrument for coining. This exception must be negatived in an indictment. The want of such authority is part of the description of the offense itself. 1 East's Pl. Cr., 167. These examples are sufficient to illustrate the meaning and reason of the rule. The reason is simply this, that unless an exception in an enacting clause is negatived in pleading the clause, no offense appears in the indictment. The case provided for in the clause pleaded is not made out on the record. It is only when the matter is such that its affirmation or denial is essential to the apparent or *prima facie* right of the party pleading, that it must be affirmed or denied by him in the first instance.

§ 2408. *The last clause of section 78 of the act of July 20, 1868 (15 Stat., 159), has no exception that must be negatived in an indictment founded on the clause.*

Now to apply the doctrine to the case at bar. This indictment is founded on the last clause of section 78 of the act of congress, approved July 20, 1868. 15 Stat., 159. This section contains three distinct clauses. The first provides that every dealer in manufactured tobacco and snuff shall, on the first day of every month, make and return to the assistant assessor of the proper division an inventory of the tobacco and snuff which he has on hand at the time; the second clause provides that after January 1, 1869, all smoking, fine cut chewing tobacco and snuff, and after July 1, 1869, all other manufactured tobacco, shall be taken and deemed to have been manufactured after the passage of this act, and shall not be sold or offered for sale unless put up in packages and stamped, as prescribed by this act, except by retail dealers from wooden packages, stamped as provided by this act. The evident purpose of this clause is to make uniform in practice, at as early a day as possible, the provisions of the law regulating the tax on tobacco. In a previous section of the act, section 62, it had been provided that, after the passage of the act, all manufactured tobacco should be put in certain described packages, fine cut tobacco in packages weighing one-half, one, two, four, eight and sixteen ounces, or in wooden boxes containing ten, twenty, forty and sixty pounds each, and all such packages should be stamped. Now this second clause put the law in force so far as fine cut tobacco or snuff is concerned, on January 1, 1869, by creating the presumption, after that day, that such tobacco and snuff were manufactured after the passage of the act, whether such was the actual fact or not, and prescribes

that no such tobacco shall be sold unless in packages and stamped as required by the act; but allows retail dealers to sell at retail from the wooden packages stamped as provided for by the act.

The third clause provides that after the 1st day of January, 1869, any person who shall sell, or offer for sale, any smoking, fine cut chewing tobacco or snuff, not so put up in packages and stamped, shall, on conviction, be fined, etc. This last clause, it seems to me, contains no proviso or exception, and this is the clause on which the indictment is found. It is complete in itself, except only that it refers to the second clause by the words, "so put up in packages and stamped." But the second clause does not inform us how the tobacco is to be packed and stamped, but refers to the previous section (sec. 62). So that this third clause may well be construed as if it read "as provided in section 62." There is nothing excepted from the operation of this clause; all tobacco must be packed and stamped as provided by the act, and to sell any tobacco not packed and stamped is made an offense by this clause of the statute.

But there is not, even in the second clause of this section, any exception to the provisions of the act that all tobacco sold must be packed and stamped in a certain way. What is relied upon as an exception in the second clause is simply a permission to retail dealers to sell in a certain way, not unstamped tobacco, but tobacco put up in a prescribed way and duly stamped. If the third clause of the section, had provided that it should be unlawful to sell tobacco unless stamped, but that tobacco manufactured, say before 1869, or tobacco manufactured at Lynchburg, Virginia, might be sold without stamps, then it would be necessary, in an indictment under this clause, to negative these exceptions. But this clause does not make these exceptions, or any others. All tobacco sold must be packed and stamped as prescribed, and the sale of any tobacco not so packed and stamped is made an offense. Nor does the second clause make an exception. It simply provides that certain persons may sell tobacco packed and stamped, as provided by law, in a certain way, but they are nowhere in the section authorized to sell tobacco unstamped. It introduces no new element or qualification into the offense, but leaves it just as broad and unqualified as the third clause leaves it. So that when this indictment alleges that on a certain day and at a certain place, the accused sold tobacco which had not paid the revenue tax, and was not stamped as provided for by law, it describes fully and completely an offense under this statute. There is no exception to be negated, because the law makes no exception. Therefore for the reason, first, that no exception is made in the clause on which the indictment is based; and second, because no exception is made in the second or any other clause of this section, I hold that the objection to the indictment is not well taken.

§ 2409. *Presumptions of guilty intent cannot be rebutted by proof of declarations subsequent to the event.*

It is urged on behalf of Imsand that the court erred in not admitting evidence of what the accused said or did on a day subsequent to the commission of the alleged offense. While I do not see how this can be taken advantage of on motion in arrest of judgment, yet I have reflected upon the question thus raised, and am satisfied with the ruling. Where an offense against the law is shown to have been committed, the law raises the presumption of guilty intent. To allow this presumption to be overthrown by the declarations of the accused, made subsequent to the commission of the offense, would be to make him a witness in his own behalf, and his unsworn declarations made in

his own favor after the offense was committed and completed, to be used to exculpate him. What he said at the time of the transaction may be admitted as part of the *res gestæ*, but I know of no rule of law by which a prisoner can give his own declarations, made at a subsequent time.

UNITED STATES *v.* SIMMONS.

(6 Otto, 360-366. 1877.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Eastern District of New York.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—Upon an indictment, charging violations of certain provisions of the Revised Statutes of the United States, relating to distilled spirits, Simmons was found guilty as charged in each count, and moved in arrest of judgment. The first and third counts were held to be bad, and the case is here upon a statement of facts and a certificate of division in opinion upon several questions involving the sufficiency of the second and fourth counts.

The second count, pursuing the words of section 3266 of the Revised Statutes, charges that the defendant “did knowingly and unlawfully cause and procure to be used a still, boiler and other vessel, for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States, in a certain building and on certain premises where vinegar was manufactured and produced, against the peace of the United States and their dignity, and against the form of the statute of the said United States in such case made and provided.”

§ 2410. *It is not sufficient in an indictment to charge the offense in the words of the statute, unless those words fully apprise the accused of the nature of the charge against him.*

Under this count we are asked the following questions: First, whether it is sufficient, in an indictment drawn under that portion of the section which prohibits the use of a still, boiler or other vessel, for the purpose of distilling, in any building or on premises where vinegar is manufactured or produced, to charge the offense in the words of the statute. Second, whether the omission of an averment that the distilling there referred to was of alcoholic spirits is a valid objection to the count.

The first question is answered in the negative. Where the offense is purely statutory, having no relation to the common law, it is, “as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.” 1 Bish. Cr. Proc., sec. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.

Tested by these rules, the second count is insufficient. Since the defendant was not charged with using the still, boiler and other vessels himself, but only with causing and procuring some one else to use them, the name of that person should have been given. It was neither impracticable nor unreasonably difficult to have done so. If the name of such person was unknown to the

grand jurors, that fact should have been stated in the indictment. Nor does it sufficiently appear that vinegar was manufactured or produced in the building and on the premises referred to at the time the still and other vessels were used for the purpose of distilling. It is consistent with the averments that the vinegar had been manufactured or produced long prior to the date when the alleged distilling occurred. The two facts must co-exist, in order to constitute the offense described in the statute.

§ 2411. *Not necessary to aver that the spirits were alcoholic.*

In reference to the second question, we do not think it essential to aver in terms that the spirits distilled were alcoholic. In view of the statutory definition of distilling, the allegation that the vessels were used "for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States," was distinct and broad enough to advise the accused of the nature of the offense charged. Counsel for the accused contend that the indictment does not show that the stills and other vessels were used for distilling. This objection cannot be sustained. The averment, that the defendant caused and procured them to be used, implies, with sufficient certainty, that they were in fact used. *United States v. Mills*, 7 Pet., 138 (§§ 2452-53, *infra*).

§ 2412. *Not necessary to aver matters of evidence.*

Nor was it necessary, as argued by counsel for the accused, to set forth the special means employed to effect the alleged unlawful procurement. It is laid down as a general rule, that "in an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance." 2 Whart., sec. 1281; *United States v. Gooding*, 12 Wheat., 460. The nature of the means whereby the unlawful use of the still and other vessels was procured is matter of evidence to establish the imputed intent, and not of allegation in the indictment.

The fourth count is based upon section 3281 of the Revised Statutes, and charges that the defendant "did knowingly and unlawfully engage in and carry on the business of a distiller, within the intent and meaning of the internal revenue laws of the United States, with the intent to defraud the United States of the tax on the spirits distilled by him, against the peace," etc.

§ 2413. *It is sufficient to state in substance the accusation against defendant.*

This count seems to us sufficient to authorize judgment thereon. It was not necessary to state in the indictment the particular means by which the United States was to be defrauded of the tax. The defendant is entitled to a formal and substantial statement of the grounds upon which he is questioned, but not to such strictness in averment as might defeat the ends of justice. The intent to defraud the United States is of the very essence of the offense; and its existence in connection with the business of distilling being distinctly charged, must be established by satisfactory evidence. Such intent may, however, be manifested by so many acts upon the part of the accused, covering such a long period of time, as to render it difficult, if not wholly impracticable, to aver, with any degree of certainty, all the essential facts from which it may be fairly inferred.

"The means of effecting the criminal intent," says Mr. Wharton, "or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment." 1 Whart., sec. 292; *United States v. Gooding*, *supra*. To the same effect is the opinion of Mr.

Justice Miller in the case of *United States v. Ulrici*, 3 Dill., 535 (§§ 2422-23, *infra*). But it is contended that the fourth count contains no averment of an unlawful act, but only of an intent to defraud the United States of the tax on spirits; and that it is not competent for congress to punish a mere intent, however fraudulent, unaccompanied by an unlawful act. We do not think the indictment justly liable to this objection.

§ 2414. *What constitutes the offense of illicit distilling.*

The internal revenue laws define the business of a distiller. Congress has the constitutional power to prescribe, as it has done, rules and regulations, in conformity to which that business may be lawfully carried on. But the citizen may not engage in or carry on such business with the intent to defraud the government of the tax on spirits distilled by him. If he does, he thereby commits the offense charged in the count under consideration, and is liable to the punishment prescribed by statute. But such punishment is not inflicted merely or solely because of the intent to defraud. It is the act of engaging in the distillation of spirits, combined with that intent, which constitutes the offense. A question somewhat analogous arose in *The Emily*, 9 Wheat., 381. That was an information founded upon the statute prohibiting the slave trade. Under those statutes a vessel fitted out by any citizen or resident of the United States for the purpose of carrying on any trade or traffic in slaves, contrary to the provisions of the statutes, etc., was subject to forfeiture. This court said: "The object in view by the section of the law under consideration was to prevent the preparation of vessels in our own ports which were intended for the slave trade. Hence is connected with this preparation, whether it consists in building, fitting, equipping or loading, the purpose for which the act is done. The law looks at the intention, and furnishes authority to take from the offender the means designed for the preparation of the mischief. This is not punishing the intention merely; it is the preparation of the vessel and the purpose for which she is to be employed that constitutes the offense and draws after it the penalty of forfeiture. . . . The intention or purpose for which the vessel is fitting must be made out, so as to leave no reasonable doubt as to the object. This is a matter of proof, and, generally speaking, to be collected from the kind of preparation that has been made." In the subsequent case of *United States v. Gooding*, *supra*, which was a prosecution for being engaged in the slave trade contrary to the prohibitions of the act of 1818, the court said that the statute imputed no guilt to any particulars of the equipment of the vessel, but to the act of fitting out the vessel with the illegal intent to engage in the prohibited traffic; that it was "the act, combined with the intent, and not either separately, which is punishable."

These decisions furnish rules applicable to the case under consideration. The statute does not prescribe a punishment simply for the intent to defraud the United States of the tax on spirits distilled, but for the act of engaging in or carrying on the business of a distiller with that intent. The act and the fraudulent intent together constitute the offense. That congress, as a means of protecting the revenue, and of securing taxes rightfully due the government, may declare such an act, when accompanied by such an intent, to be a public offense, and prescribe a punishment therefor, we do not doubt.

The views here expressed furnish a sufficient answer to the questions propounded under the fourth count. It will, therefore, be certified as the opinion of this court on the points of division: 1. That the second count of the indictment is insufficient to authorize a judgment thereon. 2. That the fourth count

is sufficient to authorize judgment to be pronounced thereon against the defendant; and it is so ordered.

UNITED STATES v. FOX.

(Circuit Court for Massachusetts: 1 Lowell, 199-203. 1868.)

STATEMENT OF FACTS.—Two defendants were indicted for carrying on illegally the business of a distiller without having paid the special tax, and were charged with having, within a stated period, distilled, to wit, one thousand gallons of proof spirit. After conviction they moved in arrest of judgment.

§ 2415. *How the offense of illegal distilling should be charged in an indictment.*

Opinion by LOWELL, J.

As I had occasion to observe in another case, the precedents prescribe a very simple form of charging such a crime as this, and of negating the authority or license. And in general, when the charge is that a certain trade has been carried on, or that the defendant has sustained a particular character, as that of a barrator, scold, etc., it is not essential to set out the particular acts which go to make up the trading or course of life. It would be otherwise if each act were a crime; or if, by the statute definition, a fixed number of separate acts made up the crime. Under this law, the quantity of spirits distilled is important, because the minimum fine depends upon it; but not the kind of spirits nor the separate acts of distilling. So as to the time. The acts being continuous, it is well to charge them as having been done on divers days between two certain days. *Commonwealth v. Tower*, 8 Metc., 527; *Wells v. Commonwealth*, 12 Gray, 327, per Metcalf, J. The objection to the expression "then and there distilling," etc., applies only to the first count; but it is not valid even to that. The legal intent of these words is that the defendant did then and there distill. *Turns v. Commonwealth*, 6 Metc., 224.

§ 2416. *Objection cannot be taken after verdict that the defendants and each of them carried on the prohibited business.*

The charge that two persons and each of them carried on a business is well enough if they were partners or jointly concerned in the business. *Rex v. Dixon*, 10 Mod., 335. And this indictment clearly points to a joint trade. I do not decide that, in a misdemeanor, such an objection can ever be taken at this stage of the case.

§ 2417. *What is meant by "gallons of proof spirit" for excise or taxation purposes.*

It was urged with great apparent confidence, both at the trial and since, that the allegation of distilling one thousand gallons of proof spirit confines the government to showing the manufacture of spirit at the exact strength of first proof, as established by another part of the statute, that is, one-half alcohol. I am of opinion, on the contrary, that this expression, "gallons of proof spirit," in the connection in which it is found, is not intended to be descriptive of the kind or strength of the spirit distilled, but only of the quantity, according to the statute standard. The mode of taxation, borrowed by congress from the excise laws of England, is to assess spirits by a conventional measure, depending upon the amount of alcohol which they contain. This measure is expressed in gallons, though the precise number of gallons taxed does not exist, excepting when the spirit is of exactly proof strength. Thus, for the purposes of taxation, that quantity, be it more or less, which contains ten gallons of

pure alcohol, is twenty gallons of proof spirits. This has been found to be a very fair and convenient method, and it has led to the use of the phrases proof gallons, gallons of proof spirit, gallons of spirit at the strength of proof, all of which mean the estimated number of gallons contained in the liquors spoken of, whatever their actual bulk may be. This use of terms I find in Ure's Dictionary, Muspratt's Chemistry, and other works of like character. Our statute taxes the proof gallon, and it is easy to understand what that is, though I have not found any general dictionary of the language that defines any such gallon. This indictment sets out the number of such gallons, in order to enable the court to impose the proper fine.

§ 2418. *An indictment which makes charges that may all be true, and yet the person charged be innocent of any offense, is bad, and judgment upon it will be arrested. Allegations as to time.*

The last objection appears to be well taken. The indictment ought to show that the business was carried on without due payment. Now everything here alleged may be true, and yet the defendants may have paid a license fee on the 1st of May, 1866, and the business may have been conducted under the license. The new act went into operation on the 2d day of September, and it does require a larger fee to be paid by distillers than was required by the statute of 1864; but it may well be doubted whether the assessors would be authorized to assess the increased amount before the following May upon those who had licenses under the old act. I find nothing in the new act looking to any such action excepting the proviso of the eightieth section, cited at the bar, which prohibits a new assessment in certain cases; the implication from that proviso is hardly strong enough to warrant me in adding a positive duty not elsewhere enjoined. I am informed that the practice of assessors has not been uniform in the different districts in this particular; and I can easily understand that this might be so. But of this I am clear, that it cannot have been the intention of the law to render a distiller liable to these severe penalties who was carrying on his business under license when the new law took effect, unless he had been duly assessed and called on to pay the additional fee, and had refused or neglected to do so.

It is said that the time is immaterial, and that on this motion it may be presumed that evidence was given of acts done since May 1, 1867. It is not material to prove the time precisely as alleged, but it is necessary that the time charged should be consistent with the offense charged, so that the indictment shall be good on its face. Thus to lay an impossible time, or one beyond the statute of limitations; or that a crime which can only be committed on Sunday was done on Monday, etc., would be bad. In motions for arrest of judgment, the time is presumed to be truly alleged (*Commonwealth v. Hitchings*, 5 Gray, 485); and taking this to be so, this indictment shows that the statute had come into full operation only as to those distillers who began business afterwards, or who, being assessed for an extra license fee, had not paid it, and not as to all distillers; and these defendants should have been shown to be within its operation, by alleging either that they began the business under the new law, or that they were not licensed under the old law, or that having been so licensed, and having been assessed an additional fee, they had not paid it.

Judgment arrested.

UNITED STATES v. HENRY.

(District Court for New York: 3 Benedict, 29-35. 1863.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—This is a motion in arrest of judgment and also for a new trial. The defendant has been convicted on an indictment founded on the forty-second section of the internal revenue act of July 13, 1866 (14 U. S. Stat. at Large, 162). That section, so far as it applies to the present case, provides that any person who shall execute any fraudulent bond required by law or regulations, or who shall fraudulently procure the same to be executed, or who shall connive at the execution thereof, by which the payment of any internal revenue tax shall be evaded or attempted to be evaded, or which shall in any way be used or attempted to be used in fraud of the internal revenue laws and regulations, on conviction thereof, shall be imprisoned, etc. The statute does not make the offense a felony. The first count of the indictment avers that the defendant, on a day and at a place named, unlawfully, knowingly and wilfully did execute, and fraudulently procure to be executed, and connive at the execution of, a certain bond, which said bond was then and there required by law and regulations to be given by one Raedle, Raedle then and there being the owner of a distillery, and then and there being the owner of a bonded warehouse provided by him for the storage of bonded spirits of his own manufacture, which said bond, so executed as aforesaid, was then and there fraudulent, and by which said fraudulent bond the payment of a certain internal revenue tax, to wit, the tax on the spirits distilled by such person as such owner of a distillery as aforesaid, was evaded and attempted to be evaded, then and there, with intent to defraud the United States. The bond is set out *in hæc verba*, and the count avers that the defendant then and there knew the said fraudulent bond to be fraudulent, against the peace, etc. The second count is in all respects like the first, except that, instead of the averment as to the evasion and attempt at evasion of the payment of a tax, it is averred that said bond was then and there used and attempted to be used in fraud of the said internal revenue laws and regulations.

§ 2419. *In an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute. It is for the defendant, if he can, to bring the case within its exceptions.*

It is urged in support of the motion in arrest of judgment, that the indictment does not sufficiently describe the offense, and that it is defective in not setting forth in what particulars the bond was fraudulent, and how the payment of the internal revenue tax was evaded and attempted to be evaded, and how the bond was used and attempted to be used in fraud of the internal revenue laws and regulations, and how the defendant executed, and procured to be executed, and connived at the execution of, the bond. The offense specified in the statute is one created by the statute. It was not an offense at common law. The general rule is well settled that, in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute, and that, if the defendant insists upon a greater particularity, it is for him to show that from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to such general rule, but few exceptions to the rule being recognized. Whart. Amer. Cr. L., ch. 5, sec. 8, p. 132, 2d ed.; United States v. Gooding, 12 Wheat., 460, 474; United States v. Mills, 7 Pet., 138, 142 (§§ 2452-53, *infra*); United States v. Staats, 8 How.,

40, 44 (§§ 2542-44, *infra*); *United States v. Pond*, 2 Curt., 265, 268 (§§ 2454-59, *infra*).

§ 2420. *It is not necessary, in an indictment under section 42 of the act of 1866, to set out the particulars in which the bond is fraudulent or the manner in which payment of the tax was evaded.*

In the present case, the indictment, in charging the offense, uses all the words which the statute employs. It is not claimed that the words of the act are not pursued, but it is claimed that the indictment should contain more than the words of the act. In the case of *United States v. Gooding*, 12 Wheat., 460, the indictment was founded on the act of April 20, 1818 (3 U. S. Stats. at Large, 450), concerning the slave trade. It alleged that the defendant fitted out for himself, as owner, a certain vessel named, with intent to employ it in procuring negroes, etc. The offense was a misdemeanor. The objection was taken that such allegation was not a legal charge of an offense, and that it was necessary to specify in the indictment the particular equipments, in order that the defendant might have notice of the particular charge against him. The judges of the circuit court were divided in opinion on this question, and it was certified to the supreme court. In the opinion of the court, p. 473, delivered by Mr. Justice Story, it is said: "It is contended that there ought to have been a specification of the particulars of the fitting out, and that it is not sufficient to allege the act itself without them. The indictment in this respect follows the language of the statute, and is as certain as that is. We cannot perceive any good reason for holding the government to any greater certainty in the averments of the indictment. The fitting out of a vessel may and must consist of a variety of minute acts and preparations, almost infinite in their detail, and their enumeration would answer no valuable purpose to the defendant to assist him in his defense, and subserve no public policy. . . . The particular preparations are matters of evidence and not of averment. . . . In general, it may be said that it is sufficient certainty in an indictment to allege the offense in the very terms of the statute. We say in general, for there are doubtless cases where more particularity is required, either from the obvious intention of the legislature, or from the application of known principles of law. At the common law, in certain descriptions of offenses, and especially of capital offenses, great nicety and particularity are often necessary. . . . So again, in certain classes of statutes, the rule of very strict certainty has sometimes been applied where the common law furnished a close and appropriate analogy. Such are the cases of indictments for false pretenses, and sending threatening letters, where the pretenses and the letters are required to be set forth, from the close analogy to indictments for perjury and forgery. Courts of law have thought such certainty not unreasonable or inconvenient, and calculated to put the plea of *autrefois acquit* or *convict*, as well as of general defense at the trial, fairly within the power of the prisoner. But these instances are by no means considered as leading to the establishment of any general rule. On the contrary, the course has been to leave every class of cases to be decided very much upon its own peculiar circumstances. Thus, in cases of conspiracy, it has never been held necessary to set forth the overt acts or means, though these might materially assist the prisoner's defense. So, in cases of solicitation to commit crimes, it has been held sufficient to state the act of solicitation, without any averment of the special means. And in endeavors to commit a revolt, which is by statute in England made a capital offense, it has always been deemed sufficient to allege the offense in the words of the statute, without

setting forth any particulars of the manner or the means. These cases approach very near to the present, and if any, by way of precedent, ought to govern it, they well may govern it."

These principles are held to be especially applicable to indictments for offenses which are misdemeanors, or are not felonies. *United States v. Mills*, 7 Pet., 138, 142 (§§ 2452-53, *infra*). The rule applied by the supreme court in *United States v. Gooding* is one applicable in all respects to the present case. The fitting out of a vessel with intent to employ her in the slave trade is a crime created wholly by statute, and its criminality depends always, in a material degree, upon the character of the fitments of the vessel. If the vessel is fitted out with appliances for engaging in the slave trade, an important step toward the crime is made out; and, in every trial for such a crime, the character of such fitments and appliances becomes a material issue. For that reason it was urged that the fitments or equipments ought to be particularly specified in the indictment, in order that the defendant might have notice of the particular charge against him. But the court held that that was not necessary, and that a simple allegation of fitting out, in the words of the statute, was sufficient. So, too, it is no more necessary to set out in the present case the particulars in which the bond is fraudulent, or the particular manner in which the payment of the tax was evaded and attempted to be evaded, or the particular manner in which the bond was used and attempted to be used in fraud of the internal revenue laws and regulations, or the particular manner in which the defendant executed and procured to be executed and connived at the execution of the bond, than it is to set out the acts or means in cases of conspiracy, or the special means in cases of solicitations to commit crimes, or the particular manner or means employed in an endeavor to create a revolt.

It is not alleged in the present case that the defendant has suffered from any surprise or mistake or absence of witnesses, by reason of the omission of any averment in the indictment. If such a fact were established, while it would not affect the validity of the indictment, it would be a proper ground to urge in favor of a new trial. This court, while seeking to uphold the law and the rights of the government, will always sedulously endeavor to secure to every person indicted or tried for crime, a full and fair opportunity to meet the allegations brought against him. No injustice is suggested in the present case. The trial was deliberate and full, the jury considered the guilt of the defendant established, and the court is entirely satisfied with their verdict.

§ 2421. *Who is the proper person to give the warehouse bond under section 27 of the act of 1866.*

In regard to the point made that the defendant, and not Raedle, was the owner of the distillery in question, the owner of the distillery and the owner of the warehouse named in the twenty-seventh section of the act of July 13, 1866, as the proper person to give the warehouse bond there provided for, is the person who, under the twenty-fourth section of the same act, gives the notice to the government that he is the person engaged in the business of a distiller at the distillery in question. That person in this case was Raedle, and not the defendant. Raedle was the owner *quoad* the government. It could know no one else. The defendant may have been the owner in a private sense, as between him and Raedle, but Raedle was the owner in a public sense. The evidence of the making of the returns by Raedle was in fact given on the part of the defendant, and was competent evidence under the first and second counts, and would have been competent if given on the part of the government.

The question as to the defendant's guilty knowledge of the worthlessness of the sureties to the bond was a question of fact for the jury. The evidence was, in the judgment of the court, sufficient to fully warrant the verdict. The motion in arrest of judgment and the motion for a new trial are denied.

UNITED STATES v. ULRICI.

(Circuit Court for Missouri: 3 Dillon, 532-543. 1875.)

Opinion by MILLER, J.

STATEMENT OF FACTS.—These are two indictments found against one Ulrici, and have been submitted to the court upon demurrers. I will now proceed to consider them, and to pronounce the decision of the court upon the questions which have been raised. To facilitate the consideration of these questions, I will divide the objections into two classes: First, those urged against both indictments, and, second, those made to the several counts respectively.

§ 2422. *The common law doctrine of repeal of a law changed by section 13, Revised Statutes.*

1. In the first place it is contended that the act of 1875, having prescribed a different punishment for the offenses charged in these indictments, the sections of the Revised Statutes under which these indictments have been drawn are repealed, inasmuch as the later act contains no saving clause. In answer to this I would observe that the thirteenth section of the Revised Statutes contains a general provision changing, as I conceive, the rule of the common law, that a statute modifying the punishment of a crime prescribed by a prior law operates as a repeal of that law. There is no doubt that that general proposition is sound.

Any statute that varies the definition or the punishment of an offense abrogates the former statute; and no offenses committed under it can, by a well-known principle of the law, be punished, unless the later act contains a saving clause. But, as I remarked, the Revised Statutes changed this rule of the common law. They were intended to change it, and it is only the extent of the change which is here questioned. Section 13 provides that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force, for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

§ 2423. — *the words penalty, liability or forfeiture, as they occur in section 13, construed.*

Now the counsel for the defendant argues that neither the word "penalty," "forfeiture," nor "liability," is equivalent to the word "punishment," and, therefore, that the section under which these indictments are drawn is repealed, unless the penal sanction is comprehended by the term "penalty," and this, he insists, means only that which can be enforced by a civil action; or, by the term "forfeiture," which relates merely to property; or, by the term "liability," which, he says, means merely subject to a civil proceeding. But, without attempting to go into a precise technical definition of each of these words, it is my opinion that they were used by congress to include all forms of punishment for crime; and, as strong evidence of this view, I found, during the progress of the argument, and called the attention of the counsel to a section, which prescribed fine and imprisonment for two years, wherein congress used

the words: "Shall be liable to a penalty of not less than \$1,000, . . . and to imprisonment not more than two years." Moreover, any man using common language might say, and very properly, that congress had subjected a party to a liability, and, if asked what liability, might reply, a liability to be imprisoned. This is a very general use of language, and surely it would not be understood as denoting a civil proceeding. I think, therefore, that this word "liability" is intended to cover every form of punishment to which a man subjects himself, by violating the common laws of the country. Besides, as my brother Treat reminds me, the word prosecution is used in this section, and that usually denotes a criminal proceeding.

§ 2424. *It is not necessary to state facts showing intent, in addition to stating an intent to defraud.*

2. I will now proceed to consider the first indictment, which contains three counts. The first count is objected to on the ground, as it stands, that it contains merely a naked presentation of an offense which is denounced and made punishable as a felony, without any averment of those acts which are necessary to show what the felony really was. Now, let us inquire whether it is liable to this objection. It sets out that the defendant did engage in and carry on the business of a distiller, at his distillery situated in the city of St. Louis, with intent, then and there, to defraud the United States of the tax due upon each and every gallon of one thousand proof gallons of spirits thereafter to be distilled by him.

Now, what he was doing is set out with sufficient particularity. It is alleged that he was carrying on the business of distiller at a particular place and at a particular time, and, while so engaged, conceived the intent, then and there, to defraud the United States. It is contended that there should be some statement of the evidence of this intent — that some one or more of the facts which manifest this intent should be set out in the indictment; but I suggested to counsel at the time, that, if he could show where it was necessary to describe more than what the party intended to do, in a case where intent was the essence of the crime, then this might not be considered a sufficient charge, but I apprehend that no such instance can be produced. Of course, you must show that *what* the party intended to do was criminal, because the offense is something which the law itself says he should not do. And that seems to have been done here. It is charged that the accused intended to defraud the United States of taxes upon the whisky he himself produced; that that tax was an internal revenue tax of seventy cents imposed upon every gallon distilled by him. But it is said that you must show *how* he was going to do it. Now, an intent is often very hard to prove, but when you show that it is essential to a civil or criminal proceeding, you can demonstrate it in a thousand ways. All human actions are the external evidence of intent. The conduct of a man, in its thousand various forms, goes to discover his inner thoughts. And, to say that the indictment should allege these with particularity, would be very difficult for the pleader. Are we to set all the facts out? If not, where is the limit to be fixed? The objections, therefore, to this count are overruled, and it is held to be good.

§ 2425. *Where the charge is of an attempt to defraud, the indictment must aver how defendant attempted to defraud.*

3. Little was said specially upon the third count of this indictment, and yet, upon examination, we consider that there is a want of particularity in that. It is charged that Ulrici being engaged in the business of distilling at this

place, did, while so engaged, *attempt* to defraud the United States of the taxes imposed by law. Here the objection is good, for this indictment says nothing about intent. I think the defendant in this cause is entitled to have it shown what he did or how he attempted to defraud. When you say that he attempted to defraud the government, I think it is your duty to specify some acts which constitute the attempt. We therefore hold the third count to be bad.

§ 2426. *Count sufficient for wrongfully removing distilled spirits. Matter of inducement.*

4. I come now to consider the fourth count. It is very different from the others. As we construe it, it is a count for the removal of distilled spirits from the distillery to a place other than the distillery warehouse. The gentleman who defended this count did not so understand it. He treated it as an indictment of the defendant for having in his possession the mash, still and other apparatus, with intent to defraud. This is the offense which, it has been said, is charged in this count. But it does not stop here. It goes on to aver that the said Ulrici, then and there carrying on the business of a distiller, did remove a large quantity of distilled spirits from the place where they were manufactured, to a place other than the distillery warehouse. This we conceive to be a good indictment for the removal, but not for having the distillery apparatus in possession with intention to defraud the government.

It was strenuously urged that the charge for the removal is well stated, as also having stamps, etc., in possession with fraudulent intent, and that, therefore, two distinct offenses are alleged in the same count, and consequently it is bad. We concur in the opinion that the allegation of the removal is sufficient and constitutes a complete crime; but we, at the same time, consider that the first averment may be properly treated as inducement, as descriptive of the character of the person charged. It may be that there is a different punishment prescribed for a distiller committing this offense from that provided for others; if so, it was proper to describe him in order that he might be subjected to that particular punishment. There is certainly a distinct punishment prescribed for a store-keeper committing this crime, and if this were an indictment against Ulrici as a store-keeper, it should certainly recite his employment as such. The count, therefore, is adjudged good for the offense of wrongfully removing distilled spirits. This disposes of this indictment.

§ 2427. *The statute nowhere requires the failure to erase or efface stamps to be intentional.*

5. The other indictment presents far more serious questions, which have caused us much more difficulty in deciding. The first count in this indictment (leaving out the formal parts, such as the venue, the date, etc.) charges that the defendant did empty and draw off, and cause to be emptied and drawn off, so many thousand gallons of distilled spirits, contained in so many barrels, which barrels bore a tax-paid stamp to denote that the tax due the United States had been paid, "and did feloniously then and there fail, at the time of emptying and causing to be emptied and drawn off, the said contents of said barrels, to efface and obliterate from each of said barrels the said stamp," etc.

The objection to this count urged by the counsel for the defense, and which we think had a good deal of force, is, that it is nowhere charged that the offense was committed intentionally or fraudulently; that is to say, that the failure to erase the stamps, which is the essence of the crime (for anybody has a right to empty a barrel of highwines after the tax is paid), is not charged to have been done intentionally or fraudulently, and that, on the contrary, it

might have been done by any honest purchaser of the whisky procured from the distillery, and this either carelessly or absolutely without knowing the obligation imposed upon him by law. It certainly was truly said that, unless there was some criminal intent, or some fraudulent purpose in the failure to erase these stamps, it was a great hardship that a man should be punished as a felon and disgraced in public estimation by imprisonment, and all for doing that, with no intent whatever to cheat or defraud or do harm to any one. The act might have been done in ignorance; it might have been done in negligence.

This section, No. 3324, is one which, in the Revised Statutes, and I think in some revision of the internal revenue laws prior to these, was intended to condense into one paragraph a description of offenses, and a denunciation of penalties which had before been scattered in various enactments, and distributed in various parts of the revenue law. It speaks of the offense of emptying casks of distilled spirits, with stamps upon them, in two different places, and, leaving out all other offenses contained in the section, I will collocate what is said on this particular subject: "Every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits from a cask or package, bearing any mark, brand or stamp required by law, shall, at the time of emptying such cask or package, efface and obliterate said mark, stamp or brand." That is the obligation of everybody. Then comes one provision in the event that it is not done. "Every such cask or package from which said mark, brand or stamp is not effaced and obliterated, as herein required, shall be forfeited to the United States, and may be seized by any officer of internal revenue wherever found." That is the penalty denounced upon the cask itself. Then there follow several other offenses, and finally we come to the penalties applicable in this case: "Every person who fails to efface and obliterate said marks, stamp or brand, at the time of emptying such cask or package, . . . shall be deemed guilty of a felony, and shall be fined not less than \$500, nor more than \$10,000, and imprisoned not less than one year, nor more than five."

Now, it is obvious, from what I have read, that the statute itself nowhere requires in express terms that the party who failed to efface or obliterate these stamps should have done it intentionally or fraudulently. The punishment is denounced against the simple failure, and such failure is declared to be a felony, and the party is subjected to the punishment appropriate to a felony. It is very well understood, both by the courts and by the profession, as well as every one interested in the matter, that the collection of the internal revenue tax in this country has required a system of legislation for its enforcement harsh beyond everything known to our history. And it is equally well understood that, harsh as these measures are, they have been far from successful. Notwithstanding the heavy penalties denounced against crimes which go to defraud the government of its revenue from internal taxes, and notwithstanding the minuteness and particularity in the description of these crimes, and notwithstanding all the aids which congress has given by legislation to the enforcement of the revenue laws, they have been very imperfectly executed, and that the government is cheated out of perhaps one-half of its revenue, especially that from the tax on whisky and tobacco. It is not contended that the legislature has not power to make this omission or failure a felony. It is not denied that it was within their province to adopt measures as severe as this, but it is argued that, in all cases, where an act is made a felony, a felonious intent is essential to the commission of the crime. At common law that may be true, but congress and the state legislatures, in defining and punishing crimes, are above

the common law. They have a right to change it, and the progress of society has developed the necessity of doing it very often; so that, in fact, there is hardly an offense existing to-day in this country which is punished in the state courts as a common law crime. And none whatsoever exists now, or ever did exist, punishable as such in the United States courts.

§ 2428. *The theory of the revenue system considered and discussed.*

The question is, then, narrowed down to this: Did congress intend, in this provision, declaring and punishing the failure to efface these stamps, at such time, as a felony, that a criminal intent should be necessary? We see nothing in the language of the statute requiring such an intent. On the other hand, we do see very much in the whole system of legislation on internal revenue showing that congress did not make intent a necessary ingredient in the crime. In their first enactments on this subject they ignored the intent, and, very frequently in the course of their legislation concerning it, they denounced acts as crimes where the intention to do wrong constitutes no part of the offense. If such legislation be wise, or permissible at all, it is precisely in this class under consideration where one would suppose that congress intended to create the offense, without making the *scienter* essential; for this *failure* itself exposes the government to fraud, just as well and just as efficiently, whether it be intentional or unintentional. An empty cask, with this live evidence upon it, that the tax upon the liquor has been paid, is perhaps the most fertile opportunity to cheat the government out of its revenue. Indeed, this stamp regulation is as complete to protect the government as any that has ever been devised by human ingenuity, for an empty cask, with a stamp upon it, bears the evidence that the whisky afterwards put into it has duly paid the tax to the government. In various ways congress has shown a lively sense of the necessity of securing the revenue against this mode of cheating, by the use of barrels which bear the evidence that any liquor with which they may be filled has paid the tax. Those stamps had been already used, and ought to have been destroyed. Congress, therefore, saw fit to subject to very heavy penalties all persons who, either through carelessness or intentional conduct, thus exposed the government to be defrauded.

But this is not all. The decision does not rest alone upon this reasoning. The section under consideration contains a description of other offenses in which the intent is made indispensable to the completion of the crime; and there is no reasoning more often referred to, or more forcible, than that, when in the same section, an element is required in one case, and is left out in another, the omission was intentional; the legislature intended it. Now, right in the middle of this section, and in this connection, congress describes an offense where the intention is made a necessary ingredient; the language is this: "And every railroad company, or other transportation company, or person, who receives or transports, or has in possession with *intent* to transport, or with intent to cause or procure to be transported, any such empty cask or package, or any part thereof, having thereon any brand, mark or stamp, required by law to be placed on any cask or package containing distilled spirits, shall forfeit," etc. Now why should congress say that, as to you, who failed to efface these stamps, no intention is required; but, as to the man who has possession of these casks, such possession must be accompanied with a criminal intent. He must intend to transport them. It seems to me so clear that congress intended this distinction, that I hardly think it necessary to argue it.

So we come now to the punishment. I have given the descriptions of the

offenses. In one case intent is necessary, and in the other it is not. This is the concluding language of the statute: "Every person who fails to efface and obliterate said mark, stamp or brand, at the time of emptying such cask or package, or who receives any such cask or package, or any part thereof, with the intent aforesaid, . . . shall be deemed guilty of a felony." We cannot conclude, however harsh it may seem, that congress intended that a criminal intent should be averred in a charge for failure to destroy the stamps.

Nearly the same question is raised, and the same argument applies, with equal force, as to the second count, which charges the defendant with having in his possession tax-paid stamps, once used. But I shall not go over this whole argument again. It will be perceived, on reading the statute, that no intent is necessary. "Every person who has in his possession any such stamp, so removed as aforesaid, or has in his possession any canceled stamp, or any stamp which has been used, or which purports to have been used, upon any cask or package of distilled spirits, shall be deemed guilty of a felony." No intent is necessary here.

It is argued that any man might have in his possession these stamps, however innocent, and that seems to me the strongest argument made. But, on looking carefully at the internal revenue laws, it appears very obvious, in view of the manner in which these stamps are affixed, that no man can have possession of them without knowing their character. They are not new stamps, they are stamps that have been once used; and the officer who places them upon the casks puts marks and names and numbers upon them, which are conclusive evidence that they have been used. Congress obviously had that view of the subject, and we do not think you can import the intent into the statute as framed. Consequently it is not necessary to allege it in the indictment. This proposition extends to all the counts in this indictment, and the demurrer is overruled. Before I close I will call the attention of the counsel to a case in 8 Howard, 41. This whole question of the allegation of intent is discussed, especially when the statute denounces the intent and makes it a part of the offense. (See §§ 2542-44, *infra*.)

Judgment accordingly.

UNITED STATES v. MCGINNIS.

(District Court for New Jersey: 1 Abbott, 120-126. 1866.)

Opinion by FIELD, J.

STATEMENT OF FACTS.—This is an indictment against Silas J. McGinnis and George Mountjoy, manufacturers of tobacco, for making a false and fraudulent return under the internal revenue act. The motion is to quash the indictment. There are two classes of objections taken. The former apply only to the first count; the latter go to the whole indictment. I will consider the latter first; for if these are sufficient, the motion must be overruled, although the first count may be defective.

§ 2429. *Rule as to joinder of parties.*

It is objected, in the first place, that the defendants are improperly *joined* in the same indictment. The general rule is, that where two or more join in the commission of an offense, they may be indicted either jointly or separately. The rule is admitted. But it is said there is an exception to it in the case of *perjury*, and that this, although not a case of perjury, is yet analogous to it; or, to use the language of counsel, it is "next of kin." But perjury is no ex-

ception to the rule. It is rather an illustration of it. The rule is, when the offense is joint there may be a joint indictment. But in perjury, from the very nature of the case, the offense cannot be a joint one. Nor is this peculiar to perjury. It applies as well to other offenses; such as the speaking of seditious and blasphemous words, or the publication by two booksellers of the same libel. In all these cases the offense is, from its very nature, several and not joint. But when two joined in singing a libelous song, it was held by Lord Mansfield that they might be jointly indicted. *King v. Benfield & Saunders*, 2 Burr., 983. So if two booksellers, who are partners, publish a libel, they may be joined in the same indictment. Archb. Cr. Pl., 59.

Here the defendants are partners in the business of manufacturing tobacco, and they are indicted for making a false return to the assessor. The return is made and signed by them in their partnership name. It is their joint act; and if the return is false they have committed a joint offense, and may, therefore, be jointly indicted. I do not see how they could be indicted in any other way. It could hardly be said that the false return was the act of McGinnis alone, or the act of Mountjoy alone. It was the joint act of the firm of McGinnis & Mountjoy. There is nothing, I think, in this objection.

§ 2430. *The criminal provisions of the internal revenue law apply to manufacturers of tobacco.*

The other objection goes, not only to the substance of the indictment, but it strikes at the foundation of the whole prosecution. The criminal provisions of the internal revenue act, it is said, do not apply to the manufacturers of tobacco. They may be proceeded against *in rem*, but not by way of indictment.

I confess I was somewhat startled by this proposition. It was an entirely new idea. And I said to myself, while counsel was urging it so earnestly, can this be so? Is it possible that congress, after all the pains they have bestowed upon this act, and the repeated revisions to which they have subjected it, should have made this serious omission? If the business had been one from which little or no revenue was expected, we could better understand how congress might have overlooked it. But it is a business from which a larger amount of revenue is derived than from almost any other single source. It is a business, too, in which the temptations to fraud, and the facilities for committing it, are greater, perhaps, than in any other, owing to the fact that the duties are so high and the articles so easily concealed. It might have been supposed, therefore, that when the criminal provisions of the act were framed, congress would have had in view, *in an especial manner*, the manufacturers of tobacco. And yet, we are told, they are the very manufacturers to whom these criminal provisions do not apply. You may seize their tobacco, if they happen to have any on hand, when their frauds are discovered, but they are not liable to indictment.

Let us see if this be so. Section 15 of the Internal Revenue Act (13 Stat. at L., 227) provides "that if *any person* shall deliver or disclose to any assessor or assistant assessor appointed in pursuance of law, any false or fraudulent list, return, account or statement, with intent to defeat or evade the valuation, enumeration or assessment intended to be made," he shall, on conviction, be fined in any sum not exceeding \$1,000, or be imprisoned for not exceeding one year, or both, at the discretion of the court. And by section 82, the word "*person*" is made to include "partnerships, firms, associations and corporations." *Id.*, 253.

Section 15 would seem to be as comprehensive as language could make it, and to embrace within its scope every possible case of a false or fraudulent re-

turn. But still, it is said, it does not apply to the manufacturers of tobacco. Why? The argument, if I understand it, rests entirely upon an expression which occurs in section 11. By that section it is provided "that it shall be the duty of any person, partnership, firm, association or corporation made liable to any duty, license, stamp or tax imposed by law, *when not otherwise provided for*, on or before the first Monday of May in each year, and in other cases before the day of levy, to make a list or return, verified by oath or affirmation, to the assistant assessor of the district where located, of the amount of annual income, the articles or objects charged with a special duty or tax, the quantity of goods, wares and merchandise made or sold, and charged with a specific or *ad valorem* duty or tax," etc. 13 Stat. at L., 225. This section simply requires *yearly* returns of incomes and articles subject to taxation. *Yearly* returns were thought to be sufficient in ordinary cases. But there were associations, and there were manufacturers, from which, it was believed, more frequent returns ought to be required, and these were to be provided for in subsequent sections. Among these were the manufacturers of tobacco. Hence the introduction of the words "*when not otherwise provided for*." These words *do* show that section 11 was not intended to apply to the manufacturers of tobacco. But how do they show that the provisions of section 15 are not applicable to them? What possible bearing or effect can they have upon the latter section? The case, then, stands thus: By section 11 yearly returns are required, unless in cases otherwise provided for. The case of manufacturers of tobacco is otherwise provided for in section 90. Monthly returns are there required of them. But by section 15 "any false or fraudulent return" is an offense, to be punished by indictment. Why does not this apply equally to the yearly returns required by section 11, and the monthly returns required by section 90, from the manufacturers of tobacco? Can any possible reason be assigned why yearly returns, if false, should be the subject of an indictment, and not monthly returns?

Such would be a fair, and, I think, a necessary construction of the act, even if section 90 did no more than provide for monthly returns by the manufacturers of tobacco. But, as if to remove all doubt upon this subject, and make assurance doubly sure, there is a clause inserted in section 90 which seems to render all further reasoning unnecessary. After providing that manufacturers of tobacco shall make returns or statements to the assessor on or before the tenth day of each month, and that in case the duties are not paid within five days after demand thereof, distraint may be made for the amount thereof, with ten per cent. additional, we find these significant words: "Subject to all the provisions of law relating to licenses, *returns*, assessments, payment of taxes, liens, fines, *penalties* and forfeitures, not inconsistent herewith, in the case of other manufacturers." 13 Stat. at L., 474.

The clause was not, perhaps, necessary, and might be deemed superfluous. And yet it seems to have been inserted out of abundant caution, and as if to guard against just such an objection as that which has been taken. It is in effect saying, that although monthly returns, and returns of a peculiar nature, are required of the manufacturers of tobacco, they shall, nevertheless, be subject to all the provisions of the act relative to false returns, and the penalties consequent thereon, as in the case of other manufacturers. It was intimated that by the word "*penalties*" in this clause was meant pecuniary penalties, and not liability to indictment. But there are no pecuniary penalties provided for the making of false returns, otherwise than by indictment. Unless, then, manu-

facturers of tobacco can be proceeded against by way of indictment for making false and fraudulent returns, they are liable to no penalty whatever. Such, certainly, could not have been the intention of the act. I am of the opinion, therefore, that the criminal provisions of the internal revenue act do apply to the manufacturers of tobacco. If I am right in this conclusion, the motion to quash must be denied, without considering the objections which have been taken to the first count of the indictment.

It was stated by the learned counsel who argued this case upon the part of the defendants, that in the state of Pennsylvania there had been no criminal prosecutions under the internal revenue act. They had been satisfied there with proceedings *in rem*. But in this state, such proceedings have been found in many cases to furnish a very inadequate remedy. There have been, therefore, a number of criminal prosecutions in this court. And there have been convictions, too. And it is come to be generally understood, that, where individuals or associations are guilty of making false and fraudulent returns, they expose themselves, not only to seizure and forfeiture of their property, but to fine and imprisonment. To this may be owing in part the remarkable fact, that while New Jersey is but the sixteenth state in the Union in point of population, there are but five that contribute so large an amount as she does to the internal revenue of the government. It is to the vigilance and fidelity of our revenue officers, and the effective manner in which the provisions of the act are carried out, that I believe this result is in some measure to be ascribed. The motion to quash is denied.

§ 2481. **Intent.**—In an indictment under section 3397 of the Revised Statutes for an offense relating to cigars, it is not necessary to aver an intent to defraud the government. *United States v. Jacoby*,* 12 Blatch., 491.

§ 2482. **Removal of spirits.**—An indictment which charges the removal of a quantity of "distilled spirits," on which the tax had not been paid, to a place other than the distillery warehouse, is good under section 3296 of the Revised Statutes. *United States v. Anthony*,* 14 Blatch., 92.

§ 2483. **Selling liquor without paying tax.**—An indictment which alleges that the defendant did, on a certain day, and continuously thereafter to a certain day, exercise and carry on the business of a wholesale liquor dealer, without paying the special tax therefor, is sufficient without stating the facts of selling or offering for sale. *United States v. Page*,* 2 Saw., 853.

§ 2484. **Person unknown.**—An averment in an information under section 3317, Revised Statutes, as amended by the act of March 1, 1879, for the receipt of certain spirits which had been unlawfully removed from a distillery, knowing that the tax on said spirits had not been paid, that the person who delivered the spirits to the defendant was unknown to the district attorney, is unnecessary, and need not be proved. *United States v. Byrne*,* 19 Blatch., 259.

§ 2485. **Manufacturing still.**—An indictment under section 25, chapter 184, statutes of 1866, for manufacturing and removing a still without notifying the collector, must charge that the still was intended to be used within the United States, for distilling spirits, and that it was the defendant who failed to give the notice. And a statement that the collector of the district in which the still was to be used was not notified is not an affirmation that there was any such district. *United States v. Reed*,* 1 Low., 232.

§ 2486. **Stamps.**—An indictment for giving a receipt which was unstamped charged "that the receipt was issued without having thereupon an adhesive stamp of two cents, for denoting the tax chargeable thereon." It was contended that the stamp should be alleged to be "of the value of two cents," but the court overruled the objection. *United States v. Moore*,* 11 Fed. R., 248.

6. *Violation of the Postoffice Laws.*[See XII, *supra*.]

SUMMARY—*Advising and procuring under the act of 1825, § 2437.—Opening a letter, § 2438.—Embezzlement; may be proceeded against by information, § 2439; as to ownership of valuable thing contained in letter, §§ 2440, 2441, 2442; by clerk; may be charged in language of statute, § 2441; averment as to place to which letter was sent, § 2442; indictment held good, § 2443; description of bank-note contained in letter, §§ 2444, 2445; description of letter secreted, § 2445; whether letter was to be conveyed by post, § 2446; sufficient to allege taking unlawful, § 2447.—Non-mailable matter, § 2448; alleging deposit of book; variance, § 2449; averment that act was committed knowingly, sufficient, § 2450; object of use of obscene words, not material, § 2451.*

§ 2437. Section 24 of the act of 1825, "to reduce into one the several acts establishing and regulating the postoffice department," declares "that every person who . . . shall procure and advise, or assist in the doing or perpetration of any of the acts or crimes by this act forbidden, shall be subject to the same penalties and punishments as the persons are subject to who actually do or perpetrate any of the said acts or crimes." It is held that an indictment under this act for procuring and advising, etc., must allege the offense charged to the chief actor to have been committed. *United States v. Mills*, §§ 2452-53.

§ 2438. An indictment for opening a letter charged, in the language of the act making it an offense, that at a time and place mentioned the defendant "did then and there open a certain letter directed to one C., which letter had been in a postoffice of the United States . . . at H. in said district, and did so open the said letter before it had been delivered to the said C., to whom it was directed, and did so open the said letter with a design to obstruct the correspondence, and to pry into the business or secrets of another, namely, of the said C., said letter not containing any article of value." *Held*, that it was not necessary to allege that the defendant unlawfully opened the letter, as the indictment set up facts which, if true, showed the opening to have been unlawful; that it was not necessary to aver that the letter was sealed, because the opening of an unsealed letter with the intent charged would constitute the offense; that it was not necessary to allege that the letter was at the time in the lawful custody of any postal official, for under the act all that is necessary is that the letter shall have been in the lawful custody of some postal official and be opened before delivery to the person addressed; that the indictment would be good though the letter was written by the defendant himself; and that it was not necessary to allege that C. was a real and not a fictitious person, for the allegation implies it, as none but a real person could have business or secrets. *United States v. Pond*, §§ 2454-59.

§ 2439. The offense of embezzling a letter in postal custody; defined and punished by section 5467 of the Revised Statutes, not being treason, and not being declared by act of congress to be a felony, and being a misdemeanor which does not fall within the designation of *crimen falsi*, is not within the fifth amendment requiring a presentment or indictment by a grand jury. It may therefore be proceeded against by information. *United States v. Baugh*, §§ 2460-63. See § 2498.

§ 2440. Where the indictment under section 5467 of the Revised Statutes is intended to charge only the embezzlement of the letter in the custody of the postoffice, and alleges the stealing or taking of its contents only by way of description (the section requiring that the letter embezzled should have contained some one of the valuable things named in the section, and that this valuable thing should have been taken from the letter), it need not charge the ownership of the valuable thing taken in some other person than the accused. *Ibid*.

§ 2441. The offense of embezzlement by a clerk in the postoffice of a letter containing bank-bills may be charged substantially in the words of the statute. It is not necessary in such case that the property in the bank-bill should be laid in some one other than the defendant; nor that the letter came into his possession by virtue of his employment; nor is it necessary to state the places between which the letter was to be carried. *United States v. Laws*, §§ 2464-67.

§ 2442. Under the act of July 1, 1864, punishing the embezzlement of any letter containing money intended to be conveyed by post, and declaring that "the fact that any such letter . . . shall have been deposited in any postoffice . . . or in charge of any postmaster, assistant postmaster, clerk, carrier, agent or messenger, employed in the postoffice establishment of the United States, shall be taken and held as evidence that the same was intended to be conveyed by post within the meaning of this statute," it is not necessary to aver that the letter was intended to be conveyed to any particular place. It is not necessary that the indictment, under this act, should aver the ownership of the money in the letter as

being in some other person than the accused. The gist of the offense is the taking and destroying the letter, not the converting of the money. *United States v. Okie*, §§ 2468-69.

§ 2443. An indictment charging that the defendant, "a person employed in one of the departments of the postoffice establishment of the United States, a certain letter which came to the possession of him, the said," etc., "and which was intended to be conveyed by post, and containing a bank-note of great value, viz., of the value of \$50, did then and there, with force and arms, feloniously embezzle," etc., is sufficient. *United States v. Patterson*, §§ 2470-73.

§ 2444. An indictment of a postoffice employee for the embezzlement of a letter containing a bank-note need not describe the note as in a case of larceny. *Ibid.*

§ 2445. An indictment of a postmaster under the twenty-first section of the act of March 3, 1825, punishing "any person employed in any of the departments of the postoffice establishment" who "shall secrete, embezzle or destroy any letter, packet, bag or mail of letters with which he shall be intrusted, or which shall have come into his possession, and are intended to be conveyed by post, containing any bank-note," etc., need not describe particularly the letter charged to have been secreted, etc. Nor is it necessary to describe particularly the bank-notes. *United States v. Lancaster*, §§ 2474-79.

§ 2446. It is not necessary that the letter should have come into his possession to be conveyed by post. *Ibid.*

§ 2447. A charge that the taking was unlawful is sufficient, and the taking need not be alleged to have been felonious. *Ibid.*

§ 2448. Where, by an indictment found under the act of July 12, 1876, for depositing matter in the mail declared by the act to be non-mailable, the defendant has information given to him as to the offense charged, by the date of the mailing, by the title of the book, and by the address on the wrapper; and the indictment states the reason for not setting forth the book to be that it is too obscene and indecent to be set forth; and a copy of the book with a designation of the obscene passages relied on could have been obtained before the trial, by asking for a bill of particulars, the defendant is not deprived of the right "to be informed of the nature and cause of the accusation," and the indictment is sufficient. *United States v. Bennett*, §§ 2480-89. See § 2495.

§ 2449. There is no variance between an averment, in an indictment for mailing non-mailable matter, alleging the deposit of a "book," and proof of the deposit of twenty-four pages of printed matter secured together, and having a cover of four pages, and having a title page on which the title is printed identically the same as on page one of the cover, the defendant's counsel in examining the witnesses having themselves called the publication a "book." *Ibid.*

§ 2450. An indictment, under the act of July 12, 1876, for depositing non-mailable matter in the mails, is sufficient if it alleges that the defendant knowingly deposited the alleged book. It need not aver that he knew it to be non-mailable matter under the statute. *Ibid.*

§ 2451. Upon the trial of an indictment for depositing obscene and indecent matter in the mails, contrary to the act of July 12, 1876, the object of the use of the obscene words is not a subject for consideration. *Ibid.*

[NOTES.—See §§ 2490-2506.]

UNITED STATES v. MILLS.

(7 Peters, 138-143. 1833.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—The defendant was indicted in the circuit court of the United States for the district of North Carolina, under the twenty-fourth section of the act of 1825, entitled "An act to reduce into one the several acts establishing and regulating the postoffice department" (7 Laws U. S., 377), which declares "that every person who, from and after the passing of this act, shall procure and advise, or assist in the doing or perpetration of any of the acts or crimes by this act forbidden, shall be subject to the same penalties and punishments as the persons are subject to who shall actually do or perpetrate any of the said acts or crimes according to the provisions of this act." Upon the trial the defendant was convicted of the offense charged in the indictment, and a motion was made in arrest of judgment, upon which motion the judges

were opposed in opinion, and the case comes here upon the following certificate:

The defendant was indicted upon the twenty-fourth section of the act of congress, approved the 3d of March, 1825, entitled "An act to reduce into one the several acts establishing and regulating the postoffice department," for advising, procuring and assisting one Joseph I. Straughan, mail carrier, to rob the mail, and being found guilty submitted a motion in arrest of judgment; one reason in support of which motion was that the indictment did not sufficiently show any offense against the said act because the same did not directly charge or otherwise aver that the said Joseph I. Straughan did actually rob the mail, and upon argument the judges were opposed in opinion upon this question, to wit, whether an indictment grounded upon the said statute for advising, etc., a mail carrier to rob the mail, ought to set forth or aver that the said carrier did in fact commit the offense of robbing the mail, and therefore the judges directed the same to be certified to the supreme court.

§ 2452. *An indictment charging the accused with advising another to rob the mail must allege that the mail was actually robbed.*

The offense charged in this indictment is a misdemeanor where all are principals, and the doctrine applicable to principal and accessory in cases of felony does not apply. The offense, however, charged against the defendant is secondary in its character, and there can be no doubt that it must sufficiently appear upon the indictment that the offense alleged against the chief actor had in fact been committed.

The first count in the indictment alleges that the defendant did, at the time and place therein mentioned, procure, advise and assist Joseph I. Straughan to secrete, embezzle and destroy a letter with which he, the said Joseph I. Straughan, was intrusted, and which had come to his possession and was intended to be conveyed by post, etc., containing bank-notes, etc. He, the said Joseph I. Straughan, being at the time of such procuring, advising and assisting a person employed in one of the postoffice establishments, to wit, a carrier of the mail, etc., contrary to the form of the act of congress in such case made and provided. The second count in the indictment sets out the particular letter secreted, embezzled and destroyed, containing bank-notes amounting to \$60. The offense here set out against Straughan, the mail carrier, is substantially in the words of the statute, second section. If any person employed in any of the departments of the postoffice establishment shall secrete, embezzle or destroy any letter, packet, bag or mail of letters with which he shall be intrusted, or which shall have come to his possession and is intended to be conveyed by post, containing any bank-note, etc., such person shall, on conviction, be imprisoned, etc.

§ 2453. *Rule as to certainty in indictments for misdemeanors.*

The general rule is that, in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crimes where particular words must be used, and no other words, however synonymous they may seem, can be substituted. But in all cases the offense must be set forth with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged. And we think the present indictment contains such certainty, and sufficiently alleges that the offense had, in point of fact, been committed by Straughan. It charges the defendant not

only with advising, but procuring and assisting Straughan to secrete and embezzle, etc. This necessarily implies that the act was done, and is such an averment or allegation as made it necessary on the part of the prosecution to prove that the act had been done.

The particular question put in the certificate of division is, whether an indictment, grounded upon the said statute for advising, etc., a mail carrier to rob the mail, ought to set forth or aver that the said carrier did in fact commit the offense of robbing the mail. The answer to this as an abstract proposition must be in the affirmative. But if the question intended to be put is whether there must be a distinct, substantive and independent averment of that fact, we should say it is not necessary, and that the indictment in this case sufficiently sets out that the offense had been committed by Straughan, the mail carrier, and that no defect appears in the indictment for which the judgment ought to be arrested. A certificate to this effect must accordingly be sent to the circuit court.

UNITED STATES v. POND.

(Circuit Court for Massachusetts: 2 Curtis, 265-270. 1855.)

STATEMENT OF FACTS.—Indictment under the twenty-second section of the act of March 3, 1825. The averments were as follows: "That on, etc., one Abel Pond, at, etc., did then and there open a certain letter directed to one 'Ebenezer H. Currier, Esq.,' which letter had been in a postoffice of the said United States, namely, etc., and did so open the said letter before it had been delivered to the said Currier, to whom it was directed, and did so open the said letter with a design to obstruct the correspondence, and to pry into the business or secrets of another, namely, of the said Ebenezer H. Currier, said letter not containing any article of value."

There was a motion to quash the indictment, on the ground that there was no addition of mystery, degree or occupation, and on other grounds stated in the opinion.

§ 2454. *A defect pleadable in abatement, and cured by pleading over, is no ground for quashing an indictment.*

Opinion by CURTIS, J.

Without expressing any opinion respecting the necessity of an addition of the mystery or degree of the defendant, in an indictment, I think the first cause assigned insufficient to support the motion. The want of an addition, or a wrong addition, when required, is ground for a plea in abatement only. 2 Hawk., c. 23, § 125; 2 Inst., 670; *Rex v. Warren*, 1 Sid., 247; *Rex v. Checkets*, 6 Maule & S., 91. A motion by a defendant to quash an indictment must be founded on defects which would make a judgment against him, on that indictment, erroneous. Bac. Ab., Indictment, K; 2 Hawk., c. 25, § 146; Com. Dig., Indictment, H. And there are many cases where the court, in the exercise of its discretion, refuses to quash an indictment even for defects which would cause an arrest of judgment. Bac. Ab., Indictment, K. In *Rex v. Wheatley*, 1 Wm. Bl., 275, Lord Mansfield said, "If any distinction is made between quashing and arrest of judgment, that of quashing is the strongest way; because the indictment must be very grossly bad to have the court quash it at once." A defect only pleadable in abatement, and which is cured by pleading over, is not ground for quashing an indictment.

§ 2455. *Rules of pleading in charging statutory offenses.*

The cause secondly assigned, if found correct, would be sufficient. In examining it, it must be remembered that this is an indictment for a misdemeanor created by statute; and that, in general, it is sufficient to describe such an offense in the words of the statute. *United States v. Mills*, 7 Pet., 138 (§§ 2452-53, *supra*). This indictment follows the words of the statute. It is sufficient, therefore, unless the words of the statute embrace cases which it was not the intention of the legislature to include within the law. If they do, the indictment should show this is not one of the cases thus excluded. In the case of *The Mary Ann*, 8 Wheat., 389, speaking of an information, Mr. Chief Justice Marshall said, "If the words which describe the subject of the law are general, embracing a whole class of individuals, but must necessarily be so construed as to embrace only a subdivision of that class, we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the legislature;" and this is only another mode of expressing the same rule which I have stated above.

§ 2456. *An indictment for opening a letter need contain no allegation that the letter was sealed; or that the opening thereof was unlawful; or that it was in the custody of a postmaster, if it had been in the postoffice.*

To apply these rules to this case, the first objection is that the indictment does not allege that the defendant unlawfully opened the letter in question. But, following the words of the act, it does allege such facts as, if true, amount to an unlawful opening; for it avers the letter was opened before it reached the person to whom it was addressed, with intent to obstruct the correspondence and pry into the business or secrets of another. This intent renders the opening of such a letter unlawful, and it would add nothing material to call it so. The court takes notice of its illegality. The next objection is the want of an allegation that the letter was sealed. I am of opinion that opening such a letter, though unsealed, with the intent charged, is an offense against this act, and therefore it was not necessary to allege it to have been sealed.

It is further objected that it is not alleged that at the time of the opening, the letter was in the custody of any postmaster, letter carrier, or other person having lawful charge of the letter. The words of the act do not require that the letter, when opened, should be in the lawful custody of any one; but only that it had been in the postoffice, or in the custody of a mail carrier, and was opened before delivery to the person to whom directed. And I do not perceive sufficient reason why the language should not be literally construed. If a letter should be obtained by fraud or theft, from a postoffice by one person, and opened by a second, with design to pry into the business or secrets of another, or obstruct his correspondence, I think it would be an offense within this act. And so in any other case which has occurred to me, of a lawful or unlawful custody at the time of the opening, with such intent.

§ 2457. — *excluding the idea the defendant wrote the letter.*

But it is said the indictment does not exclude the idea that the letter was written by the defendant, and belonged to him at the time it was opened. I think it does; for the intent charged in the indictment could hardly exist, if the defendant wrote the letter. Such a case, of a person opening a letter which he had himself written, with intent to obstruct the correspondence, or pry into the business or secrets of another, cannot reasonably be supposed possible. But if it were possible, I do not know on what ground I could say it is not within this act. True, the mere opening of a letter by him who wrote it, and put it

into the postoffice, is an innocent act. It may be done to correct a mistake, or for many proper reasons. But doing it for an improper and wicked motive may well enough be declared criminal; and if the legislature use language broad enough to embrace such a case, and it can be proved in point of fact, in my opinion it must be deemed within the law, and subjects the offender to punishment.

§ 2458. — *the indictment need not aver that the person to whom the letter was addressed was a real person.*

It is further urged the indictment should have alleged that Ebenezer H. Currier, to whom the letter was directed, was a real person. This proceeds upon one of two grounds; the first is, that letters addressed to real persons under fictitious names are not within the protection of the act. I do not think so. Many lawful reasons may exist for writing and receiving such letters. A desire to avoid publicity, though it generally accompanies crime, is also quite consistent with innocence. Much lawful and important correspondence is conducted under fictitious addresses. Nothing is more common than to see requests to address a particular number, or one or more letters of the alphabet. I do not consider it necessary that the address on the letter should have been the true name of any person. The other ground is that it does not appear that the letter was addressed to any real person by a fictitious or real name. But the indictment charges an intent to obstruct the correspondence and pry into the business and secrets of one Ebenezer H. Currier. This cannot be proved without showing that there is a real person in existence capable of having correspondence and business, and secrets, affected by the letter in question, but also that his name is Ebenezer H. Currier. In an indictment for larceny, the property is laid in J. N. I never saw an averment made that J. N. was a real person. The allegation imports it, for none but a real person can hold property. So here the allegation that Ebenezer H. Currier had business, and secrets, and correspondence, imports that he was a real person.

§ 2459. *Venue need not be laid to the unlawful intent.*

The last objection is, that there is no venue or time laid to the allegation of intent. But venue and time are laid to the act of opening, and I am of opinion it was not necessary to lay them to the intent, which it is averred accompanied the act of opening, and so must necessarily have had its existence when and where the act was done. The motion to quash is overruled.

UNITED STATES v. BAUGH.

(Circuit Court for Virginia: 4 Hughes, 501-512; 1 Federal Reporter, 784-789. 1880.)

STATEMENT OF FACTS.—Information against Baugh, under section 5467, Revised Statutes, for embezzling a letter intrusted to him as a letter carrier. There was a verdict of guilty and a motion in arrest of judgment.

§ 2460. *Under Revised Statutes, section 5467, two offenses may be charged—embezzling a letter containing a valuable thing, and stealing that valuable thing.*

Opinion by HUGHES, J.

This is an information for the embezzlement of a letter. The offense is statutory, and the information must charge such an offense as the statute defines. It is not the taking and secreting of *any* letter that constitutes the statutory crime. Under the terms of this law, that only is embezzlement where the letter is in postal custody; is not yet delivered to the person to whom it is addressed; contains some one of the valuable things named in the statute; and

this valuable thing is taken out of the letter or stolen. This same section of the Revised Statutes also makes the act of taking this valuable thing out of the letter, or stealing it, an offense. In the case of *The United States v. Taylor*, 1 Hughes, 514, I held that there might be a prosecution for taking or stealing a valuable thing out of a letter in postal custody, and also a prosecution for embezzling the letter itself—two prosecutions in respect to the same letter, either against the same person, or against one person for embezzling the letter, and against another person for taking the valuable thing out of it, or stealing that thing, if the facts should justify the two proceedings. If prosecuting for the embezzlement, the pleader would allege the stealing by way of description only. If prosecuting for the taking or stealing, he would allege the embezzlement of the letter by the accused or some other person, merely by way of description.

In the case at bar, the government prosecutes only for the embezzlement of the letter, and alleges the stealing or taking of its contents only by way of description. Accordingly the information, after charging the embezzlement, goes on by words of description to set forth that the letter was such as is defined by the statute; and, amongst other things, that it contained two treasury notes, and that these notes were taken out of the letter and stolen. These latter words are not employed in the technical form usual in charging a larceny, because the information is not for the offense of larceny, but distinctly and only for that of embezzlement; and the taking or stealing of the notes is alleged by way of description for the purpose of bringing the offense fully within the terms of definition employed by the statute. If it were, indeed, an information for the common law offense of larceny (an offense rarely prosecuted in the United States courts), then it would, no doubt, be defective in not alleging an adverse ownership of the two treasury notes in some person other than the accused.

§ 2461. *An information may be filed and a party tried under it for embezzling a letter under Revised Statutes, section 5467, notwithstanding the fifth amendment to the constitution. What are felonies and infamous crimes.*

Having premised this much, I come now to consider particularly the grounds on which the motion in arrest of judgment is founded.

I. It being an information for embezzlement, this offense does not fall within the provisions of the fifth amendment to the national constitution. It has been often held that, when terms of the criminal law are used in that constitution, they are intended in their technical sense, and not in the latitudinous sense which may be given them in popular parlance. The term *infamous* there used is a term of the law, and is to be construed as such with technical precision. As the offense charged is not *treason*, and is not expressly declared by act of congress to be a *felony*, it is a misdemeanor. It may, therefore, be tried on information, unless it is of that class of misdemeanors which fall within the designation of *crimen falsi*. The charge is for embezzling a letter containing money, and a conviction for embezzlement has never been held to render the party convicted *incompetent to testify*, which is the test by which the character of an offense may be determined to be or not to be *crimen falsi*.

In the case of *The United States v. Lancaster*, 2 McL., 431 (§§ 2474–79, *infra*), it was decided that all offenses under the postoffice laws are *misdemeanors*. If, then, embezzlement is not an *infamous* offense, the offense charged in this information is clearly not infamous. Moreover, as it is not charged nor averred

in the information that the letter embezzled went into the defendant's possession by virtue of his employment, the offense, as set forth in the pleading, does not even involve a breach of trust. It has of late years been so often held by this and other federal courts that offenses not infamous may be tried on information, that I hardly deem it necessary to refer to the decisions. Judge Dillon has so decided in *United States v. Maxwell*, a case which has frequently been quoted and relied on in this court. See 21 Int. Rev. Rec., 148; see, also, *United States v. Shepard*, 1 Abb., 432 (§§ 3195-99, *infra*). In the case of *United States v. Miller*, it was so decided by this court. That case was much stronger than this, because the offense could much more appropriately be regarded as *crimen falsi*. In that case the charge was of *conspiring to defraud* the United States. The defendant was tried at Norfolk, convicted and sentenced to the penitentiary.

§ 2462. *The character of an offense under the federal laws is not determined by the mode and measure of punishment.*

Under the federal laws, it is not the mode or measure of the punishment prescribed that determines the character of the offense, as is the case under the statute of Virginia. Hence much of the confusion which exists in the minds of many of our best lawyers upon the question now raised in this case. By the Virginia statute, all offenses are declared to be felonious which are punishable capitally, or by confinement in the penitentiary; and if this statute prescribed a rule of decision for the federal courts in the state when trying criminal offenses against the United States, there is no doubt that the defendant at bar could be tried for his offense only upon an indictment, inasmuch as the offense is punishable by *hard labor*, which is not necessarily, but is generally, a species of punishment inflicted only in a penitentiary. But this state statute does not apply at all in the federal courts in criminal trials. The rules for our procedure in such cases are derived from the common law. See *United States v. Reid*, 12 How., 361 (§§ 2694-99, *infra*).

Under the federal laws nothing is felony unless expressly so declared to be by congress, with the exception of capital offenses. And it has always been the policy of congress to avoid, as much as possible, the multiplication of statutory felonies. See 1 Greenl. Ev., sec. 373; and 1 Whart. Cr. L., sec. 760. I may add that informations are never brought in this court, except after formal complaint under oath, and full examination before a commissioner of the court wherein the witnesses testify while confronted by the accused; nor are they filed except by leave of court. In the case at bar, the information was filed upon motion for leave to do so, in the presence of the accused and his counsel, without objection on their part, or offer to show cause to the contrary. On the whole, therefore, I must overrule the objection in arrest of judgment founded upon the fifth article of the amendments to the constitution.

§ 2463. *It is not necessary to allege ownership of notes taken out of a letter.*

II. I have already virtually disposed of the second objection, viz., that this is an information charging larceny, and, for that reason, is defective in not charging ownership of the treasury notes in some person other than the accused. I have already shown that this is a prosecution for the embezzlement of a letter; and that one of the ingredients of the offense is, that the letter must have contained some one of the valuable things mentioned in section 5487, which valuable thing (treasury notes here) shall have been taken out of or stolen from

the letter. The taking of the notes out of the letter was one of the incidents attending the offense of embezzlement, and was alleged by the pleader only as such. It was not necessary to such a purpose to allege an ownership of the two notes. The motion in arrest of judgment is denied.

UNITED STATES v. LAWS.

(District Court for Massachusetts: 2 Lowell, 115-119. 1872.)

STATEMENT OF FACTS.—Indictment charging the defendant, a clerk in the postoffice at Boston, with embezzling a letter containing a bank-note. Motion for a new trial and in arrest of judgment.

§ 2464. *Laxity allowed in pleading statutory offenses. Sufficient indictment for embezzlement of a letter.*

Opinion by LOWELL, J.

Much more laxity of pleading has been permitted in setting out the offenses created by acts of congress than obtained under the system of the common law, even when that system was applied to new statutes. The cases cited by the district attorney all agree that this offense may be charged substantially in the words of the statute. Were it not for these authorities, there would seem to be much force in the objection that the property in the bank-bill should be laid in some one other than the defendant. Such is the usual rule in embezzlement as well as larceny. And if the indictment were for stealing the money from the letter, it may be that the analogy would hold good. Such appears to be the opinion of Mr. Justice Curtis, as indicated by the marginal note to the case of *United States v. Foye*, 1 Curt., 364 (§§ 912-915, *supra*), though the judgment is silent on this point. And the supposed decision in that case, which had not then been reported, appears to have been followed in *Cummings' Case*, 3 Pittsb. L. J., 405. But where the charge is that a clerk secreted and embezzled a letter, which is described as having been addressed to some one else, and was intended to be conveyed by post, the gist of the offense is in the breach of trust as applied to the letter, and it has not been usual to lay the property in the letter in any one. Two of the cases cited at the bar decide this point. There is no real hardship in this decision, because the property might be laid in the United States as bailees, and then precisely the same evidence would be sufficient for a conviction as would be received under the counts of this indictment, and the defendant would still be left to rebut the presumption arising from the fact of his dealing with a letter which did not appear to be his.

It was argued that the envelope is no part of the letter, and that, therefore, there is a variance. This was duly reserved at the trial, and comes up regularly on the motion. So far as the argument rested on the assumed fact, concerning which there was no evidence on either side, that the use of envelopes was unknown, or was rare, when the postoffice act of 1825 was passed, both parties appear to have been under the impression that this indictment must be founded on that statute. Undoubtedly it was so intended. But section 21 of that act has been repealed or remodeled by the statute of July 1, 1864 (13 Stats., 337), which copies the section in many parts with great exactness, but adds to the list of securities that may be secreted or embezzled many that have come into use since 1825, such as stamps of various kinds, and adapts the law in other respects to the changes in the service. It is by this statute that the indictment must be tried, whatever may have been the intent of the pleader

who drew it; and it is not contended that in 1865 envelopes were not in common use and popularly considered a part of the letters which they inclosed. The other answer of the district attorney appears to be equally strong, that when a letter is in fact put in an envelope which is directed to a certain person, the letter is directed to that person, whether the envelope forms part of the letter or not.

§ 2465. — *whether it must be charged that the letter came into defendant's possession by virtue of his employment.*

Another very ingenious point much dwelt on by counsel is that the charge does not contain the technical and precise averment that the defendant came into possession of these letters by virtue of his employment. Possibly the indictment is open to this criticism; but, if so, the statute is equally deficient. The law appears to avoid with care this limitation. The language, both in the act of 1825 and in that of 1864, is, which shall have been intrusted to him, "or which shall have come to his possession," intending, no doubt, to punish all such acts committed by persons employed in the department, whether the letters were regularly in their possession or not. For instance, if a clerk takes the letters from some box or bag in charge of another clerk, or any with which he has no concern whatever, he is within the statute. If there is any implied limitation in the statute, such as of a letter picked up in the street, it may equally be left to implication in the indictment, and would be excluded by not conforming to the allegation that it was intended to be conveyed by post.

§ 2466. — *the places between which the letter was to be carried need not be charged.*

The objection that the places between which the letter was intended to be conveyed are not set out was fully considered by Judge Benedict in the case of *United States v. Okie*, 5 Blatch., 516 (§§ 2468-69, *infra*), and in that decision, overruling the objection, and in the reasons given for it, I concur.

§ 2467. *Allegations as to organization of grand jury.*

Indictments never allege the organization and action of the grand jury further than is done in this case. The signature of the foreman vouches for the regularity of the proceedings after the jury are impaneled, and the records of the court show the venire, etc.

Motion denied.

UNITED STATES v. OKIE.

(Circuit Court for New York: 5 Blatchford, 516-518. 1867.)

STATEMENT OF FACTS.—Indictment under the act of July 1, 1864, against defendant for embezzling money found in a letter which had come into his hands while acting as dead letter clerk. Verdict of guilty and motion for a new trial and in arrest of judgment.

Opinion by BENEDICT, J.

The first point taken is, that the indictment charges the embezzlement of a letter intended to be conveyed by post from New York to Philadelphia, whereas the evidence showed that the letter, although mailed in New York, and addressed and directed to Francis Keyser at Philadelphia, was deposited without prepayment of postage, with the intention of having it go through the hands of the defendant, on its way to the dead letter office at Washington, where it must by law be sent, because the postage was not prepaid. This position is based upon an erroneous reading of the indictment. There is no averment in

the indictment that the letter in question was intended to be conveyed from New York to Philadelphia. The averment is, that the letter was intended to be conveyed by post, without fixing the *termini* of the conveyance. In the latter part of the indictment it is averred that the letter "was addressed, directed to one Francis Keyser, at the city of Philadelphia." This is, however, a mere description of the letter, not of the intent as to its conveyance.

§ 2468. *The place to which the letter was to have been conveyed need not be averred in an indictment for the embezzlement of such letter.*

But it is urged that, if this be so, then the indictment must be held defective for omitting to designate any place to which the letter was to be conveyed; and the case of *United States v. Foye*, 1 Curt., 364 (§§ 912–915, *supra*), is cited as authority. The decision in that case does not sustain the position. All that was decided in that case was that, when the indictment does designate the place to which the letter is to be conveyed, the proof must conform to the averment. In that case the averment was, that "a letter addressed to John Blake, Ipswich, was mailed, to be conveyed by post to the town of Ipswich aforesaid" — a very different averment from that in the present case. Furthermore, that case arose under the act of March 3, 1825 (4 U. S. Stat. at Large, 102), while this case is under the act of July 1, 1864 (13 U. S. Stat. at Large, 337), which differs from the former act in this, that it provides that "the fact that any such letter . . . shall have been deposited in any postoffice . . . or in charge of any postmaster, assistant postmaster, clerk, carrier, agent or messenger, employed in the postoffice establishment of the United States, shall be taken and held as evidence that the same was intended to be conveyed by post, within the meaning of this statute." Whatever may have been necessary under the act of 1825, it is quite clear, under this provision of the act of 1864, that, inasmuch as it is not necessary to prove more than the fact of the deposit of the letter in a postoffice, or in charge of a postoffice agent, it cannot be necessary to aver that it was intended to be conveyed to any particular place. The averment, in the words of the statute, that the letter was "intended to be conveyed by post," is sufficient, if indeed it was necessary to state more than that it was a letter deposited in the postoffice or in charge of a postoffice clerk.

§ 2469. — *nor is it necessary to aver the ownership of the money taken from the letter.*

The only remaining point urged in behalf of the prisoner is, that the indictment is fatally defective in omitting to lay the ownership of the money in the letter as being in some other person than the accused. As to this, it is sufficient to say that the offense created by the act and charged in the indictment is the embezzlement and destruction of a letter of a certain description, to wit, containing money. The gist of the offense is the taking and destroying the letter, not the converting of the money in the letter. Larceny of money in a letter is elsewhere in the statute made a separate offense, but that is not the charge made here. In this provision of the statute the taking of the money is not made an element of the crime, and, therefore, no averment as to its ownership is necessary.

The motion must, accordingly, be denied, and judgment be entered on the verdict.

UNITED STATES *v.* PATTERSON.

(Circuit Court for Michigan: 6 McLean, 466-469. 1855.)

Opinion by WILKINS, J.

STATEMENT OF FACTS.—The motion made to arrest the judgment in this case is founded principally on two reasons: 1st. That the offense is not described in the indictment with sufficient certainty and precision. 2d. That no offense is charged against the defendant in the last four counts.

§ 2470. *Indictment for embezzling a letter held sufficiently certain.*

1. The offense in the fifth count is described thus: "That Charles Patterson, a person employed in one of the departments of the postoffice establishment of the United States, a certain letter which came to the possession of him, the said Patterson, and which was intended to be conveyed by post, and containing a bank-note of great value, viz., of the value of \$50, did then and there, with force and arms, feloniously embezzle," etc. Stripped of the verbiage descriptive of time, place and circumstance, and what is the charge here specified? Is it not "that Charles Patterson, employed as stated, embezzled a certain letter which came to his possession as deputy postmaster?" The language employed is the language of the statute creating and defining the offense, which is sufficient.

The time has gone by when the technical objections so ably urged in the argument, and for which there is so much authority in England and in our state tribunals, can be of any force in the courts of the United States. The cases of *The United States v. Lancaster*, 2 McL., 432 (§§ 2474-79, *infra*), and *The United States v. Martin*, 2 McL., 254, cover the whole ground as to this objection; and certainly settle the law in the VII. circuit until reversed by the supreme court. And the cases of *The United States v. Mills*, 7 Pet., 142 (§§ 2452-53, *supra*), and *The United States v. Gooding*, 12 Wheat., 460, declare the law of the United States to be "that it is sufficient to charge the offense in the words of the statute;" Mr. Justice Story intimating in the last case that any other description would be fatal.

§ 2471. *In an indictment for embezzlement of a bank-note it is not necessary to describe the note as in a case of larceny.*

If the offense was the simple larceny of a letter and bank-note, indictable at common law, a description of the letter and of the note would have been necessary. But the offense is embezzlement, a criminal breach of trust, and that the thing embezzled was a bank-note of a certain value is but an aggravating circumstance, and the description of the same not held essential. And the form in Arch., 156, which was for the embezzlement, as clerk, of a bill of exchange, a particular description of the bill other than its amount is omitted. This objection is not sustained.

§ 2472. *Accused sufficiently described. Surplusage.*

2. It is urged that it is not succinctly or grammatically charged that the defendant committed the offense. Separating the first clause of the charging matter from the concluding part, and making two sentences instead of one, there is doubt and obscurity as to the offender; but, considering the whole as one continuous sentence, there can be no misunderstanding as to the party accused. The court can reject the unnecessary word "*that*" as surplusage; as, in the case of *Rex v. Cooke*, 4 Harg. St. Tr., the omission of the words "*et ipse idem Petrus Cooke*," which was not fatal. Consider the "Charles Patterson" in the first clause as the nominative case, and that he did embezzle the

letter and money mentioned. Charles Patterson is charged with being employed in the postoffice department, and with embezzling a certain letter and bank-note, which then and there came into his possession. The repetition of the nominative case, namely, "that he, the said Charles," did embezzle, might have saved the court and the counsel an argument and research; but its omission does not make the charge so equivocal as to warrant the arrest of the judgment, and the consequent discharge of the accused.

It is clear some intelligent being did the act, and equally clear that no other being is connected with the description of the offense than Charles Patterson, whose name is repeated twice in the sentence; once as being the person in trusted with the letter in question, and once as being employed in the post-office at the time. To hold judicially that the indictment leaves it in doubt who is meant would be grammatically straining words beyond their usual import. Some one mentioned *did* embezzle; who was it? Not White, for Patterson is described as his deputy, and "the deputy," or "the said Patterson," must be the nominative preceding, and giving signification to the verb. But, could I have sustained this objection, it would have been of little avail to the defendant. Here, as in the first objection, English and state authorities may be considered as fully sustaining the position of defendant's counsel, but the United States cases are the other way.

§ 2473. *Where the verdict is general, if one count is good judgment will not be arrested.*

The verdict is general on an indictment containing seven counts, two of which are unquestionably good; but it is authoritatively ruled by Mr. Justice McLean, in 3 McL., 411, and by the supreme court of the United States, in 5 Wheat., 184 (§§ 542-551, *supra*) (the case of Furlong and others), "that each count in an indictment is a distinct substantive charge, and that on a general verdict, if one be deemed bad, the judgment of the court may be pronounced upon that count considered sufficient." Here the court hold *all* the counts as sufficient, and only allude to those United States authorities in order to remark that, where such exist, and are applicable, this court will not regard as of any weight whatever either the English or state decisions, and this intimation will supersede hereafter a laborious research, so commendable in counsel, but which must prove, eventually, labor lost. Motion refused.

UNITED STATES v. LANCASTER.

(Circuit Court for Illinois: 2 McLean, 431-446. 1841.)

Opinion by the COURT.

STATEMENT OF FACTS.—This is an indictment against the defendant for stealing letters containing money from the mail, while he acted as postmaster at Carrolton, in this state. The indictment contained six counts. And a motion was made, and argued at length, to quash the second, fourth, fifth and sixth counts. The second count charged that, within the district aforesaid, the said Charles Lancaster did then and there secrete and embezzle one letter which came to his possession, and was intended to be conveyed by post, containing divers bank-notes for the payment of money, he, the said Charles Lancaster, being, at the time of such secreting and embezzling as aforesaid, then and there employed in one of the departments of the postoffice establishment, to wit, a postmaster at Carrolton, in the county of Greene, in the state and district aforesaid. This count is framed under the twenty-first section of the act of 3d March, 1825, to punish

offenses against the postoffice regulations, which provides that, if any person employed in any of the departments of the postoffice establishment shall secrete, embezzle or destroy any letter, packet, bag or mail of letters with which he or they shall be intrusted, or which shall have come to his or her possession, and are intended to be conveyed by post, containing any bank-note or bank post-bill, etc., such person shall, on conviction for any such offense, be imprisoned not less than ten years nor exceeding twenty-one years.

It is objected to this count: First, that the charge of embezzling the letter is not specific; second, that the bank-notes are not described; third, no crime charged; fourth, no averment that defendant did the act at Carrolton; fifth, a conviction on this count could not be pleaded in bar to a charge of embezzling a specific letter, etc.

§ 2474. *No federal jurisdiction of common law offense.*

The federal government has no jurisdiction of offenses at common law. Even in civil cases the federal government follows the rule of the common law as adopted by the states, respectively. It can exercise no criminal jurisdiction which is not given by statute, nor punish any act criminally, except as the statute provides. The offenses defined in the postoffice law are misdemeanors and not felonies. The statute does not declare them to be felonies, and, by the federal government, they are only punishable under the statute.

§ 2475. *No technical words necessary to describe statutory offenses.*

In describing an offense under the statute no technical words are necessary as in many common law offenses. In the case of *United States v. Mills*, 7 Pet., 142 (§§ 2452-53, *supra*), the court say: "The general rule is, that in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony." In an indictment for murder no word can be substituted for *murdravit*; in burglary, for *burglariously*, etc. The second count charges the offense in the words of the statute. And the defendant is shown to have been employed, at the time the act was done, in the postoffice department.

§ 2476. *In an indictment for robbing the mails a particular description of the letter stolen is not necessary.*

Is it essential that the letter, charged to have been embezzled, should be described by stating to whom it was directed, and by whom it was written. This description is generally given where it is practicable. But it is seldom in the power of the prosecuting attorney to state these facts, much less to prove them. A postmaster, or carrier, after having stolen a letter from the mail, will not be likely to preserve it as the evidence of his guilt. Where the act is done deliberately, as may be presumed to be the case, generally, when done by a postmaster, there is not one instance in a thousand, perhaps, where the letter is not destroyed. And if a particular description of it be essential to the validity of the indictment, a conviction under this, or any other similar provision of the act, would be hopeless. Where a letter is thrown into the mail to decoy a postmaster, by an agent of the department, who opens and examines the mail immediately after it leaves the office, the letter may be described with the certainty required by the counsel; but such certainty could not be obtained in any other case where the violated letter was not recovered. The security of individuals does not seem to demand this particular description of the letter; and to require it would, in most instances, defeat the great purposes of justice.

The case of *United States v. Mills*, above cited, was brought before the

supreme court by a division of opinion of the judges of the circuit court, on a motion in arrest of judgment. There were two counts in the indictment. The first count charged that the defendant at, etc., did procure, advise and assist ——— to secrete, embezzle and destroy a mail of letters with which the said ——— was intrusted, and which had come to his possession, and was intended to be conveyed, by post, from Pittsburg, in the district aforesaid, to Fayetteville, also in said district, containing bank-notes, etc. The second count was framed in the same words as above, excepting the writer of the letter and the person to whom it was directed were stated, adding after the words "bank-notes, amounting, in the whole, to \$60, of a description to the jurors aforesaid unknown, and of the issue of a bank to the said jurors also unknown," etc.

The court say: "The second count in the indictment sets out the particular letter secreted, embezzled and destroyed, containing bank-notes amounting to \$60." And they remark, the offense here set out against ———, the mail carrier, is substantially in the words of the statute, repeating the words above cited. The court do not pronounce either count defective, but say the charge is set out with sufficient certainty to authorize a judgment. The main point was, whether the guilt of the principal was sufficiently averred to convict the defendant for having advised and procured him to do the act. By the English postoffice act the stealing of a letter from the mail by a person employed by the postoffice is made a high misdemeanor, and is punished by fine or imprisonment. And an indictment there for that offense describes the letter as "a post letter." The person to whom it was directed, or by whom it was written, is not stated; nor the place where mailed, or to which it was destined, nor the route on which it was to be conveyed. It is stated to be the property, and, also, its contents, of the postmaster-general, but this is in virtue of an act of parliament of the 7 W. 4; and 1 Vict. c. 36, s. 40.

§ 2477. — *it is sufficient to show that the letter was intended to be conveyed by post.*

It is insisted that this count does not show that the letter was, in fact, in the mail. It is enough that the letter is charged "to have come to the possession of the defendant, and was intended to be conveyed by post," in the words of the statute.

§ 2478. — *as to describing the notes contained in the letter.*

Is it necessary, particularly, to describe the bank-notes? This, in some cases, may be practicable, but in most cases it is not. In the first count of the indictment against Mills the notes were not described. Nor were they described in the second count, except as amounting to \$60. They were represented to have been issued by a bank unknown to the jurors, and of a description unknown. In an indictment for larceny, it is essential to the validity of the charge that the name of the owner of the property should be stated. And if the fact of ownership be mistaken, it is ground for the acquittal of the defendant. As before remarked, by statute in England, the property of the bank-notes, or other articles contained in a letter stolen from the mail, is laid in the postmaster-general. But this, it is presumed, could not have been done before the statute.

Why is it necessary that the property in these notes should be laid in any person in the indictment? It is difficult to perceive any good reason for this form. Under our statute it is believed not to have been done generally, if at all. The taking of these notes does not constitute the principal offense. It adds

greatly to the enormity of the act, and increases the punishment. But the main offense is the violation of the sanctity of the mail, by an individual who had sworn to protect it. In 1 Chitt. Rep., 698, it is laid down that, where the offense cannot be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of. As in the case of a conspiracy to defraud a person of goods, it is not necessary to describe the goods as in an indictment for stealing them; stating them as "divers goods" has been holden sufficient.

Pursuing the words in the statute is sufficient, in describing an offense, unless there are generic terms, in which case it is necessary to state the species, according to the truth of the case. Archb. Cr. Pl. (ed. 1840), 47. Under the English form it is not necessary to describe the bank-note, or bill of exchange, contained in the letter stolen. Archb. Cr. Pl. (ed. 1840), 211. A bill of exchange, for the payment of £10, is stated in the precedent, and no other description is given. The value of the article inclosed need not be alleged in the indictment, or proved on the trial. This, however, is under the act of 7 Will. 4, and 1 Vict., c. 36, sec. 40, which provides "it shall not be necessary, in the indictment, to allege, or to prove upon the trial, or otherwise, that the post letter bag, or any such post letter, or valuable security, was of any value." It was held by the circuit court of Ohio (*United States v. Nott*, 1 McL., 504; §§ 898-904, *supra*), that some evidence of the value of the article inclosed in the letter must be given. That "it was clearly not necessary to prove the handwriting of the presidents and cashiers whose signatures appear on the face of the notes by one who has seen them write." But this was a case where the notes were described in the indictment; of course proof of them would be required. But from this it by no means follows that it is necessary to set out the notes particularly in the indictment. The court, in the above case, further remark, that a counterfeit note being of no value, or a note on a bank which never existed, or is wholly insolvent, would not constitute the offense under the statute.

That the rights of the accused are in no sense abridged or jeopardized by a general description of the notes — "as bank-notes, for the payment of money," as contained in the present indictment, — strongly appears from the British precedent. For the principles of the common law are less departed from in that country, in the administration of justice, and, especially, of criminal justice, than in any other. And although the present form of an indictment like this has been framed under the sanction of an act of parliament, it is considered of no less weight of authority on that account. If the form of the indictment had been adopted by the rules or decisions of their courts, it would have been regarded as no slight evidence of the law. And the principle having received the sanction of the legislature, as well as of the courts, the authority is stronger. It is certainly stronger as regards the safety and propriety of the form.

That the count does not state the value of the notes, or that they were of any value, was not objected in the argument on the motion to quash, nor was it considered by the court. This is, perhaps, the strongest objection to the count. The notes are described, generally, as bank-notes for the payment of money, but if, as suggested in the above case against *Nott*, the notes must be proved to be of some value, it is doubtful whether some value should not be averred. If the notes must be of some value, the notes of an insolvent bank, which are wholly worthless, are not within the statute. If this position be correct, the notes of insolvent banks form an exception, and the rule is, where an act prosecuted criminally may be within an exception which makes it an innocent act, the defendant should be shown not to be within it. And if the

notes in this case, being on insolvent banks, could add nothing to the criminality of stealing the letter, it would seem that the indictment should show that they were not bank-notes of this description, by an averment that they were of some value. But, as before remarked at the trial, this point was not raised in the argument nor decided by the court.

§ 2479. *Various objections overruled. When an acquittal may be pleaded in bar.*

As to the third objection, that no crime is technically charged in this count, it is sufficient to say the count charges, in the very words of the statute, that the defendant did secrete and embezzle one letter, etc. The word embezzle is a significant word; it is used in the statute and means to steal by breach of trust, which is a most appropriate term, and more descriptive of the offense than any other.

It is objected, in the fourth place, that there is no averment that the act was done by the defendant while acting as postmaster at Carrolton; and that, if the act had been committed at any other place, he is not punishable under this count. There is no foundation for this exception. The count charges that the defendant did secrete and embezzle one letter containing divers bank-notes for the payment of money; the said Charles Lancaster being, at the time of such secreting and embezzling as aforesaid, then and there employed in one of the departments of the postoffice establishment, to wit, a postmaster at Carrolton, etc.

In the fifth and last place it is objected that an acquittal or conviction on this count could not be pleaded in bar to a future indictment, for the same offense, more technically described. This objection cannot be sustained. The true test whether an acquittal could be pleaded is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. *Rex v. Clark*, 1 Brod. & B., 473; *Rex v. Sheen*, 2 Carr. & P., 634; *Rex v. Emden*, 9 East, 437.

An acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for a larceny of the same goods; because on the former indictment the defendant might have been convicted of the larceny. 2 Hale, 245; *Rex v. Vandercomb*, 2 Leach, 716. Where the offense is alleged in the two indictments to have been committed at different times or places, they may be identified by a general averment that they are one and the same offense. But if one of the indictments appear to be for the murder of a person unknown, or for the larceny of the goods of a person unknown; and the other for the murder of J. N., or for larceny of the goods of J. N., a plea may aver that the person so described as a person unknown and J. N. are one and the same person and not different persons. And so in every other case, however different on the face of the two indictments the facts may be charged, yet, if they relate to the same offense, a formal acquittal or conviction may be pleaded. 2 Hawk., 6, ch. 35, sec. 3; *Rex v. Wildey*, 1 Maule & S., 183. On these principles there can be no doubt that an acquittal or conviction on this count could be pleaded in bar to an indictment for the same offense.

The fourth count, to which objection is made, charges that the defendant, etc., "did then and there feloniously steal two bank-notes for the payment of money, to wit, a bank-note issued by the Bank of Louisville, in the state of Kentucky, for the payment of \$2, and of the value of \$2; and one other bank-note issued by the Franklin Bank of Cincinnati, in the state of Ohio, for the payment of \$1, and of the value of \$1, out of a certain letter, which came to

the possession of the said Charles Lancaster, at the time the said letter came to his possession, as aforesaid, and at the time of stealing of the said bank-notes out of the said letter, as aforesaid, being then and there employed," etc. This charge is framed under the twenty-first section of the postoffice act above referred to, which provides "if any person employed as aforesaid shall steal or take any of the same, that is, bank-note or other article of value, named in the section, out of any letter, packet, bag or mail of letters, that shall come to his or her possession, such person shall, on conviction," etc.

The objections to this count are that the letter is not sufficiently described, and that it does not appear to have come into the possession of the defendant to be conveyed by post. It will be observed that this count does show that the letter came into the possession of the defendant as postmaster of Carrolton. It is not necessary that it should have come to his possession to be conveyed by post. The objection as to the statement of the letter is sufficiently answered in considering the same exception made to the second count.

An objection is made to the fifth count, which, in no respect, varies from the fourth, except the defendant is charged in the fifth with having unlawfully taken two bank-notes, etc. The words of the statute are, *shall steal or take, etc.* This count, it is insisted, charges no crime. It charges the taking to have been unlawful. Now the word unlawful is not in the statute, but the punishment provided can only have been intended by the statute where the taking was unlawful, that is, in violation of law. It could not mean a lawful taking. This offense, though one of high magnitude, is only a misdemeanor. It is not necessary to charge that there was a felonious taking. We think the count is sufficient.

The sixth and last count objected to charges that the defendant did "steal out of a mail of letters" that then and there came to his possession, etc. This count, with the above exception, is the same as the preceding count. The words of the statute are, "any person employed as aforesaid shall steal or take any of the same out of any letter, packet, bag, or *mail of letters*," etc. This count charges the defendant with stealing out of a mail of letters, etc., one bank-note, etc.; and we think it contains the requisite precision and certainty. Indeed the counts are all drawn with a commendable brevity and precision.

UNITED STATES v. BENNETT.

(Circuit Court for New York: 16 Blatchford, 338-375. 1879.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—The indictment against the defendant contains two counts. The first count avers that the defendant, "on the 12th day of November, in the year of our Lord 1878, at the southern district of New York, and within the jurisdiction of this court, did unlawfully and knowingly deposit, and cause to be deposited, in the mail of the United States, then and there, for mailing and delivery, a certain obscene, lewd and lascivious book, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said book is so lewd, obscene and lascivious that the same would be offensive to the court here, and improper to be placed upon the records thereof; wherefore, the jurors aforesaid do not set forth the same in this indictment; which said book was then and there inclosed in a paper wrapper, which said wrapper was then and there addressed and directed as follows: G. Brackett, Box 202, Granville,

N. Y." The second count avers that the defendant, "on the 12th day of November, in the year of our Lord 1878, at the southern district of New York, and within the jurisdiction of this court, unlawfully and knowingly did deposit, and cause to be deposited, in the mail of the United States, then and there, for mailing and delivery, a certain publication of an indecent character, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said publication is so indecent that the same would be offensive to the court here, and improper to be placed on the records thereof; wherefore, the jurors aforesaid do not set forth the same in this indictment; which said publication was then and there inclosed in a wrapper, which said wrapper was then and there addressed and directed as follows, to wit: G. Brackett, Box 202, Granville, N. Y." The defendant was tried at one of the exclusively criminal terms of this court, held under the provisions of sections 613 and 658 of the Revised Statutes, by the district judge for the eastern district of New York. The jury rendered a verdict of guilty, and the defendant has moved for a new trial, on a case and exceptions, and also to set aside the verdict, and for an arrest of judgment upon the same, the motion being made at an exclusively criminal term, held under the same sections, by the circuit judge for the second judicial circuit, and the district judges for the southern and eastern districts of New York.

§ 2480. *There is no provision of law whereby an indictment can be remitted by a circuit to a district court, unless the district attorney deem it necessary.*

Before the commencement of the trial, the counsel for the defendant moved the court that the case be remitted from this court to the district court for this district, so that the defendant might be there tried, and thereby acquire a right to the benefit of the act of March 3, 1879 (20 U. S. Stat. at Large, 354), entitled "An act to give circuit courts appellate jurisdiction in certain criminal cases." The court denied the motion. The act of 1879 provides that "the circuit court for each judicial district shall have jurisdiction of writs of error in all criminal cases tried before the district court, where the sentence is imprisonment, or fine and imprisonment, or where, if a fine only, the fine shall exceed the sum of \$300." It then provides for the settlement of a bill of exceptions, and for the allowance of a writ of error, and for the affirmance or reversal by the circuit court of the judgment of the district court, when it is a judgment against the defendant in a criminal case. In this case the sentence may be imprisonment or fine and imprisonment, or, if a fine only, the fine is to be not less than \$100 nor more than \$5,000. But this indictment was found in this court before the act of 1879 was passed, and there is no provision of law whereby an indictment can be remitted by a circuit court to a district court, unless the district attorney deems it necessary. Such is the provision of section 1037 of the Revised Statutes. Section 1028 provides for the remission of an indictment from the district court to the circuit court when, in the opinion of the district court, "difficult and important questions of law are involved in the case;" but there is no provision under which a circuit court can, of its own motion, or on the application of the defendant, remit an indictment to a district court.

The case states as follows: "The prosecution then proved the deposit by the defendant in the United States mail, for mailing and delivery, of the work entitled 'Cupid's Yokes, or the Binding Forces of Conjugal Life.' The counsel for the prosecution then announced that he had marked the passages in the work already in evidence in its entirety, which he would read to the jury, and with the reading of those passages to the jury he rested on the part of the

prosecution." The counsel for the prisoner thereupon moved for the discharge of the prisoner on the following grounds, to wit: "1. That the statute under which this indictment has been presented is not warranted by, and is in contravention of, the constitution of the United States, and is, therefore, without force and void. 2. That the indictment itself is defective, because it does not set out the whole pamphlet, nor localize in any way in it the matter alleged to be within the statute, nor the passages relied upon as obscene or of an indecent character, and which are now, for the first time, asserted as the grounds of this prosecution. 3. That the first count of the indictment is not sustained by the proof, for it avers the deposit of a *book*, whereas the proof shows a deposit of a *pamphlet*. This, under the statute, is a fatal variance. 4. The second count is also liable to a similar objection. It avers the deposit of 'a certain publication of an indecent character,' without further describing it, and the averment is not sustained by the evidence given. It is, therefore, void for uncertainty. 5. That the indictment does not allege an offense under the statute, in that it does not set forth that the said pamphlet is 'non-mailable' under said statute, and that it does not set out that the prisoner knew that the same was non-mailable, as is required by the statute, so as to constitute an offense thereunder." The court denied the motion.

§ 2481. *The statute prohibiting the mailing of obscene books, etc., is constitutional.*

The statute under which this indictment proceeds is section 3893 of the Revised Statutes, as amended by section 1 of the act of July 12, 1876 (19 U. S. Stat. at Large, 90). It provides as follows: "Every obscene, lewd or lascivious book, pamphlet, picture, paper, writing, print or other publication of an indecent character, . . . are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any postoffice, nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter . . . shall be deemed guilty of a misdemeanor, and shall, for each and every offense, be fined not less than \$100 nor more than \$5,000, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court." The question of the constitutionality of this statute, so far as the offenses charged in this indictment are concerned, seems to us to have been definitely settled by the decision of the supreme court in *Ex parte Jackson*, 96 U. S., 727. That decision related to a statute excluding from the mail letters and circulars concerning lotteries, but the views of the court apply fully to the present case.

§ 2482. *Rule as to setting out obscene publications in indictments.*

It is insisted that the book or publication alleged in the indictment to be obscene, lewd and lascivious, or of an indecent character, should have been set forth *in hæc verba* in the indictment, or that, at least, the passages in it relied upon as obscene or of an indecent character should have been thus set forth. This is claimed on the view that the accused has a right to demand a precise statement, in the indictment, of all the facts constituting his alleged offense. The indictment proceeds on the ground that, if it states that the obscene, lewd or lascivious book is so obscene, lewd and lascivious, or that the publication of an indecent character is so indecent, that the same would be offensive to the court and improper to be placed on the records thereof, and that, therefore, the jurors do not set forth the same in the indictment, it is not necessary to set forth *in hæc verba* the book or publication or the obscene or indecent parts of

it relied on, provided the book or publication is otherwise sufficiently identified in the indictment for the defendant to know what book or publication is intended.

It is the law of England, as decided in *Bradlaugh v. The Queen*, L. R., 3 Q. B. Div., 607, by the court of appeal, that, in an indictment at common law for publishing an obscene book, it is not sufficient to describe the book by its title only, but the words thereof alleged to be obscene must be set out, and if they are omitted the defect will not be cured by a verdict of guilty, and the indictment will be bad, either upon a motion in arrest of judgment, or upon a writ of error. This decision reversed, on a writ of error, that of the queen's bench division in *The Queen v. Bradlaugh*, L. R., 2 Q. B. Div., 569. The indictment in that case identified the book only by its title, and it neither set forth the book nor any part of it, and it did not allege any reason for not setting forth the same. The conclusion arrived at by the court of appeal was that, whenever the offense consists of words written or spoken, those words must be stated in the indictment, and, if they are not, it will be defective upon demurrer, or on motion in arrest of judgment, or on writ of error. The court rejected the reason given for not setting forth on the record obscene libels, that the records of the court should not be defiled by the indecency, and it pointed out that, in order to bring the indictment before it within the American cases cited to it, referred to hereafter, it would have been necessary to aver that the libel was so indecent and obscene that it ought not to appear on the records of the court.

In *Commonwealth v. Holmes*, 17 Mass., 336, the indictment was for an offense at common law—publishing an obscene print in a book, and also for publishing such book. The second count did not set forth the book or any part of it, but alleged that it was so obscene that it would be offensive to the court and improper to be placed on the records thereof, and that, therefore, the jurors did not set it forth in the indictment. The fifth count described the print. The defendant, after conviction, moved in arrest of judgment, because, in certain counts, no part of the book was set forth, and because, in certain other counts, the print was not so particularly described as it ought to have been, so that the jury might judge whether the same was obscene. The court said: "The second and fifth counts in this indictment are certainly good, for it can never be required that an obscene book and picture should be displayed upon the records of the court, which must be done if the description in these counts is insufficient. This would be to require that the public itself should give permanency and notoriety to indecency, in order to punish it."

In *Commonwealth v. Tarbox*, 1 Cush., 66, the indictment was for a statutory offense—publishing and distributing a paper containing obscene language. The indictment set forth what it alleged to be the purport and effect of the paper, and gave no excuse for not setting it forth *in hæc verba*. The defendant, after conviction, moved in arrest of judgment, because the indictment did not profess to set out the words or tenor of the publication, but only its substance, and did not aver any reason or excuse for not setting out the words. The court say: "In indictments for offenses of this description it is not always necessary that the contents of the publication should be inserted; but, whenever it is necessary to do so, or whenever the indictment undertakes to state the contents, whether necessary or not, the same rule prevails as in the case of libel; that is to say, the alleged obscene publication must be set out in the very words of which it is composed, and the indictment must undertake or profess

to do so by the use of appropriate language. The excepted cases occur whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and then the statement of the contents may be omitted altogether, and a description thereof substituted; but in this case a reason for the omission must appear in the indictment by proper averments. The case of *Commonwealth v. Holmes*, 17 Mass., 336, furnishes both an authority and a precedent for this form of pleading. In the present case the indictment sets out the printed paper according to its purport and effect, and not *in hæc verba*, or according to its tenor, or by words importing an exact transcript. The mode of pleading adopted cannot be sustained, and, the indictment being insufficient, judgment is arrested."

In *Commonwealth v. Sharpless*, 2 Serg. & R., 91, the indictment charged that the defendant "did exhibit and show for money to persons, to the inquest aforesaid unknown, a certain lewd, wicked, scandalous, infamous and obscene painting, representing a man in an obscene, impudent and indecent posture with a woman." After a verdict against the defendant a motion in arrest of judgment was made, on the ground that the picture was not sufficiently described in the indictment. On this point Ch. J. Tilghman says: "We do not know that the picture had any name, and therefore, it might be impossible to designate it by name. What, then, is expected? Must the indictment describe minutely the attitude and posture of the figures? I am for paying some respect to the chastity of our records. These are circumstances which may be well omitted. Whether the picture was really indecent the jury might judge from the evidence, or, if necessary, from inspection. The witnesses could identify it. I am of the opinion that the description is sufficient." The motion in arrest was overruled.

In *People v. Girardin*, 1 Mich., 91, the indictment charged that the defendant printed and published "a certain wicked, nasty, filthy, bawdy and obscene paper and libel, entitled *City Argus*, in which said libel are contained, among other things, divers wicked, false, feigned, impious, impure, bawdy and obscene matters, language and descriptions, wherein and whereby are represented the most gross scenes of lewdness and obscenity," etc. After conviction the defendant moved in arrest of judgment, on the ground that the obscene matter was not set forth in the indictment. The motion was overruled. The court said: "There is another rule, as ancient as that contended for by the counsel for the prisoner, which forbids the introduction in an indictment of obscene pictures and books. Courts will never allow their records to be polluted by bawdy and obscene matters. To do this would be to require a court of justice to perpetuate and give notoriety to an indecent publication before its author could be visited for the great wrong he may have done to the public or to individuals. And there is no hardship in this rule. To convict the defendant he must be shown to have published the libel. If he is the publisher he must be presumed to have been advised of the contents of the libel, and fully prepared to justify it. The indictment in this cause corresponds with the precedents to be found in books of the highest merit. If authority were necessary the case of *Commonwealth v. Holmes*, 17 Mass., 336, fully sustains the views we have expressed."

In *State v. Brown*, 1 Will., 619, the indictment was for selling an obscene publication, which was described in the indictment as "a certain lewd, scandalous and obscene printed paper, entitled '*Amatory Letters*,' '*Ellen's Letter to Maria*,' and '*Maria's Letter to Ellen*,' which said printed paper is so lewd

and obscene that the same would be offensive to the court here, and improper to be placed upon the records thereof; wherefore, the jurors aforesaid do not set forth the same in this indictment.” The defendant demurred to the indictment, but it was held sufficient. The court (Redfield, Ch. J.) say: “Ordinarily, the indictment, in a case like the present, should set forth the book or publication *in hæc verba*, the same as in indictments for libel or forgery. This seems to be an acknowledged principle in the books. But, even in indictments for forgery, it may be excused, as, if the forged instrument is in the possession of the opposite party. So, also, in a case like the present, if the publication be of so gross a character that spreading it upon the record will be an offense against decency, it may be excused, as all the English precedents show. Some of the precedents are much like the present, describing the obscene character of the publication in general terms. But, more generally, the nature of the publication is more specifically described. But, in both cases, the principle of the case is the same. If the paper is of a character to offend decency and outrage modesty, it need not be so spread upon the record as to produce that effect. And if it is alleged, in such case, to be a publication within the general terms in which the offense is defined by the statute, it is sufficient, which seems to be done in the present case. The degree of particularity with which the paper could be described without exposing its grossness would depend something upon the nature of that feature, whether it consisted in the words used or the general description given. In the former case, it could not be more particularly described than it here is, without offending decency.”

In *McNair v. The People*, 8 Cent. L. J., 235, the view of the court was, that, if the obscene publication is in the hands of the defendant, or is not in the power of the prosecution, or the matter is too gross and obscene to be spread on the records of the court, and the excuse for the failure to set out the obscene matter is averred in the indictment, the supposed obscene matter need not be set out in the indictment.

One Heywood was indicted in the district court of the United States for the district of Massachusetts. The indictment contained two counts. The first count alleged that the defendant “did unlawfully and knowingly deposit, and cause to be deposited, in the mail of the United States of America, then and there, for mailing and delivery, a certain obscene, lewd and lascivious book, called ‘Cupid’s Yokes, or The Binding Forces of Conjugal Life,’ which said book is so lewd, obscene and lascivious that the same would be offensive to the court here and improper to be placed upon the records thereof, wherefore, the jurors aforesaid do not set forth the same in this indictment; which said book was then and there inclosed in a wrapper and addressed as follows, that is to say: E. Edgewell, Squan Village, New Jersey, Box 49.” The second count alleged that the defendant “did wilfully and unlawfully deposit, and cause to be deposited, in the mail of the United States of America, then and there, for mailing and delivery, a certain publication of an indecent character, called ‘Cupid’s Yokes, or The Binding Forces of Conjugal Life,’ which said publication is so indecent that the same would be offensive to the court here and improper to be placed upon the records thereof, wherefore, the jurors aforesaid do not set forth the same in this indictment; which said publication was then and there inclosed in a paper wrapper and addressed as follows, that is to say: E. Edgewell, Box 49, Squan Village, New Jersey.” The indictment was remitted to the circuit court, and the defendant was tried upon it before Judge Clark, at the October term, 1877, and convicted. Afterwards he filed a motion

in arrest of judgment, in January, 1878, before sentence, on the ground that the act of congress under which the indictment was found, to wit, section 3893 of the Revised Statutes, was unconstitutional, inoperative and void. In June, 1878, he filed a motion for leave to amend said motion in arrest, by assigning the additional cause, that "the indictment does not set out the book alleged to be obscene, lewd and lascivious and indecent, and the same is not made a part of said indictment." Both motions were heard before Mr. Justice Clifford and Judge Clark and were overruled, and the defendant was sentenced to pay a fine and be imprisoned.

No case in the United States has been cited where an indictment in form like the one in this case, for publishing or circulating or mailing an obscene or indecent publication, has been held defective, either on demurrer or on motion in arrest of judgment. In *Knowles v. State*, 3 Day, 103, the information alleged that the defendant exhibited a horrid and unnatural monster, highly indecent, unseemly, and improper to be seen or exposed as a show. It stated no circumstances describing the appearance of the thing, and gave no excuse for omitting such description. It was held bad, on a motion in arrest of judgment. In *State v. Hanson*, 23 Tex., 232, the indictment alleged that the defendant "did publish an indecent and obscene newspaper called 'John Donkey,' manifestly designed to corrupt the morals of the youth of said county." The composition or print was not set out or described, nor was any excuse given in the indictment for failing to do so. The indictment was held bad, on exception. In *People v. Hallenbeck*, 52 How. Pr., 502, the indictment alleged that the defendant did utter, write and publish a certain obscene, lewd and indecent paper and writing, which said paper was inclosed in an envelope and deposited in the post-office of the United States at said town of Catskill, for mailing and delivery, the said envelope being then and there addressed by the words following, that is to say: "Mrs. Mary T. Westmore, Catskill, N. Y." The indictment was demurred to. The court held that, as there was no description whatever of the alleged libelous writing, not even by its title, and not the slightest thing was mentioned by date, subject-matter, expression, thought or word, which identified or described the alleged obscene writing, the indictment was bad.

For the rule that an indictment must state the facts which constitute the crime, three reasons have been assigned by the authorities: (1) That the person indicted may know what charge he has to meet. (2) That, if convicted or acquitted, he may with facility plead or prove a plea of *autrefois convict* or *autrefois acquit*. (3) That he may take the opinion of the court before which he is indicted by demurrer, or by motion in arrest of judgment, or the opinion of a court of error by writ of error, on the sufficiency of the statements in the indictment. As to the first two reasons, Lord Justice Bramwell says, in *Bradlaugh v. The Queen*, L. R., 3 Q. B. Div., 616, that "those two reasons may be disregarded, because an accused person is very rarely ignorant of the charge which he is called upon to meet, and no real difficulty exists as to pleading or proving a former conviction or acquittal," adding, however, that it was a very plausible observation, that, where the book as a whole is charged as an offense, the defendant cannot tell what passages will be selected as those on which the charge is to be supported. As to the third reason, the lord justice says that, in his opinion, it is to this day substantial and cannot be disregarded.

As to being informed of the charge which he has to meet, so far as regards being furnished with a copy of the book or with a copy of the alleged obscene parts of it, a defendant can always procure such information by applying to the

court, before the trial, for particulars. In the present case, there is no complaint that such application was made and refused, and the case shows that at the trial, immediately after the mailing of the book was proved, the counsel for the prosecution announced that he had marked the passages in the book which he would read to the jury, and then read them to the jury. The defendant made no claim that he was not until then advised what such passages were, or that he was prejudiced by not being until then so advised, nor did he move to delay the trial because not sooner advised of them; and the court afforded time for the examination of such marked passages and their contexts, by adjourning until the next day, before the counsel for the defendant commenced his summing up to the jury.

We are unable to recognize the force of the suggestion that the defendant, in the case of an indictment for depositing an obscene book in the mail, is entitled to take the opinion of the court by demurrer, as to whether the matter alleged to be obscene is obscene. The suggestion referred to has never been regarded, in the American cases, as of sufficient weight to lead to a following of the present English rule. The true view, we think, is, that if, in a case like the present one, any question can be raised to the court, it can only be the question whether, on the matter alleged to be obscene, a verdict that it is obscene would be set aside as clearly against evidence and reason. This question can be fully raised before the trial, by a motion to be made on the indictment and a bill of particulars. Under all other circumstances, it is for the jury to say whether the matter is obscene or not. See *Commonwealth v. Landis*, 8 Phil., 453.

§ 2483. *A defendant not sufficiently informed by the indictment of the charge is entitled to a bill of particulars.*

In the present indictment, the defendant had information given to him as to the offense charged, by the date of the mailing, by the title of the book, and by the address on the wrapper. The indictment states the reason for not setting forth the book to be, that it is too obscene and indecent to be set forth. A copy of the book, with a designation of the obscene passages relied on, could have been obtained before the trial, by asking for a bill of particulars. The defendant was not deprived of the right "to be informed of the nature and cause of the accusation." The weight of authority, as well as of reasoning, is in favor of the sufficiency of the present indictment. See *United States v. Foote*, 13 Blatch., 418.

§ 2484. *A publication of twenty-four pages, with a cover, is a book.*

It is objected that the publication in question is not a "book," as alleged in the first count of the indictment, but is a pamphlet of twenty-three pages. It consists of one sheet of sixteen pages and a half sheet of eight pages, secured together, making twenty-four pages of white paper, with a cover of four pages of colored paper. It has a title page, which is page 1 of the white paper, and the title on such title page is printed identically on page 1 of the cover. Page 24 of the white paper and pages 3 and 4 of the cover are filled with advertisements. The case shows that the defendant's counsel, on the trial, in his offers of evidence and in his questions to witnesses, called the publication in question a "book." He so called it in questions to the defendant as a witness. We think there is nothing in the objection.

It is also objected that the second count does not state whether the publication is a book, a pamphlet, a picture, a paper, a writing, or a print, or what other publication than any one of those it is; and that it is bad for uncer-

tainty. Whether the second count is good or not, the first count is good and sufficient to support the conviction.

§ 2485. *It is sufficient in an indictment for mailing an obscene book to allege that it was knowingly deposited.*

It is also contended that it is not sufficient for the indictment to allege that the defendant knowingly deposited the obscene book, but that it should aver that he knew the same to be non-mailable matter under the statute. We think the objection untenable. If the defendant knew what the book was which he was depositing, if he did not deposit it by mistake, or if he did not deposit it when he thought he was depositing another book, it is of no consequence that he may not have known or thought it to be obscene and so non-mailable, so long as it was, in fact, obscene, and he knew he was depositing the identical book complained of. The defendant as a witness at the trial was asked, on direct examination: "Q. At any time, in the sale or mailing of this book, you may state whether you did it with a knowledge or belief that it was obscene?" On objection, the question was excluded. The propriety of such exclusion is manifest, as will appear from views to be presented hereafter, in connection with the charge and the defendant's requests to charge.

§ 2486. *Where the portions of a book which were alleged to be obscene were marked and read at the trial, it was proper to exclude other portions.*

At the close of the testimony, the counsel for the defendant offered to read to the jury the whole book in question, and the district attorney objected to the reading of the whole book. The district attorney had marked the particular portions of the book which he claimed to be within the statute, and stated that he did not claim that any portions of the book, except those which were marked, brought it within the scope of the statute. The court said: "I do not feel called upon to permit the reading of any portions of the book, except the parts marked, unless it be in immediate connection, to qualify that particular portion of the book. The general scope of the book is not in issue. I, therefore, shall confine the counsel to those parts that the government has marked. If counsel on the part of the defense think proper to read them to the jury, I do not forbid that, and I allow any latitude of comment upon those portions; but, as to the rest of the book, in my opinion, there is no occasion for its being read. When counsel reach that stage where it is proper to sum up the case, portions of it may be read then. The jury shall have the whole book, but the necessity of reading the whole book is not apparent, and I am inclined to forbid it and give you an exception. If there is any particular sentence necessary to make the sense and meaning of a passage clear, I intend to allow you to read that." To this ruling the defendant's counsel excepted. The case afterwards says: "The counsel then proceeded, under permission of the court, to read, and to comment to the jury upon, each of the passages marked, as relied upon by the prosecution, and the context of the same. The passages relied upon by the prosecution, and read and commented on by the prisoner's counsel, are marked and numbered with black ink in the Exhibit 'Cupid's Yokes,' herewith submitted to the court, and the contents of the same, read by the prisoner's counsel, are indicated by red ink, and are at pages 1, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and each one of the jurymen had a copy of the book in his hand during the reading, and took the same with him." The case elsewhere states that the court allowed the counsel for the defendant to read and comment on the contexts of the passages marked by the prosecution, so far as to show the meaning of the language of the marked passages. So far as the

case shows, the counsel for the defendant was, under this ruling, left entirely free to select and read everything which he thought would show the meaning of the language of the marked passages, except that after reading the last passage marked by the prosecution marked 22, he offered to read to the jury the last page of the book, page 23, and on objection the court refused to permit it to be read, and the defendant excepted. It is entirely clear that the page so excluded contained nothing which shows the meaning of the language of any passage marked by the prosecution. We do not perceive that the defendant was deprived of any right or privilege to which he was entitled. The jurors had each of them a copy of the whole book, and the parts which the defendant's counsel was excluded from reading and commenting on were parts which, under the law applicable to this case, may properly be regarded as not being in the book.

In commenting on one of the passages which he read, the counsel for the defendant stated that he desired to read from another book a clause of a similar character, by way of showing "how that sort of illustration, or expression or narrative, is regarded in standard literature." The court excluded all reference to, and illustrations from, other books and publications, and the defendant's counsel excepted. We are unable to see that there was any error in their exclusion. It is the duty of the court to prevent the presentation to the jury of any issues other than the one on trial, and it did not tend to show that the marked passage in question was not obscene, that another passage in the book from which the marked passage was quoted, or another passage in some other book, was not generally accepted as obscene. The foregoing are all the matters occurring prior to the requests to charge, in respect to which error is alleged, in the argument of the defendant's counsel.

Prior to the charge to the jury, the following requests to charge were made by the defendant and were refused by the court, except as they agree with its charge and rulings as made: "(1) That by the word *obscene* is meant 'that which openly wounds the sense of decency,' by exciting lust or disgust. That by *indecent* is meant the wanton and unnecessary expression or exposure, in words or pictures, of that which the common sense of decency requires should be kept private or concealed. That where words which might otherwise be obscene or indecent are used in good faith, in social polemics, philosophical writings, serious arguments, or for any scientific purpose, and are not thrust forward wantonly or for the purpose of exciting lust or disgust, they are justified by the object of their use, and are not obscene or indecent, within the meaning and purpose of the law. (2) That none of the words used in the parts of the essay in question relied upon by the prosecution are, by and of themselves, necessarily obscene or indecent; that all of said words are well known and common words of the English language, and may be properly used as such, and are not within the meaning and purpose of the law, unless wantonly and unnecessarily used, so as to offend the sense of decency. (3) That the true character of these words, and whether they are obscene or not, must be determined by their context, and by the scope and purpose of the whole essay, and by the jury. That any of the words objected to, which may at first seem to be unnecessarily used, are not within the law, if reasonably required by the argument and the context, and if they were plainly so used by the author. (4) That because some of the words and sentences used may be, from certain points of view, or generally, immodest, indelicate, impolite, unbecoming, blasphemous, irreligious, immoral and bad in their influence upon society, such words and sentences are not, therefore,

necessarily obscene, and do not make the essay obscene, within the intent of the law, nor under this indictment. (5) That the whole scope of the essay and the purposes and intent of the author must be considered before it is found that the words and sentences claimed to be objectionable bring it within the meaning and purpose of the law. That, if the general intent and purpose of the essay was not to make an obscene or indecent publication, the passages relied upon by the prosecution do not necessarily make it so. (6) That the fact that the words and sentences claimed to be obscene, or similar ones, are, and have been for years, in common use in scientific, polemic or controversial writings, and in reformatory and general literature, is to be considered by the jury in determining whether they are used in this essay so as to be really an offense under the law or not, and that such use affords a strong presumption that they are not within the law. (7) That, when the words and sentences claimed to be obscene are used in a social polemic, the necessity and propriety of their use in a work of that character should be considered by the jury, and, if they appear to have been used by the author in good faith, for the purposes of the polemic, and not wantonly, for the purpose to offend decency or to excite lust or disgust, they do not constitute an offense under the statute. (8) That, although it may appear certain to the jury that the doctrines and sentiments of the passages relied upon by the prosecution or of the whole essay would be injurious to the community or destructive to society, if generally practiced, yet, if said words and sentences were used by the author in good faith to properly and reasonably set forth his mistaken and wicked doctrines and sentiments, and not wantonly or unnecessarily, to offend decency or to excite lust or disgust, such words and sentences are not within the law. In no case should the jury be influenced by the effect which, in their judgment, those mistaken and wicked doctrines and sentiments might have upon morals or society, or the family, or religion, or the welfare of the community, if brought into general practice. (9) That this statute, being in derogation of the common law, and restrictive of the liberties of the citizen, and of a highly penal character, should be strictly construed in cases of this kind. (10) That when in cases under this law doubts and uncertainties arise as to the meaning and intentions of the words objected to, or in construing them with the context, or if there are difficulties in applying the definitions given by the court, all reasonable doubts, uncertainties and difficulties are to be resolved by giving the accused the benefit of them."

The court then charged the jury as follows: "The statute under which the defendant is indicted provides that 'every obscene, lewd or lascivious book or pamphlet, picture, paper, writing, print, or other publication of an indecent character,' is non-mailable matter, and shall not be conveyed in the mails, nor delivered from any postoffice, nor by any letter carrier; and that any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything so declared to be non-mailable matter, shall be guilty of an offense, and liable to the punishment stated. The object of this statute was to prevent the employment of the mails of the United States for the purpose of disseminating obscene literature. The necessity of such a statute is obvious to any person who has paid attention to the facts. If you think what the United States mails are, how they are protected by the law, where they go, the secrecy attending their operations, you will at once see, that, for the distribution of matter of any kind upon paper, there is no other engine of equal power. It is the machine best adapted to the dissemination of obscene literature, because of the fact that it reaches every person, and letters delivered by the mail can

be received in secret by the person to whom they are addressed, whether in their own or in fictitious names. For this reason the mails have been used, and the extent to which they have been used for that purpose is appalling to one acquainted with the facts. These facts have been made known to the congress of the United States, the government of the United States alone being charged with the carrying of the mails, and it being competent for the congress of the United States to say what shall be and what shall not be carried in the mails, whereupon congress declared that obscene matter should not be so carried. Nobody can question the justice, the wisdom, the necessity of such a statute. This statute does not undertake to regulate the publication of matter. Matter of any kind may be published, and not violate this law. It does not undertake to regulate the dissemination of obscene matter. Such matter may be sent by express without violating any law of the United States. But, what the United States government says is, that the mails of the United States shall not be devoted to this purpose. It is a law to protect the community against the abuse of that powerful engine, the United States mail. The constitutionality of the law is not a question here. The statute is the law of the land, and it is to be enforced by the courts, to be obeyed by the citizens. Under this statute, this defendant is charged with having deposited in the mail an obscene book or publication. There has been some talk about who made the complaint. But who made the complaint which caused this prosecution to be instituted is a matter of no consequence to you or to me. The motives of the person who made the complaint are not material here. Most infractions of law are discovered and punished by reason of hostility or enmity on the part of some person in the community against some other person. But that does not affect the question of the guilt or innocence of the party accused, when he is properly accused under the law. So you will dismiss from your consideration the question whether Mr. Comstock has hostile feelings against this man or not. It makes no difference whether he has or has not. The prosecution is not his. It is the prosecution of the United States. Under our form of criminal procedure, a prosecution must be indorsed by the district attorney, an officer selected under the law, as a public prosecutor. There is not such an officer in all countries. In England, I think, to this day, there is no public prosecutor, which accounts, perhaps, for the happening of such an event as was alluded to by the counsel, in the case of Shelley's works.

"But here there is a public prosecutor, and he must entertain the complaint and present it to the grand jury. The grand jury, under their oaths, must find it a case proper to be presented to a petit jury; and that has been done in this case. Whether it is wise to institute such prosecutions or not is not a question for you or for me. You are not the district attorney; you have not the responsibility of the district attorney upon you; and it is not likely that you will be willing to assume that responsibility, by deciding any case like this upon the question whether the effect of such a prosecution will be good or ill. Your duty in this case, under your oaths, can only be discharged by rendering a verdict according to the facts proven. The facts belong to you; the questions of law belong to the court. You will not undertake, therefore, to speculate upon the construction of the law, but leave that responsibility upon the court, where it belongs. You will consider the facts, for your responsibility is a responsibility in regard to the facts of the case. I do not intend, in my remarks, to convey to you my opinion of the questions of fact involved. I intend to leave you, upon your oaths and your responsibility, to say what are

the facts here, and to render the verdict which the facts may require. This is not a question of religion, nor a question of the freedom of the press. There is no such question involved in this prosecution. This defendant may entertain peculiar views on the subject of religion; he may be an infidel; he may have peculiar and improper notions on the marriage relation; he may be a free-thinker; he may be whatever he pleases; that should have no effect upon your deliberations. Whatever may be his beliefs or opinions, he is entitled here to a verdict at your hands, impartially, upon the simple fact involved in this case and upon no other fact. If you should find a verdict against this man because you do not like his doctrines in respect to religion; if you should find a verdict against him because you do not like attacks on the marriage relation, you would do injustice to the man, and to the community also, for the community has no other interest than to have criminal cases decided correctly according to the law, and impartially upon the facts. But if you should find that this book is an obscene book, he having deposited it, and you nevertheless acquit him because of any opinion you may have in harmony with his doctrines or beliefs, you would be equally guilty of an injustice. You are not, therefore, called upon by your verdict to express your opinion in regard to any doctrines alluded to in this publication. All men in this country, so far as this statute is concerned, have a right to their opinions. They may publish them; this man may entertain the opinions expressed in this book, or he may not. Free-lovers and freethinkers have a right to their views, and they may express them and they may publish them; but they cannot publish them in connection with obscene matter, and then send that matter through the mails. If, in the discussion of any doctrine, any man uses obscene matter, he cannot send it through the mails of the United States without violating the law. Of course, freedom of the press, which, I think, was alluded to, has nothing to do with this case. Freedom of the press does not include freedom to use the mails for the purpose of distributing obscene literature, and no right or privilege of the press is infringed by the exclusion of obscene literature from the mails. That this man mailed this book is proved, and not controverted; that he knew what the book was that he mailed is not controverted. The statute has the word 'knowingly.' That means that the man must know what book he deposited. A boy might be sent with an obscene book wrapped in a paper, and he might deposit it in the mail, and he would not be guilty under this statute, for it says 'knowingly;' but when a man deposits in the mail a book, if he knows what the book is, then he has made a deposit knowingly, within the statute. You could have no question about that, it not being controverted that this man mailed this book, and that he knew what book he was mailing. The only question, therefore, which you are called upon to decide is whether or not the book is obscene, lewd or lascivious, or of an indecent character. Now, you have had this book in your hands, and the district attorney has marked certain passages. He does not claim that any passages in that bring it within the statute except those marked, and therefore you may confine your attention to the marked passages as the matter which you are to determine upon. It is upon those passages alone that this case must turn.

"There has been some discussion in this case tending in the direction of the argument that, if the general scope of the book was not obscene, the presence of obscene matter in it would not bring it within this statute. Such is not the law. If this book is, in any substantial part of it, obscene, lewd, lascivious, or of an indecent character, then it is non-mailable under this statute and the

defendant is guilty. Any other rule of law would render the statute nugatory. If a person should write an essay upon the subject of honesty and fill it with notes containing filthy and obscene stories, and could then pass it through the mails on the ground that it was an essay on honesty, the way would be easy to a disregard of the statute. So I again charge you that the general scope of this book is not the matter in hand, but the question is whether those marked passages are obscene or indecent in character. There are, in the language, words known as words obscene in themselves. It is not necessary, in order to make a book obscene, that such words should be found in it. The most obscene, lewd and lascivious matter may be conveyed by words which in themselves are not of an obscene character. The question is as to the idea which is conveyed in the words that are used, and that idea characterizes the language. As I have stated, the object with which this book is written is not material, nor is the motive which led the defendant to mail the book material. The effect likely to be produced by this matter which was in the book is the question for you. A man might—I mention this by way of illustration only—a man might conclude that it would be the best way to promote honesty and purity to bind together in a single book all the obscene stories that could be found—and we may imagine a person to honestly entertain the belief that that course would be the best way to excite disgust and so to prevent vice—he might honestly entertain that view and be as good a man as any man in the community; yet, if he published such a book and concluded to disseminate it through the mails, he would be a violator of this statute. The question is whether this man mailed an obscene book, not why he mailed it. His motive may have been ever so pure; if the book he mailed was obscene he is guilty. You see, then, that all you are called upon to determine in this case is, whether the marked passages in this book are obscene, lewd or of an indecent character.

§ 2487. *Test of obscenity.*

“Now I give you the test by which you are to determine the question. It is a test which has been often applied and has passed the examination of many courts, and I repeat it here as the test to be used by you. You will apply this test to these marked passages, and if, judged by this test, you find any of them to be obscene or of an indecent character, it will be your duty to find the prisoner guilty. If you do not find them, judged by this test, to be obscene or of an indecent character, it will be your duty to acquit him. This is the test of obscenity within the meaning of the statute: It is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall. If you believe such to be the tendency of the matter in these marked passages, you must find the book obscene. If you find that such is not the tendency of the matter in these marked passages, you must find the book not obscene, and acquit the prisoner. The statute uses the word ‘lewd,’ which means having a tendency to excite lustful thoughts. It also uses the word ‘indecent.’ Passages are indecent within the meaning of this act when they tend to obscenity; that is to say, matter having that form of indecency which is calculated to promote the general corruption of morals. Now, gentlemen, I have given you the test; it is not a question whether it would corrupt the morals, tend to deprave your minds or the minds of every person; it is a question whether it tends to deprave the minds of those open to such influences, and into whose hands a publication of this character might come. It is within the law if it would suggest impure and libidinous thoughts in the young and the inexperi-

enced. There has been some comment on the fact that, in many libraries, you may find books which contain more objectionable matter, it is said, than this book contains. It may be so; it is not material here. When such books are brought before you you will be able to determine whether it is lawful to mail them or not. Here the question is with reference to this book; and it is of no importance how many books of worse character this man, or that man, or the other man, has, or whether the tendency of those books is worse or better than this book. The question is the tendency of this book. If you find that the tendency of the passages marked in this book is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall, it is your duty to convict the defendant, notwithstanding the fact that there may be many worse books in every library of this city. Now, gentlemen, I have endeavored to bring you down, in your examination of this case, to the precise point. This is a question, as I have before stated, for you alone; the responsibility is upon you, and upon each of you, to say, upon your oaths, after an examination of those passages, what the tendency of those passages is, and whether they have that tendency which I have described to you as necessary to be found in order to bring it within this statute. The statute is an important statute; it is a statute to be enforced in all proper cases; it is not a statute to be strained; it is not a statute for twelve men to refine upon. The question which I have stated to you calls for good judgment—one to be submitted to the intelligent judgment of twelve intelligent men, who should judge sensibly, not straining points, when they determine what the tendency of the matter in this book is. It is a criminal case, and the defendant is entitled to the benefit of a reasonable doubt. You are bound to be satisfied beyond a reasonable doubt that the tendency of this matter is such as I have described. This must not be a fancy. By a reasonable doubt is meant a doubt arising from the want of evidence. As to what the book contains, there is no dispute; and you must be satisfied in your own minds, satisfied clearly, so that you are willing to say on your oaths that you believe that the tendency of the matter in those marked passages is such as I have described. If you believe such to be the tendency of this matter, then you must find the book non-mailable and the prisoner guilty. If you are not satisfied beyond a reasonable doubt that the tendency of this matter is such as I have described to you, then it is your duty to give him the benefit of that doubt and acquit him."

At the close of the charge, the defendant requested the court to charge the jury in addition as follows: "That the jury are the final judges of the law and fact in this case, and that the definitions charged by the court are not conclusive upon them. That the court should make no absolute test or definition of the words of the statute, and that the test and definitions made and submitted to the jury by the court are advisory, and not authoritative or conclusive upon them."

The defendant also objected to the definitions given, and excepted to each of them in detail, and also excepted to each and every part of the charge, rulings and directions of the court contrary to or inconsistent with the foregoing requests, and to the refusal of the court to charge the same.

It is contended that the court erred in what it said to the jury as to the test of obscenity within the meaning of the statute; that it substituted the stated test for the words of the statute; that the stated test was, as a definition, erroneous, and was not a definition of obscenity; that it was a defi-

nition of an effect, and not of the word "obscenity;" that, because an essay tends to deprave and corrupt the morals of society, it does not follow that it is obscene; that, while all obscenity tends to immorality, all immorality is not obscenity; and that essays on the drama, gluttony, inebriety, gaming, cock fighting, horse racing, polygamy, divorce or blasphemy, advocating or palliating any of them, might tend "to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands a publication of this sort may fall," but they would not necessarily be obscene. It is a mistake to suppose that, in what the court said as to the test of obscenity, it intended to give to the jury a definition of "obscenity." The dictionary says that "obscene" means "offensive to chastity and decency; expressing or presenting to the mind or view something which delicacy, purity and decency forbid to be exposed." The statute and the indictment both use the word "obscene" without affixing to it any definition. In the first request to charge made before the charge was given, the defendant requested the court to charge that the word "obscene" and the word "indecent" mean severally what is set forth in such request. The court refused so to charge except as such request agreed with its charge. There is nothing in the charge which is contrary to the substance of such request. On the contrary, after using, in the course of the charge, the words "obscene," "lewd," "lascivious" and "indecent," as being words whose meaning the jurors, as intelligent men, fully understood, and as being words needing, therefore, no definition to be given of them by the court to the jury, the court defines the word "lewd," as used in the statute (it being also used in the first count of the indictment), as meaning "having a tendency to excite lustful thoughts." The court did not define the word "lustful" any more than the first request to charge defined the word "lust," or the words "sense of decency." The court then defined the word "indecent," as used in the statute (it being also used in the second count of the indictment), as meaning "tending to obscenity" — "having that form of indecency which is calculated to promote the general corruption of morals." This does not mean any other form of indecency calculated to promote the general corruption of morals than the obscene form; because the court immediately proceeds to say that, in what it had said about corrupting morals, it had been speaking of corrupting the morals and depraving the minds of those "open to such influences," that is, the influences of "obscene" matter, and that it meant thereby matter which would "suggest impure and libidinous thoughts in the young and inexperienced." It did not define the word "impure" or the word "libidinous" any more than the first request to charge defined the word "lust" or the words "sense of decency."

In saying that the "test of obscenity, within the meaning of the statute," is as to "whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall," the court substantially said that the matter must be regarded as obscene if it would have a tendency to suggest impure and libidinous thoughts in the minds of those open to the influence of such thoughts, and thus deprave and corrupt their morals, if they should read such matter. It was not an erroneous statement of the test of obscenity, nor did the court give an erroneous definition of obscenity, or a definition different from that of the first request to charge. It gave a definition substantially agreeing with that of such request.

In *Regina v. Hicklin*, L. R., 3 Q. B., 360, the question arose as to what was

an "obscene" book, within a statute authorizing the destruction of obscene books. The book in question was, to a considerable extent, an obscene publication, and, by reason of the obscene matter in it, was calculated to produce a pernicious effect, in depraving and debauching the minds of the persons into whose hands it might come. It was contended, however, that, although such was the tendency of the book upon the public mind, yet, as the immediate intention of the person selling it was not so to affect the public mind, but to expose certain alleged practices and errors of a religious system, the book was not obscene. As to this point, Ch. J. Cockburn said: "I think that, if there be an infraction of the law, the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view (which is the immediate and primary object of the parties), of a different and an honest character. It is quite clear that the publishing an obscene book is an offense against the law of the land. It is perfectly true, as has been pointed out by Mr. Kydd, that there are a great many publications of high repute in the literary productions of the country, the tendency of which is immodest, and, if you please, immoral, and, possibly, there might have been subject-matter for indictment in many of the works which have been referred to. But it is not to be said, because there are in many standard and established works objectionable passages, that, therefore, the law is not as alleged on the part of this prosecution, namely, that obscene works are the subject-matter of indictment; and I think the test of obscenity is this: whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character." These views seem to us very sound. In the present case, the remarks made by the court, in its charge, as to the test of obscenity, were made in reference to suggestions like those made in the *Hicklin* case. It was contended that the motive and object of the book were material. On this question the court said: "The question is, whether this man mailed an obscene book; not why he mailed it. His motive may have been ever so pure; if the book he mailed was obscene, he is guilty. You see, then, that all you are called upon to determine in this case is, whether the marked passages in this book are obscene, lewd, or of an indecent character. Now, I give you the test by which you are to determine this question. It is a test which has been often applied, has passed the examination of many courts, and I repeat it here, as the test to be used by you. You will apply this test to these marked passages, and if, judged by this test, you find any of them to be obscene or of an indecent character, it will be your duty to find the prisoner guilty. If you do not find them, judged by this test, to be obscene or of an indecent character, it will be your duty to acquit him. This is the test of obscenity, within the meaning of the statute: It is whether," etc. The test there stated is substantially the same as that stated by Ch. J. Cockburn. The words "charged as obscenity," and the word "immoral," used by Ch. J. Cockburn, are dropped, and the words "the morals of" are not used by Ch. J. Cockburn. But the meaning of the two sentences is identical. The case of *Regina v. Hicklin* was approved in *Steele v. Brannan*, L. R., 7 C. P., 261, where Ch. J. Bovill states that he fully concurs in the decision in *Regina v. Hicklin*.

In the case against Heywood, before referred to, the defendant was the writer

of the book, and the book was the same book which is in question in the present case. In the trial of the Heywood case, Judge Clark, in charging the jury, said: "A book is obscene which is offensive to decency. A book, to be obscene, need not be obscene throughout the whole of its contents, but if the book is obscene, lewd or lascivious or indecent, in whole or in part, it is an obscene book, within the meaning of the law; a lewd and lascivious and indecent book. A book is said to be obscene which is offensive to decency or chastity, which is immodest, which is indelicate, impure, causing lewd thoughts of an immoral tendency. A book is said to be lewd which is incited by lust, or incites lustful thoughts, leading to irregular indulgence of animal desires; lustful, lecherous, libidinous. A book is lascivious which is lustful, which excites or promotes impure sexual desires. A book is indecent which is unbecoming, immodest, unfit to be seen. A book which is obscene, as I have said to you before, or lewd, or lascivious, or indecent, in whole or in part, or in its general scope or tendency, in its plates or pictures, or in its reading matter, falls within the scope of the prohibition of the statute. . . . An argument has been made here to show you that Mr. Heywood was a moral man, a well-behaved man, and that his design in publishing this work was a good one; that he really believed the doctrines which he taught. But the court say to you that such an argument cannot be received and considered by you, and cannot make any difference in the question of guilt or innocence. A man might believe that obscene things may be and ought to be corrected, and he might argue against them and publish for this purpose; but still the book might not be allowed to go through the mails, if obscene in itself. It is not the design. There is no reference in the statute to the design that a man has in putting the book in the mail, whether for a bad or a good purpose; but the law says, explicitly, that such books shall not go through the mails, and that, if anybody deposits them, he is to be punished for it. There is no question here in regard to the suppression or the spread of knowledge. . . . Something was said in regard to other books — that these books are no more offensive than some other books, but you are not sent here to try other books, nor to compare this book with other books, and you heard the court rule out all other books. The sole question is, whether these books are obscene, lewd or indecent. Other books may be so or may not be so. They may or may not have gone in the mail. . . . Observations were made in regard to the extent to which these books might be obscene, lewd, lascivious or impure, or might excite unlawful or impure desires; and it was said to you, that you might read these books, and they would excite no impure desire in you, no impure thought; but that is not a sure criterion by any means. These books are not sent ordinarily to such people as you. But you may consider whether they are obscene, or lewd or lascivious, to any considerable portion of the community, or whether they excite impure desires in the minds of the boys and girls or other persons who are susceptible to such impure thoughts and desires. If any other standard were adopted, probably no book would be obscene, because there would be some men and women so pure, perhaps, that it would not excite an impure thought; but it is to be governed by its effect upon the community — whether it is obscene and is of dangerous tendency in the community generally or any considerable portion of the community." These views are, in substance, those contained in the charge in the present case.

We are of opinion that there was no error in what was charged by the court as to the test of obscenity. No other part of the charge was specifically con-

plained of in the argument; but it was urged that the court erred in refusing to charge as requested in the second paragraph of the first request, and in requests 2, 3, 4, 5, 6, 7, 8 and 9.

§ 2488. *The object of an obscene book is not material in a prosecution for mailing it.*

As to the second paragraph of the first request, we are of opinion that the object of the use of the obscene or indecent words is not a subject for consideration. In addition to the observations already cited from the case of *Regina v. Hicklin*, Ch. J. Cockburn says further: "May you commit an offense against the law in order that thereby you may effect some ulterior object which you have in view, which may be an honest or even a laudable one? My answer is, emphatically, no. The law says, you shall not publish an obscene work. An obscene work is here published, and a work the obscenity of which is so clear and decided that it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come would be of a mischievous and demoralizing character. Is he justified in doing that which clearly would be wrong, legally as well as morally, because he thinks that some greater good would be accomplished? . . . I hold that, where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, *quoad* the intention and *quoad* the act, it does not lie in the mouth of the man who does it to say: 'Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.'" In *Steele v. Brannan* (*before cited*), it was contended that the book treated of a matter which might properly be the subject of discussion and controversy, and that the object of those who put it forward was not only innocent but praiseworthy, inasmuch as they intended thereby to advance the interests of religion and of the public, and that, therefore, the book was not obscene. The court held otherwise, and approved the ruling in the *Hicklin* case. The views of Judge Clark, to the same effect, have been quoted.

As to request 2, it was charged in substance, so far as its propositions are correct. The rest of it falls within what has been said as to the last paragraph of the first request. This last observation applies also to request 3. As to request 4, its substance was charged, and, as to anything in it not charged, there was no error in not charging it.

The observations made as to the last paragraph of the first request apply also to requests 5, 6 and 7, and the first paragraph of request 8. The last paragraph of request 8 was, in substance, charged. We perceive no error in the refusal to charge as requested in request 9. This statute differs from no other criminal statute, and the jury were properly instructed on the subject of a reasonable doubt. We have given no attention to any exceptions appearing in the case which are not presented in the printed brief of the counsel for the defendant.

The case contains the following statement: "During the absence of the jury, the court sent to them by the officer in charge, and, in the absence of the prisoner, after exhibiting the same to the counsel for the prisoner, a direction in writing that they might deliver a sealed verdict to said officer, and that thereupon they should be allowed to separate and directed to appear in court at the hour of the opening of the court on the next day. At about 6:30 o'clock the next morning (March 21, 1879), the jury delivered a sealed verdict to the officer, and were thereupon allowed by him to separate. The court resumed its session at 11 o'clock A. M. on that day, and the jury, having been called by

the clerk, announced, by their foreman, that they had agreed upon a verdict, and that he had handed a sealed verdict to the officer in charge of them. The counsel for the prisoner duly excepted to the direction of the court that the jury should bring in a sealed verdict at all, and to the reception by the court of such a verdict from the officer, and also to the right of the jury to separate at all until they had rendered their verdict in open court. Under these exceptions the jury were allowed to render a verdict of guilty, as stated in the sealed verdict received by the court from the officer, in the presence of the defendant, and which was thereupon announced and recorded in open court as a verdict of guilty. The counsel for the prisoner then and there requested that the jury be polled, which was done, and thereupon each of the jurymen, to the question of the clerk whether the verdict announced was his verdict, answered in the affirmative." It is contended for the defendant that the direction of the court to the jury, in the absence of the prisoner, and without his consent, that they might deliver a sealed verdict to the officer in charge and then separate, and their doing so, is ground for a new trial. The propositions urged to this end are, that sealed verdicts have no authority in law without the prisoner's consent; that they have been introduced with great reluctance and great suspicion in civil cases, and are always a source of danger; that the separation of juries in criminal cases, after the charge of the court, is always a recognized source of danger to the prisoner, to which the law does not voluntarily expose him; that the prisoner cannot prove a negative to show that he has not been injured; that the direction of the court is no justification or protection; that an instruction to the jury, that, after a long confinement, they may obtain a much desired release by a sealed verdict, is a direct inducement to the minority of the jury to yield against the prisoner and was effective against him in this case; that the absence of authority for the course pursued upon this trial, and the reluctance with which any separation, before or after the charge, is allowed, is conclusive for the prisoner, on this point; and that, while the rule has been somewhat relaxed from necessity only, this has never been done so as to allow of a sealed verdict and a general separation of the jury, without the prisoner's presence, knowledge and consent, before their real verdict should be rendered in court and in the prisoner's presence.

§ 2489. *It is not error, in a trial for a misdemeanor, to permit the jury to bring in a sealed verdict, under limitations, and then separate.*

It appears, by the case, that the direction in writing to the jury, that they might deliver a sealed verdict to the officer and might then separate, was exhibited to the counsel for the prisoner before it was sent to the jury by the court; that the jury strictly followed such direction; that the court received the sealed verdict from the officer the next morning, in the presence of the jury and of the defendant, in open court, after the jury had then and there announced that they had agreed upon a verdict and that such sealed verdict contained it; that the verdict of guilty announced and recorded was the verdict contained in such sealed verdict; and that, on the polling of the jury, at the request of the counsel for the defendant, each juror stated that the verdict announced was his verdict.

It is laid down in Whart. Cr. L. (6th ed., § 3125), that, "in misdemeanors, there is no difficulty, in practice, in permitting the jury to separate during the trial." In the present case, the statute expressly declares the offense to be a misdemeanor. Wharton cites the leading case of *Rex v. Woolf*, 1 Cbit., 401, where it is held that, in a case of misdemeanor, the dispersion of the jury

does not vitiate the verdict. The dispersion referred to is one before agreement on a verdict. *A fortiori*, a dispersion after agreement, and after the verdict is written and signed and sealed up, and where the jury afterwards attend in court with it, and the court receives and opens it, and the jury give an oral verdict in accordance with it, on being polled, does not vitiate the trial. In *People v. Douglass*, 4 Cow., 26, it is laid down that the mere separation of a jury is not a sufficient cause for setting aside a verdict either in a civil or a criminal case, if there be no farther abuse. In *People v. Ransom*, 7 Wend, 417, 424, it is said that any irregularity or misconduct of the jurors will not be a sufficient ground for setting aside a verdict, either in a criminal or a civil case, where the court are satisfied that the party complaining has not, and could not have, sustained any injury from it. In *Commonwealth v. Carrington*, 116 Mass., 37, the question arose whether, in a criminal case not capital, the jury may be authorized by the court, without the consent of the defendant, to separate after agreeing upon, signing and sealing up a paper in the form of a verdict, and afterwards return a verdict in open court in accordance with the result so stated and sealed up. It was held* that such a course is proper. The court say: "The tendency of modern decisions has been to relax the strictness of the ancient practice which required jurors to be kept together from the time they were impaneled until they returned their verdict, or were finally discharged by the court. In civil cases the jury are never kept together at the intermissions of the sittings of the court pending the trial; and it is well settled, that, after the case is finally committed to them, they may be allowed by the court to separate, if they first agree upon and seal up their verdict, and afterwards affirm it in open court; and that, if their verdict, when opened, does not cover all the issues on which they are to pass, the case may be recommitted to them and a verdict subsequently rendered will be good. *Winslow v. Draper*, 8 Pick., 170; *Pritchard v. Hennessey*, 1 Gray, 294; *Chapman v. Coffin*, 14 Gray, 454. But if, upon returning into court, one of the jurors dissents from the verdict to which all had agreed out of court, it cannot be recorded. *Lawrence v. Stearns*, 11 Pick., 501. In capital cases, indeed, the uniform practice in this commonwealth has been to keep the jury together from the time the case is opened to them until their final discharge. But the practice is equally well settled, and in accordance with the decisions elsewhere, that, pending a trial for a misdemeanor, the jury may be permitted by the court, without the consent or knowledge of the defendant, to separate and go to their homes at night without vitiating the verdict. *The King v. Woolf*, 1 Chit., 401; S. C., nom. *The King v. Kinnear*, 2 B. & Ald., 462; *McCreary v. Commonwealth*, 29 Penn. St., 323. If the jury, in a case of misdemeanor, are allowed, without the consent of the defendant, to separate after the case is finally committed to them by the court, and before the verdict is returned, the verdict cannot be recorded unless it clearly appears that the verdict was not influenced by anything that took place during the separation. It was accordingly held, that, where the jury were allowed by the judge to disperse upon stating to the officer they had agreed on and sealed up a verdict, and, upon coming into court, rendered an oral verdict, without any sealed verdict being produced or opened, or its contents made known to the defendant or his counsel, the verdict was invalid. *Commonwealth v. Durfee*, 100 Mass., 146; *Commonwealth v. Dorus*, 108 Mass., 488. But, when all possibility of improper influences is excluded by conclusive evidence that the jury arrived at and reduced to writing, before their separation, the same result which they afterwards announced in open

court, the verdict may be received and recorded. *State v. Engle*, 13 Ohio, 490; *State v. Weber*, 22 Miss., 321; *Reims v. People*, 30 Ill., 256." These views seem to us to be the clear result of the authorities, and to be founded in reason. In the present case, it clearly appears that the jury, before they separated, arrived at the same result which they afterwards orally announced in due form, when inquired of by the clerk, in open court, and, therefore, that the verdict was not influenced by anything that took place during the separation.

We have examined the cases cited by the counsel for the defendant and find in them nothing inconsistent with the foregoing views. After a careful consideration of all the points presented, we are unanimously of opinion that the motion for a new trial, and to set aside the verdict, and for an arrest of judgment upon the same, must be denied.

§ 2490. *Stealing*.—Where the felonious abstraction of the letter from the mail is made the principal offense by the statute, and the abstraction of the draft from the letter is rather an incident increasing the punishment than the foundation of the prosecution, it is sufficient to set out the draft according to its legal effect. It is unnecessary to allege by whom the draft was drawn. But, if it is alleged that the draft was drawn by Joseph Johnson, it cannot be admitted in evidence if it appears on its face to have been drawn by Jos. Johnson. *United States v. Keen*,* 1 McL., 429. An indictment for stealing the mail, based on a statute, need not allege any value. *United States v. Burroughs*,* 8 McL., 405.

§ 2491. Where an indictment for stealing a bank-note from a letter in the mail alleges that the letter was intended to be conveyed from a certain post to another certain post, it was held that this allegation was not surplusage, but must be proved as laid, inasmuch as it was necessary to allege that the letter was intended to be conveyed by post. *United States v. Foye*, 1 Curt., 364 (§§ 912-915).

§ 2492. The statute imposes on a carrier who steals a letter from the mail a higher penalty where the letter contains an article of value. An indictment which alleges that the carrier stole a letter is sufficient, without stating whether the letter contained an article of value. But it must be alleged that the letter contained an article of value, if such was the fact, in order to subject the carrier to the higher penalty. *United States v. Fisher*,* 5 McL., 23.

§ 2493. *Franking*.—In an indictment for unlawfully franking letters it is not necessary to charge that the defendant was a member of congress when the offense was committed. *Dewee's Case*,* Chase's Dec., 531.

§ 2494. The charge in an indictment of franking letters for another, which were liable to pay postage, so that they should pass through the mail free of charge, sufficiently negatives the idea that the letters were written for the defendant by his order, and on the business of his office. *Ibid*.

§ 2495. *Non-mailable matter*.—Under section 3894, Revised Statutes, declaring that "no letter or circular concerning lotteries, so-called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail, and any person who shall knowingly deposit or send anything to be conveyed by mail, in violation of this section, shall be punished," etc., an indictment is not bad for describing the writing sent as a "circular and letter." It cannot be objected to an indictment, under this statute, that it omits to charge that the paper was one "concerning a lottery offering prizes." That the indictment does not show that the paper sent was illegal, except by the averment that the paper was "a certain letter and circular concerning a lottery," taken in connection with the words "La. tickets," "all prizes," and "official copy of drawings," appearing in the paper itself, is a formal defect in the indictment, designed by section 1025, Revised Statutes, to be disregarded, it appearing that the defendant has suffered no injury thereby. This being an averment in substance that the letter set out referred to a lottery, it appears, upon the face of the paper, that it is within the prohibition of the statute. Such a circular or letter must be set forth *in hæc verba*, and it is not sufficient to set it forth by a description of its contents. *United States v. Noelke*, 17 Blatch., 554 (§§ 975-937). See §§ 2448-51.

§ 2496. It is sufficient, in an indictment under the act of July 12, 1876, declaring it to be a misdemeanor to deposit or cause to be deposited for mailing or delivery anything declared to be non-mailable, to describe the article so as to identify it, or by stating to whom it was addressed, and then to allege that it is within the terms of the statute, as that it is an obscene book, pamphlet, paper, print, picture or otherwise, or an indecent thing. It need not state its contents. *Bates v. United States*, 10 Fed. R., 92 (§§ 1010-14).

§ 2497. An indictment for mailing an obscene pamphlet need not set forth the obscene and objectionable matter, and a bill of particulars will be furnished, if necessary, on the order of the court. *United States v. Foote*,* 13 Blatch., 418.

§ 2498. *Embezzlement*.— In an indictment against a postal clerk for embezzling a letter it is not necessary to aver that it has not been delivered to the person to whom it was addressed. *United States v. Jenther*,* 13 Blatch., 335. See § 2439 *et seq.*

§ 2499. An indictment for embezzling a letter described it as inclosed in "an envelope addressed and directed as follows, that is to say, to A., No. 122 W. 26 St., etc., a more particular description, etc., being to the jurors unknown, said envelope having been destroyed." The proof showed the letter to have been directed "A., No. 122 W. 26 street." *Held*, that the insertion of the "to" before the name and the use of the "st." for "street" was not a variance which was material. *Ibid.*

§ 2500. Section 279 of the Revised Postal Laws, reciting that "any person employed in any department of the postal service of the United States who shall secrete, embezzle or destroy any letter intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried by any person employed in any department of the mail service, and which shall contain any bank-note, bond, draft, promissory note, or agreement for the payment of money; any such person who shall steal or take away any of the things aforesaid out of any letter which shall have come into his possession, either in the regular course of his official duties, or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, every such person shall, on conviction thereof, for every such offense, be imprisoned," etc., is held to create two offenses, the one of embezzling a letter, and the other the stealing the contents of a letter. An indictment, therefore, which charges only the offense of embezzling a letter, and contains no charge of stealing the contents, is sufficient. *United States v. Taylor*, 1 Hughes, 514.

§ 2501. The averment, in an indictment for embezzling letters, that the letters were actually sent by mail, is a sufficient averment that they were "intended to be sent by post." *United States v. Golding*,* 2 Cr. C. C., 212.

§ 2502. A count in an indictment which charges that the defendant, having embezzled certain letters and packets, he therefrom stole certain bank-notes, is not objectionable as charging two separate offenses, since the charge of embezzlement is a mere matter of inducement, and the gist of the indictment is the stealing. *Ibid.*

§ 2503. A charge of embezzling sundry and great numbers of letters and packets, and stealing therefrom sundry and great numbers of bank-notes, is not bad for uncertainty, when the grand jurors say that the number and particular description thereof is yet unknown to them. *Ibid.*

§ 2504. An indictment of a postmaster for embezzling a letter containing bank-notes need not describe the notes particularly nor state whose property they were. *United States v. Brown*,* 3 McL., 233.

§ 2505. In an indictment against an employee of the post-office department for embezzling a letter it is not necessary to set up the office held by the defendant. *United States v. Clark*,* Crabbe, 584.

§ 2506. It is not necessary, in an indictment against a postoffice employee for embezzling a letter containing a bank-note, to specify the name of the bank, or, where the denomination of the bill is given, to allege that its value equaled its denomination. *Ibid.*

7. Perjury.

[See XIV, *supra*.]

SUMMARY.— *Before a United States commissioner*, § 2507.— *Under act of March 3, 1825*, § 2508.— *It must be shown what charge was under investigation*, § 2509.— *Subornation of perjury*, §§ 2510, 2511.

§ 2507. An indictment for perjury which alleges the perjury to have been committed on the examination of certain persons charged with crimes or offenses against the United States before a certain commissioner of the United States (naming him), duly appointed according to law, and having competent authority and power to arrest offenders for any crime or offense against the United States, and to examine the same, and to examine witnesses and administer oaths in the matters and proceedings relating to and concerning the offenses and crimes charged against the persons named in the indictment, but does not state how, or by whom, or under what statute, or for what purpose, such commissioner was appointed, does not contain a sufficient common law averment of the legal authority and jurisdiction of the commissioner to administer the oath under which it is alleged that the defendant committed

the offense charged. This indictment is not helped out by the act of April 30, 1790, in reference to the forms of indictments for perjury, since this statute does not dispense with the necessity of setting out the true and proper designation of the court, or the name and official title, designation and character of the officer before whom the oath was administered. *United States v. Wilcox*, §§ 2512-15.

§ 2508. An indictment for perjury based on the act of March 3, 1825, must show that the proceeding in which false testimony was given was one in which an oath was required. It is not enough to allege that the persons against whom the proceedings were had were charged with a crime against the United States, but the particular charge should be stated. *Ibid.*

§ 2509. It must appear in an indictment for perjury what charge was under investigation in the proceeding in which the oath was taken, in order that the court may see that the testimony alleged to have been falsely given was material. *Ibid.*

§ 2510. Subornation of perjury is in its essence but a particular form of perjury itself. *United States v. Dennee*, §§ 2516-19. See § 2532.

§ 2511. An indictment for subornation of perjury is bad which does not aver that the testimony which the defendant instigated the witnesses to give was false, and that the defendants knew that the witness knew that the testimony which he was instigated to give was false. *Ibid.*

[NOTES.—See §§ 2520-2532.]

UNITED STATES v. WILCOX.

(Circuit Court for New York: 4 Blatchford, 391-393. 1859.)

Indictment for perjury. Demurrer to the indictment.

§ 2512. *An indictment for perjury committed on an examination before a commissioner, but failing to state how, or by whom, or for what purpose, or under what statute, such commissioner was appointed, is bad on demurrer.*

Opinion by HALL, J.

The indictment alleges the perjury to have been committed on "an examination of certain persons charged with crimes or offenses against the laws of the United States," before Aurelian Conkling, Esq., "a commissioner of the United States, duly appointed according to law, and having competent authority and power to arrest offenders for any crime or offense against the United States, and to examine the same and to imprison or hold the same to bail, and, in the proceedings and matters before him, in relation to offenses and offenders, as aforesaid, to administer oaths and examine witnesses, and in the matters and proceedings relating to and concerning the offenses and crimes charged against" the persons, etc., named in the indictment; but the indictment does not state how, or by whom, or under what statute, or for what purpose, such commissioner was appointed. The case of *United States v. Stowell*, 2 Curt., 153, is in point to show that this is not a sufficient common law averment of the legal authority and jurisdiction of Commissioner Conkling to administer the oath under which it is alleged the defendant committed the offense charged; and, unless such an averment is rendered unnecessary by the act of congress of April 30, 1790 (1 U. S. Stat. at Large, 116, 117, §§ 19, 20), in reference to the forms of indictment for perjury and subornation of perjury, the indictment is clearly bad for that reason.

§ 2513. *An indictment for perjury should state the official title of the officer before whom the oath was taken.*

I have examined, with some care, the question whether the statute referred to authorizes this form of pleading, and my conclusion is that it does not. The allegation is, that Mr. Conkling was a commissioner of the United States; not of the circuit court of the United States, or appointed by the circuit court of the United States. Commissioners of the United States, in the ordinary sense of that term, have not the powers alleged to have been possessed by this

commissioner. Although the language of the statute referred to is very broad, I do not think it dispenses with the necessity of setting out the true and proper designation of the court, or the name and official title, designation or character of the officer before whom the oath was administered. This, it strikes me, is of the substance of the offense, and not mere matter of form. The setting forth of the commission, or the particular powers and authority of the officer, and the source whence they are derived, is not necessary, if he is alleged to hold an office which apparently confers upon him the authority to administer the oath in the particular case specified. This being done, the general allegation, that he had competent authority to administer the oath, is declared to be sufficient. *People v. Phelps*, 5 Wend., 9, 19; *The Queen v. Overton*, 4 Ad. & Ell., N. S., 83. But there is no distinct and precise allegation that this commissioner had competent authority to administer the particular oath stated, and, therefore, the requirement of the statute has not been complied with; and, certainly the indictment would be bad at common law.

§ 2514. *An indictment for perjury is bad which fails to state the particular crime or offense with which the parties named were charged.*

It was also objected, upon the argument of the demurrer, that the indictment does not show that the proceeding before the commissioner was one in which an oath was required, so as to bring the case within the thirteenth section of the act of March 3, 1825 (4 U. S. Stat. at Large, 118), on which the indictment is founded. In this respect, also, the indictment is bad. It is not enough to allege that the persons named were charged with a crime or offense against a law of the United States, for that is a conclusion of law, but the particular charge should be stated. The act of congress, before referred to, does not dispense with this statement. *The Queen v. Overton*, 4 Ad. & Ell., N. S., 83.

§ 2515. — *the charge under investigation must be stated.*

It was also objected that it does not appear from the indictment what charge was under investigation before the commissioner, and that, therefore, the court cannot see that the testimony alleged to have been falsely given was material. In this respect, also, the indictment is defective. The indictment was evidently drawn during the disorder and hurry of the circuit, and is in other respects uncertain and defective. The demurrer must be allowed and judgment rendered thereon for the defendant.

UNITED STATES v. DENNEE.

(Circuit Court for Louisiana: 8 Woods, 39-43. 1877.)

STATEMENT OF FACTS.—This was an indictment for subornation of perjury in inducing Martha Knight to swear falsely before a United States commissioner in a suit pending in the court of claims between Harriet Mills and the United States. There was a demurrer to the indictment. Further facts appear in the opinion.

§ 2516. *What constitutes the crime of subornation of perjury.*

Opinion by Woods, J.

The crime of subornation of perjury has several indispensable ingredients which must be charged in the indictment, or it will be fatally defective. 1. The testimony of the witness suborned must be false. 2. It must be given wilfully and corruptly by the witness, knowing it to be false. 3. The suborner must know or believe that the testimony of the witness given, or about to be given,

will be false. 4. He must know or believe that the witness will wilfully and corruptly testify to facts which he knows to be false.

A careful scrutiny of the counts of this indictment fails to reveal any averment that the defendants knew or believed that the testimony of the witness whom they are charged with suborning would be false, or that they knew it was false, or that they knew that the witness knew it was false, or that they knew that she would wilfully and corruptly testify, or had wilfully and corruptly testified, to facts as true, knowing them to be false.

§ 2517. *An indictment for subornation of perjury must set out the false swearing.*

To make a good indictment for subornation of perjury the false swearing must be set out with the same detail as an indictment for perjury, and the indictment must charge that the defendants procured the witness to testify knowing that the testimony would be false, and knowing that the witness knew that the testimony he had given, or was about to give, was false, and knowing that he would corruptly and wilfully give false testimony. In the case of *Commonwealth v. Douglass*, 5 Metc., 244, the defendant was indicted for subornation of perjury. On the trial the court below instructed the jury that, "if it was proved to them beyond a reasonable doubt that the defendant, on the former trial for forgery (referred to in the indictment), put Fanny Crossman on the stand, or caused her to be put on the stand, as a witness, knowing that she would testify as set forth in the indictment, and intending that she should so testify, and he put her on the stand, or caused her to be put on the stand, for the purpose of her so testifying, and she did so testify, and such testimony was false, and he knew when he put her on the stand that, if she did so testify, her testimony would be false, it would be sufficient to prove that part of the indictment which alleged that defendant suborned Fanny Crossman to commit perjury as set forth in the indictment."

This charge was assigned for error, and the supreme judicial court, in passing upon it, said: "The remaining exception to the charge of the presiding judge is of more importance, and is, we think, well founded. The jury were instructed that, if certain facts stated in the exceptions were proved beyond reasonable doubt, it would be sufficient proof of that part of the indictment which charged that the defendant suborned Fanny Crossman to commit perjury. Now we are of opinion that all these facts might exist, and yet the defendant might not be guilty of the crime charged in the indictment. The defendant might know or believe—for he could not know with certainty—that the witness whom he called would testify as she did, and he might know that her testimony would be false; but if he did not know that she would wilfully testify to a fact knowing it to be false, he could not be convicted of the crime charged. If he did not know or believe that the witness intended to commit the crime of perjury, he could not be guilty of the crime of suborning her. To constitute perjury the witness must wilfully testify falsely, knowing the testimony given to be false. 1 Hawk., c. 69, sec. 2; Bac. Ab., Perjury, A; 2 Russell on Crimes, 1753. A witness, by mistake or defect of memory, may testify untruly without being guilty of perjury or any other crime."

§ 2518. *Subornation of perjury defined.*

Subornation of perjury is in its essence but a particular form of perjury itself. 2 Bish. Cr. L., sec. 1197. See, also, Whart. Prec. of Indict., pp. 598, 599, forms *c* and *d*; see, also, form of indictment in Archb. Cr. Pl. and Ev., 575, 577; see same form, 2 Bish. Cr. Proc., sec. 878; *State v. Carland*, 3 Dev. (Law), 114.

§ 2519. *Essentials of an indictment for subornation of perjury.*

Tested by these authorities, both counts of the indictment are bad, first, because they do not aver that the defendants knew that the testimony which they instigated the witnesses to give was false, and, second, because there is no averment that the defendants knew that the witness knew that the testimony she was instigated to give was false. Demurrer sustained.

§ 2520. *Materiality.*—An indictment for perjury is good without any averment of materiality, when it appears upon its face that the fact alleged to have been falsely sworn to was a material one. *United States v. McHenry*,* 6 Blatch., 503.

§ 2521. An indictment for perjury must *aver* the materiality of the facts, or must aver facts from which materiality may be inferred. *United States v. Cowing*,* 4 Cr. C. C., 613.

§ 2522. *In bankruptcy.*—An indictment for false swearing in a proceeding in bankruptcy, which alleges that the proceeding was before a "judge sitting in bankruptcy," sufficiently describes the judge. *United States v. Deming*,* 4 McL., 3.

§ 2523. An indictment for perjury, in making a false affidavit to a petition in bankruptcy, need not set out the petition; a mere reference to its character and object is sufficient. *Ibid.*

§ 2524. An indictment for perjury in making a false schedule in bankruptcy need not set out the schedule at large. *United States v. Chapman*,* 3 McL., 390.

§ 2525. On an indictment for perjury in swearing to a false schedule in bankruptcy, it is sufficient to allege that the property was withheld to defraud one of the creditors, naming him, and others. It is not necessary to name all the creditors. *Ibid.*

§ 2526. *Time.*—An indictment for perjury must allege the day on which the trial took place in which the defendant was sworn; for want of such allegation the judgment will be arrested. *United States v. Bowman*,* 2 Wash., 328.

§ 2527. *Variance as to matter sworn to.*—In an indictment for perjury, any discrepancy between what the defendant swore to in the deposition alleged to have been falsely sworn to, and what is set out in the indictment as having been sworn to by him, is fatal to a conviction. *United States v. Coons*,* 1 Bond, 1.

§ 2528. *Variance as to time.*—Where an indictment for perjury charged the offense to have been committed at a trial before the circuit court of the United States on the 19th day of May, 1811, and the record of the trial showed that it was held on the 20th day of May, the variance was held to be fatal. *United States v. McNeal*,* 1 Gall., 387.

§ 2529. *Knowingly and corruptly.*—An indictment for perjury, either under the thirteenth section of the act of March 3, 1825, or the third section of the act of March 1, 1823, must aver that the defendant knew that he swore falsely and that his motive was corrupt. *United States v. Babcock*,* 4 McL., 113.

§ 2530. *Stating the law.*—It is not necessary to aver, in an indictment for perjury, what act or acts of congress required the oath to be taken. That the oath was taken, the description of the oath and its occasion, are the only matters of fact necessary to be alleged to show the materiality of the oath, and that it was required by law. *United States v. Nickerson*,* 17 How., 204.

§ 2531. *Must state court in which committed.*—An indictment for perjury, which declares the offense to have been committed on the hearing of a certain complaint against a certain person for piracy "depending before the honorable John Davis, then and ever since being judge of the district court of the United States for the aforesaid district of Massachusetts, and a magistrate of the said United States," is insufficient, because it does not charge the offense to have been committed in any court of the United States, nor in any deposition pursuant to its laws, as is required by the act of April 30, 1790, on which the indictment is founded, and which punishes any person who "shall wilfully and corruptly commit perjury, . . . in any controversy, matter or cause, depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States." *United States v. Clark*,* 1 Gall., 497.

§ 2532. *Subornation of perjury.*—Section 13 of the act of March 3, 1825, provides that "if any person in any case . . . where an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States shall, upon the taking of such oath or affirmation, knowingly and wilfully swear or affirm falsely, every such person so offending shall be deemed guilty of perjury; . . . and, if any person or persons shall knowingly or wilfully procure any such perjury to be committed, any person so offending shall be deemed guilty of subornation of perjury." An indictment, under this section, which alleges that the defendant did feloniously, knowingly and wilfully procure certain persons named to swear falsely in taking an oath, etc., but does not allege that these persons or either of them did knowingly and wilfully swear falsely, is fatally defective. *United States v. Wilcox*,* 4 Blatch., 393. See §§ 2510-11.

8. *Miscellaneous Offenses.*

SUMMARY — *Defrauding the government; felonious intent*, § 2533. — *Sending false affidavit to pension office*, §§ 2534, 2535. — *Smuggling*, §§ 2536-2539. — *Effecting a false entry of goods*, §§ 2540, 2541.

§ 2533. An indictment, under the third section of the act of March 3, 1823, declaring that any person shall be deemed guilty of felony who "shall transmit to or present at, or cause or procure to be transmitted to or presented at, any office or officer of the government of the United States, any deed, . . . or other writing in support of or in relation to any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited," is not fatally defective for not charging the acts to have been committed by the defendant feloniously, or with felonious intent. The felonious intent is no part of the description of the offense. Felony is the conclusion of law from the acts done with the intent described. *United States v. Staats*, §§ 2542-44.

§ 2534. Though a charge in an indictment for sending a false and fraudulent "writing and affidavit" to the pension office might be ambiguous if standing alone, yet where the writing is set out and it appears that it is but one instrument, such description is sufficient and proper. *United States v. Corbin*, §§ 2545-47.

§ 2535. An indictment for sending a false and fraudulent affidavit to the pension office must describe the particulars wherein such instrument was false and fraudulent, and if it was false in the statement of a fact, it must be shown that that fact was material. *Ibid.*

§ 2536. In an indictment for smuggling it is not necessary to describe the property with such particularity as will obviate all necessity for proof outside the record to support a plea of once in jeopardy. It is sufficient if the description in the indictment, together with such evidence as the trial must necessarily furnish, will fully protect in any future prosecutions for the same offense. *United States v. Claffin*, §§ 2548-51.

§ 2537. If, in an indictment for smuggling, the description of the goods smuggled is insufficient to enable the defendant to prepare his defense, the court, on his sworn application stating that fact, will order a bill of particulars to be furnished him. *Ibid.*

§ 2538. On an indictment for buying smuggled goods it is not necessary to describe the goods with the same particularity of time, place and circumstance as would be required in an indictment for smuggling. It is sufficient to describe the goods as having been previously smuggled, but it is insufficient to say that they have been imported contrary to law. *Ibid.*

§ 2539. The word smuggle is a technical word having a known and accepted meaning — a necessary meaning in a bad sense. It implies something illegal, and is inconsistent with an innocent intent. The idea conveyed by it is that of a secret introduction of goods with intent to avoid payment of duty. *Ibid.*

§ 2540. The offense of effecting a false entry of goods, and of aiding in effecting such entry, may be committed by different persons, yet they are different stages of the same offense, and may be charged conjunctively against one person in one count of an indictment, and proof of either will sustain the charge. *United States v. Bettilini*, §§ 2553-56.

§ 2541. The offense of making a false entry of goods, and aiding in making a false entry of goods, is a misdemeanor where all are principals. *Ibid.*

[NOTES.— See §§ 2557-2607.]

UNITED STATES *v.* STAATS.

(8 Howard, 41-47. . 1849.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Northern District of New York.

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.— The prisoner was indicted under the third section of the act of congress passed 3d March, 1823, entitled "An act for the punishment of frauds committed on the government of the United States." The section provides that, if any person shall falsely make, alter, forge or counterfeit, etc., any deed, power of attorney, order, certificate, receipt or other writing, for the purpose of obtaining or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive from the United States, or

any of their officers or agents, any sum or sums of money; or shall utter or publish as true, or cause to be uttered or published as true, any false, forged, altered or counterfeited deed, etc., with intent to defraud the United States, knowing the same to be false, forged or counterfeit; or shall transmit to or present at, or cause to procure to be transmitted to or presented at, any office or officer of the government of the United States any deed, power of attorney, order, certificate, receipt or other writing, in support of or in relation to any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited; every such person shall be deemed and adjudged guilty of felony, etc.

The indictment contains two counts. The first charges that one David Goodhard was an applicant for a pension under the act of congress entitled "An act supplementary to the act for the relief of certain officers and soldiers of the Revolution," passed 7th June, 1832 (4 Stats. at Large, 529); and that Thomas Staats, Jr., the prisoner, contriving and intending to defraud the United States, and to cause and induce the same to pay to the said David divers large sums of money, did cause and procure to be transmitted to the commissioner of pensions, and to be presented at the office of the said commissioner, a certain writing purporting to be made, subscribed and sworn to by one Benjamin Chadsey, etc., in which said writing it was alleged and declared (setting out the contents of the affidavit), the said Thomas Staats, Jr., knowing the said affidavit to be false and untrue, etc.; and did cause and procure to be transmitted to the said commissioner of pensions the said false writing and affidavit, as a true writing, in support of the aforesaid application of the said David, with intent to defraud the United States. The second count is substantially like the first, except that it avers the false affidavit to have been made by one William Bowsman.

The prisoner, on being arraigned, pleaded not guilty, and, on the trial of the issue, was convicted; whereupon his counsel moved in arrest of judgment; upon whose motion the following questions arose, upon which the opinions of the judges were opposed, and the questions certified to this court: 1. Whether the said indictment is defective, for the reason that the acts charged to have been committed by the defendant are not charged to have been committed feloniously, or with a felonious intent; and, 2. Whether the acts charged in the said indictment to have been committed by the defendant do constitute an offense within the provisions of the first section of the act of congress above recited.

§ 2542. *Rule as to charging statutory offenses.*

1. In respect to the first question certified. The general rule is, that the charge must be laid in the indictment so as to bring the case within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it. Nothing is to be left to implication or intendment. Generally speaking it is sufficient to pursue the words of the act; but if, in pursuing them, there should be any ambiguity or uncertainty in charging the offense, the pleader should regard the substance and legal effect of the enactment. And when words or terms of art are used in the description, that have a technical meaning at common law, these should be followed, being the only terms to express in apt and legal language the nature and character of the crime.

§ 2543. *Felonious intent must be averred, when.*

In all cases of felonies at common law, and some, also, by statute, the felo-

nious intent is deemed an essential ingredient in constituting the offense; and hence the indictment will be defective, even after verdict, unless the intent is averred. The rule has been adhered to with great strictness; and properly so, where this intent is a material element of the crime. Sir William Blackstone observes that the term "felony" originally denoted the penal consequences of the crime, namely, the forfeiture of the lands and goods; but that, by long use, it came at last to signify the actual crime committed. He further remarks that the idea of felony is so generally connected with that of capital punishment that it is difficult to separate them, and that the interpretation of the law conforms to that usage; and, therefore, if a statute makes any new offense felony, the law implies that it shall be punished with death, that is, by hanging, as well as by forfeiture, unless the offender prays the benefit of clergy. 4 Bl. Com., 97, Wend. ed. This view accounts for the necessity of the averment of a felonious intent in all indictments for felony at common law; and, also, in many cases when made so by statute; because, if it is used in the sense of the law, to denote the actual crime itself, the felonious intent becomes an essential ingredient to constitute it. The term signifying the crime committed and not the degree of punishment, the felonious intent is of the essence of the offense; as much so as the intent to maim or disfigure, in the case of mayhem, or to defraud, in the case of forgery, are essential ingredients in constituting these several offenses.

§ 2544. — *it need not be averred when it constitutes no part of the crime.*

But in cases where this felonious intent constitutes no part of the crime, that being complete, under the statute, without it, and depending upon another and different criminal intent, the rule can have no application in reason, however it may be upon authority. The statute upon which the indictment in question is founded describes the several acts which make up the offense, and then declares the person to be guilty of felony, punishable by fine or imprisonment. The transmission or presentation of any deed, or other writing, to any office or officer of the government, in support of or in relation to any account or claim, with the intent to defraud the United States, knowing the same to be false, are the only essential ingredients. The felonious intent is no part of the description, as the offense is complete without it. Felony is the conclusion of law from the acts done with the intent described, and makes part of the punishment; as, in the eye of the common law, the prisoner thereby becomes infamous, and disfranchised. These consequences may not follow, legally speaking, in a government where the common law does not prevail; but the moral degradation attaches to the punishment actually inflicted.

This question arose in a case before Park, J., on the northern circuit, in 1831, on the trial of an indictment for burning stacks of grain, which is made felony by the 22 and 23 Car. II. The second count charges the prisoner with aiding and abetting; and an objection was taken that the indictment should have averred that he was feloniously present, aiding and abetting. Park, J., was inclined to think the objection fatal, but allowed the trial to proceed, and the prisoner was acquitted on the facts. Cannon and another's case, 1 Lewin's Northern Circuit, 227. It again arose before Lord Lyndhurst, C. B., at the Durham assizes, in 1834, on an indictment under the statute of mayhem (9 Geo. IV., c. 31, § 2). An objection was taken, after conviction, that the indictment did not allege that the prisoner upon the prosecution feloniously did make an assault, etc.; but it was held that, as the indictment described the

offense in the words or terms of the statute, it was sufficient. Deac. Cr. L. Supp., 1652, 1681, *Rex v. Liddle*.

This statute, after describing the acts constituting the offense, concludes like the one before us, that every such person shall be guilty of felony, and, on conviction, shall suffer death. The decision, therefore, bears directly upon the question in hand; and, as the principle seems to have been given up in the country from whence it was derived, and at best is here but the merest technicality, it is difficult to perceive any ground for still giving effect to it. It would be otherwise if the felonious intent was descriptive of the offense, and not simply of the punishment. We shall therefore direct that it be certified to the court below that the indictment is not fatally defective, for the reason the acts charged to have been committed by the defendant are not charged to have been committed feloniously, or with a felonious intent.

2. With respect to the second question certified. The court are of opinion that the offense charged in the indictment comes within the statute. The only doubt that can be raised is whether the writing transmitted or presented to the commissioner in support of the claim for a pension should not, within the meaning of the statute, be an instrument forged or counterfeited, in the technical sense of the term; and not one genuine as to the execution, but false as it respects the facts embodied in it. The instruments referred to in the first part of the section, the false making or forging of which, with the intent stated, is made an offense, probably are forged instruments in a strict technical sense; and there is force, therefore, in the argument that the subsequent clause, making the transmission or presentation of deeds or other writings to an officer of the government a similar offense, had reference to the same description of instruments.

But this is by no means a necessary conclusion upon the words of the statute. Indeed, upon this construction, it is not easy to see the materiality of the clause, because the uttering and publishing of the forged instruments mentioned in the first clause as true is made an offense, the same as the forging; and it is quite clear that the acts provided against in the subsequent clause amount to an uttering and publishing. If restrained, therefore, to forged instruments, the clause would seem to be unnecessary. The deeds and other writings mentioned are not connected with those in the preceding paragraph, as would have been natural, and almost of course, if intended to describe similar instruments. The language is, "any deed, power of attorney," etc.; not the aforesaid deed, which words must be, in effect, interpolated upon the construction contended for. The clause, therefore, may well be regarded as providing for a distinct and independent offense,—one essential to the protection of the government against fraudulent claims; and which consists in the transmission or presentation of false or counterfeit papers to any officers of the government in support of an account or claim, with intent to defraud.

The case is within the mischief intended to be guarded against, and, also, within the words; and we think the considerations urged, founded upon the form and structure of the general provision, though plausible, and calculated to excite doubts, not sufficient to take it out of them. A genuine instrument containing a false statement of facts, used in support of a claim, the party knowing it to be false, and using it with the intent to defraud, presents a case not distinguishable in principle, or in turpitude, or in its mischievous effects, from one in which every part of the instrument is fabricated; and when the

one is as fully within the words of the statute as the other, we may well suppose that it was intended to embrace it.

We shall direct, therefore, that it be certified to the court below that the acts charged in the said indictment to have been committed by the defendant do constitute an offense within the provisions of the act above referred to.

UNITED STATES *v.* CORBIN.

(Circuit Court for New Hampshire: 11 Federal Reporter, 238-243. 1882.)

Opinion by CLARK, D. J.

STATEMENT OF FACTS.—The respondent was indicted under the statute of March 3, 1823 (3 St., p. 771, § 1), for sending a false writing and affidavit to the pension office. He was found guilty by the jury, and now moves for a new trial for various rulings of the court; and for arrest of judgment for certain faults and defects in the indictment.

Before examining carefully the reasons for a new trial, the court has turned its attention to the motion in arrest of judgment; because, if the indictment be so deficient or insufficient that no judgment ought to be rendered upon it, a new trial would be of no avail to the government. And so, if it be found that all the rulings of the court upon the trial were right, and there was no occasion for a new trial, and yet the indictment was fatally faulty, the judgment would have to be arrested. Is, then, this indictment sufficient in its allegations, and are they well and correctly stated? The respondent says it is not sufficient, nor is the pleading good: (1) Because it is double, containing or including two distinct offenses in one count, to wit, that he (the respondent) transmitted to the pension office a certain writing and affidavit—two distinct documents. (2) That it (the indictment) does not definitely and specifically allege or assign the particular statements in the writing and affidavit believed to be false, and traverse the same, or alleged that they were false; and (3) that it charges no act which is a crime or misdemeanor by the laws of the United States. (4) The act of March 3, 1823 (3 St., p. 771, § 1), provides “that if any person or persons shall falsely make, alter, forge or counterfeit,” or shall transmit to or present at, or cause or procure to be transmitted to or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt or other writing, in support of or in relation to any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited, every such person shall be deemed and adjudged guilty of felony.

§ 2545. *What is not double pleading.*

The indictment, after reciting that one Shedd had a claim against the United States, and that the respondent was intending and contriving to defraud the United States, and to induce them to pay the claim of Shedd, alleges that the respondent “did transmit, and cause and procure to be transmitted, to the office of the commissioner of pensions,” to wit, to the office of the commissioner of pensions of the United States, a certain writing and affidavit purporting to be made, subscribed and sworn to by one Adolphus Hall, and by one Jacob Litchfield, both of Grantham, in said district, in which writing and affidavit it was alleged and declared as follows. It then sets out the affidavit *in hæc verba*. Then it proceeds: “The said Austin Corbin then and there, well knowing the said writing and affidavit to be false and untrue, and then and there well knowing the statements contained in said writing and affidavit to be untrue and

false, then and there did willingly transmit to, and did cause and procure to be transmitted to, the office of the said commissioner of pensions the said false writing and affidavit," etc. Grounding himself upon this expression of "*writing AND affidavit*," the respondent supports his first objection because he says the pleading is double; that he is accused of two crimes in the same count—that of sending a false *writing*, and of sending a false *affidavit*, to the pension office. If this were so, we are inclined to the opinion that the objection would be of more serious import. Two crimes cannot be charged in the same count, and judgment will be arrested for such defective pleading. *State v. Nelson*, 8 N. H., 163; *Morse v. Eaton*, 23 N. H., 415. But we are of the opinion such is not the case here.

The expression "writing and affidavit" may mean two documents, or it may mean one—a writing called or known as an affidavit. Standing alone it might be ambiguous; but where the writing and affidavit is recited in the indictment it is shown clearly to be but one instrument,—an affidavit,—a writing called an affidavit. This objection, therefore, must be overruled. If the sense of a word be ambiguous, it shall be construed according to the context. Arch., 41, and authorities cited. The next objection, that the indictment does not specify the particular statements in the affidavit relied upon as false, is of a more serious character. The same objection in substance was taken at the trial, but was overruled upon the authority of the case of *United States v. Staats*, 8 How., 41 (§§ 2542–44, *supra*).

§ 2546. *An indictment under section 1 of the act of March 3, 1823 (3 Stat. at Large, p. 771), must distinguish between sending a writing not genuine in execution, and one genuine in that respect but false in statement.*

The offense in that case was the same as in this; the indictment was substantially the same in its allegations, and upon the same clause of the same statute. There was in that case no particular assignment of the falsity of the writing or affidavit, but a general allegation that the respondent knew that it was "false and untrue," and the court held that the acts charged constituted an offense within the provisions of the statute and overruled the *particular objections* there taken. A more careful examination of that case, however, and other authorities, together with a consideration of the principles and rules regulating criminal proceedings, has satisfied us that the objection is a fatal one, and that the judgment in this case must be arrested. Though in the case of *United States v. Staats* the indictment was the same as here, the point made here was not made there, nor does the attention of the court appear to have been called to it. Two considerations arose there: (1) Whether the indictment should not have described the offense to have been committed "*feloniously*;" and (2) whether the acts charged constituted the offense described in the statute; that is, whether the sending a writing false in its statements constituted the offense, or a writing false in its execution—not a genuine paper. The court held that the offense need not be described as committed *feloniously*, and that sending a paper containing false statements, though genuine in its execution, constituted the offense, but nothing further. No question was there made, like the one in this case, whether, in describing the offense, the indictment should not have been framed with more particularity, and have shown more definitely in what the falsity of the writing consisted.

§ 2547. *Certainty required in an indictment.*

It is a well-established rule in criminal proceedings that every indictment must charge the crime with such certainty and precision that it may be under-

stood, charging all the requisites that constitute the offense, and that every averment be so stated that the party accused may know the general nature of the crime of which he is accused. 1 Chit. Cr. L., 172; Archb. Cr. Pl. & Ev., 39. Thus, in an indictment for obtaining money by false pretenses, it was held necessary to specify the false pretenses. *Rex v. Mason*, 2 Term R., 581; *Rex v. Munoz*, 2 Strange, 1127. So, in an indictment for extortion, the indictment must show what fee was due, and what was taken. *Rex v. Lake*, 3 Leon, 268. An indictment for stopping the highway must specify what part was stopped. *Rex v. Roberts*, 1 Show., 389. So an indictment which may apply to either of two different offenses, and does not specify which is bad. *Rex v. Marshall*, 1 Moody, C. C., 158. Where the statute made it felony maliciously to kill cattle, it was held the particular kind of cattle must be specified. *Rex v. Chalkley, Rose. & Ry.*, 258. Applying the rule as to certainty thus laid down by Chitty and Archbold, and illustrated by these decisions, the defects of this indictment become very apparent.

The indictment alleges the sending of a false writing and affidavit to the pension office. Now an affidavit may be false in its making, it may be forged, or it may be false in its statements. This indictment alleges that the affidavit was false and untrue, and that the statements in it were untrue and false,—an allegation broad enough to include a false and forged instrument, and one false in its statements but genuine in its execution, without specifying which. It may apply to either of the two offenses, or both, but does not specify which, and therefore falls within the case of *Rex v. Marshall*, 1 Moody, C. C., 158. Again: "The special matter of the whole fact ought to be set forth with such certainty that it may judicially appear to the court that the offense has been committed" (1 Russ. Crimes, § 304; Salkeld, Pleas of the Crown, book 2, ch. 25, § 57); and if any fact or circumstance which is a necessary ingredient of the offense be omitted in the indictment, such omission vitiates the indictment. Thus in an indictment against a person for not serving in the office of constable, the mode of election must be set out to show that he was legally elected. *Rex v. Harpur*, 5 Mod., 96. So in prosecutions for perjury, the indictment must allege not only the taking of the oath, but in what proceeding and before what court, and that the oath was material. It must also set out particularly that part of the oath relied upon as false, with particular averments of its falsity. Archb. Pl. & Ev., 538, 539; Hawkins, book 2, ch. 25, § 57. The statute in this case makes it an offense to send a false affidavit to any office or officer of the United States knowingly and with intention to defraud. In the case of *United States v. Staats*, 8 How., 41 (§§ 2542-44, *supra*), the court held that an affidavit or writing false in its statements, in contradistinction from falsity in execution, was within the description of the offense in the statute.

The affidavit set out in the indictment in this case contains numerous allegations. Some are material, some are not. Probably no one would contend that if the affidavit or writing were false only in some immaterial statements, the crime had been committed; yet there is no allegation that the false statements were material, and no such particular specification or description of the false statements as will enable the court to say that they were material. It is quite true that the court instructed the jury that they must find the affidavit false in some material matter or allegation, but taking the indictment and the verdict of guilty, no one can say whether the jury found the affidavit false in a material or immaterial part. And if it be sound law that the affidavit must have been false in some material allegation to warrant conviction, then it follows

there are not sufficiently specific allegations in the indictment to sustain the verdict and warrant a judgment upon it. The indictment should have alleged the material false statement.

It is contended in the brief of the prosecuting officer that this is an offense, made such by special statute, and is set out in the language of the statute, and is, therefore, sufficient. But neither of these propositions can, as we think, be successfully maintained. Archbold (Pl. & Ev., 46) says: "As to indictments for offenses created by statute, the statute contains a definition of the offenses, and the offense consists of the commission or omission of certain acts under certain circumstances, and in some cases with a particular intent. An indictment, therefore, for an offense against the statute must with certainty and precision charge the defendant to have committed or omitted the acts under the circumstances and with the intent mentioned in the statute; and if one of these ingredients in the offense be omitted, the defendant may demur, move in arrest of judgment, or bring writ of error. The defect will not be aided by the verdict." He cites *Lee v. Clarke*, 2 East, 333, and other cases. The statute of 7 Geo. IV., ch. 64, § 21, provides that if the indictment describe the offense in the words of the statutes, after verdict, it will be sufficient in all offenses created or subjected to any greater degree of punishment by any statute; but we have no such statute. Salkeld says (Pl. Cr., book 2, ch. 25, § 111): "Neither doth it seem to be always sufficient to pursue the very words of the statute, unless by so doing you fully, directly and expressly allege the fact in the doing or not doing thereof the offense consists, without any, the least uncertainty."

We are of opinion that all the ingredients of this offense are not set out with sufficient particularity, and that neither the court nor the respondent could know from the indictment whether he was to be tried for sending an affidavit to the pension office, not genuine in its execution, or one genuine in its execution, but false in statement; nor, if so false in statement, whether in a material or immaterial allegation; and that the judgment should be arrested.

Judgment arrested. Defendant discharged.

UNITED STATES *v.* CLAFLIN.

(Circuit Court for New York: 13 Blatchford, 178-187. 1875.)

Opinion by BENEDICT, J.

STATEMENT OF FACTS.—This cause comes before the court upon a motion to quash the indictment. The provision of law under which the defendants are charged is section 4 of the act of July 18, 1866 (14 U. S. Stat. at Large, 179), reproduced in section 3082 of the United States Revised Statutes. It is as follows: "If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such merchandise, after importation, knowing the same to have been imported contrary to law," "the offender shall be fined," etc., the offense being a misdemeanor. The indictment contains four counts. In the first the charge is that of concealing; in the second, that of facilitating the transportation; in the third, that of facilitating the sale of certain merchandise. These three counts are similar in form, and the objections now to be considered apply to each of them. The fourth count is different, and will be considered by itself.

§ 2548. *A description sufficiently particular for an indictment for smuggling.*
Cases cited.

The first objection which I examine is, that the goods, forming the subject of the transaction charged, are not sufficiently identified. The language used to identify the goods is as follows: "certain goods, wares and merchandise, to wit, a large quantity of silk goods, to wit, six cases containing silk goods of the value of \$30,000, a more particular description of which is to the jurors unknown." There is also the additional statement that the goods were dutiable goods introduced into the port of New York from France. The rules by which the sufficiency of an indictment is to be determined have been too often stated to require repetition. These rules, as they have been understood and applied in the adjudged cases, are to be applied here. Their operation cannot be extended because of any embarrassment under which these defendants lie because of the great extent of their business and the large number of transactions, similar in character, which their dealings involve. Judged thus, the description under consideration will be found sufficient. Plainly the language used shows the subject of the transaction to be within the scope of the statute creating the offense, for the statute in terms includes all kinds of merchandise. It is also clear that the description in the indictment, together with such evidence as a trial must necessarily furnish, will fully protect in any future prosecution for the same offense. It is not necessary to describe property with such particularity as will obviate all necessity for proof outside the record to support a plea of once in jeopardy. Says the court, in *Regina v. Mansfield*, 1 C. & M., 140: "There must be some parol evidence in all cases to show what it was that he was tried for before." The requisite notice of the offense charged is also to be found in the language used. The rule requiring notice of the offense charged is never so applied as to compel a description calculated to be fatal to the prosecution. A reasonable amount of detail in description is all that can be demanded for the purpose of informing the defendant. If, in any case, such reasonable detail prove insufficient to enable the defendant to prepare his defense, all possibility of injustice is removed by a bill of particulars, to which the defendant is entitled upon making oath that further particulars are necessary to enable him to defend. While speaking of a bill of particulars, it may be remarked that the objections to a bill of particulars in a criminal case, because it cannot be certainly known that the bill of particulars describes the goods to which the attention of the grand jury was drawn, is an obvious one, and has been often urged, but has not been deemed of sufficient practical importance to overcome the advantages, both to the defendant and the prosecution, which follow from the practice. I have never heard a motive suggested as calculated to induce a public prosecutor to omit the presentation to the consideration of the grand jury of the goods that he must prove before the petit jury in support of the indictment which the grand jury find; and it cannot be presumed that the official representative of the United States, when called on to furnish a more detailed description of the goods presented by him to the consideration of the grand jury, would place on file a description of other goods. Experience has shown that the opposite presumption is sufficient to prevent injustice, and the practice seems established by the authorities. The description under consideration is not so deficient in detail as to be fatal to the indictment. It states that the articles bought were cases containing silk goods imported from France. It is true that no numbers or marks are given; but marks and numbers may have been absent from the cases, and that for the pur-

poses of concealment. The voyage of importation is not given, nor the name of the ship, nor that of the consignee; but such particulars are not necessarily disclosed by the cases or the goods, and are often wholly unknown; and, to require the various species of silk goods in the cases to be set forth, would open too wide the door for the defeat of the prosecution upon a question of variance. To demand the statement in the indictment of such particulars of description is to push the rule beyond reason. Furthermore, the grand jury have stated in the indictment that a more particular description is unknown to them.

That I do not go beyond the bounds of precedent in holding this description to be sufficient for the purpose of identifying the goods and enabling the defendants to prepare a defense is made apparent by referring to some of the descriptions which adjudged cases show to have been approved. The words "one sheep" do not go far towards enabling an extensive grazier to prepare a defense. Such charges as "ten domestic fowls," "woolen cloth," "hay," "twenty-two pounds' weight of tin," "certain goods," "one post letter, the property of the postmaster-general," "one leg of mutton," "one book of the value of \$3," "divers goods," will all be found to have been considered sufficient to identify the subject of the charge in an indictment.

§ 2549. *What is necessary to be stated in an indictment for buying smuggled goods.*

I pass, therefore, to consider the next objection—that the illegality in the importation of these cases is not properly stated. In support of this objection, the proposition is advanced that an indictment for buying goods which have been brought into the United States contrary to law must set out the offense committed in the original importation, with the same particularity of time, place and circumstances that would be required in an indictment for the original offense. Such a proposition cannot be maintained. The offense of knowingly buying smuggled goods is similar in character to that of receiving stolen goods; so much so that it has been conceded that the rule applied to indictments for receiving stolen goods may be properly applied to this indictment. The concession is fatal to the objection under consideration. The rule applying to indictments for receiving stolen goods is thus given by Roscoe: "It is not necessary to state in the indictment the name of the principal felon, and the usual practice is merely to state the goods to have been before then feloniously stolen." Roscoe, Cr. Ev., 885. See, also, 2 Whart., §§ 1899, 1900. Archbold gives the form thus: "one silver tankard, goods and chattels of J. N., before then feloniously stolen." In *Rex v. Jervis*, 6 Carr. & P., 156, it was expressly adjudged unnecessary to say by whom the principal offense had been committed. The same rule has been applied in cases of other offenses than that of receiving stolen goods. Thus, in a prosecution under the English statute which makes it an offense to "receive any post letter, . . . the stealing, or taking, or embezzling, or secreting whereof shall amount to a felony under the postoffice act, knowing the same to have been stolen, taken, embezzled or secreted," the indictment as given by Archbold (441) charges that "one post letter, the property of the postmaster-general, before then from and out of a certain post-letter bag feloniously stolen, J. S. feloniously did receive and have, knowing," etc. So, under 16 and 17 Victoria, where the offense is being in company with more than four others, "with any goods liable to forfeiture under this or any act relating to the customs," the indictment, as given by Archbold (869) charges that J. S., "being then in company with divers persons to the jurors unknown,

to the number of five and more, was found feloniously with certain goods then liable to forfeiture under and by virtue of a certain act, to wit, an act," etc.

§ 2550. *An indictment need not state the facts tending to establish the fact that the alleged smuggled goods had been really smuggled.*

I next consider the position taken in support of this motion, that the indictment, to be good, should not only confine the charge to the dealing in smuggled goods, that is, goods secretly run into the United States without passing through the custom-house, but also should state facts from which the court can determine such to have been the character of the importation referred to. It seems unnecessary to determine, in this case, whether section 4 of the act of 1866 can be applied in any case other than that of smuggled goods, for, whether the general words of the act are intended to cover other cases or not, this indictment is confined to such a case. Here, the pleader having, by the use of the words of the act, brought the charge within the scope of the statute, has proceeded to limit the charge to a dealing in smuggled goods. The illegality of the original importation is, in express terms, stated to consist in this, that said goods have been smuggled and clandestinely introduced into the United States. The case of *United States v. Thomas*, 4 Ben., 370, is authority to show that the effect of adding such words to the words of the act is to confine the charge to the illegality thus described. Thus the indictment itself furnishes an answer to the first branch of the objection under consideration; and this language of the indictment has been here relied on by the prosecution as answering the argument made to show that section 4 of the act of 1866 is confined to cases of smuggled goods.

§ 2551. *An adequate averment that goods had been smuggled, and that their original importation was illegal.*

The second branch of the objection in hand is, that averring the goods to have been smuggled and clandestinely introduced into the port of New York from the republic of France is not giving such a statement as enables the court to say that the original importation was illegal within the meaning of the act of 1866. But, as already shown, the particularity of the statement respecting the act of importation required in charging the smuggler is not required in charging the buyer of smuggled goods. In the case of the buyer, the act to be proved is the buying of certain goods, and the guilty knowledge which makes the act criminal is knowing the goods to have been smuggled. Here, the act of the defendant intended to be proved is stated with particularity of time, place and subject-matter, and the guilty knowledge required by the act is shown by the averment that the defendants knew the goods to have been imported contrary to law, as aforesaid, that is to say, in this, that they had been smuggled into the United States.

§ 2552. *Definition of the word "smuggle."*

The word "smuggle" is a technical word, having a known and accepted meaning — "a necessary meaning in a bad sense." It implies something illegal, and is inconsistent with an innocent intent. The idea conveyed by it is that of a secret introduction of goods, with intent to avoid payment of duty. As such it is used by itself alone, and in the statutes even. It is used in section 4596 of the Revised Statutes, in a provision relating to seamen, where an "act of smuggling" plainly is supposed to mean such an act as above described, and none other. The word is used in the same technical manner in the English statute (16 and 17 Victoria, ch. 107, § 244), where it is deemed sufficiently descriptive of a particular illegal employment in a ship, to desig-

nate it as "a smuggling ship." This technical meaning of the word has taken the form of a statutory definition in the moiety act of June 22, 1874 (18 U. S. Stat. at Large, 186), where it is declared that the act of "smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles, without passing the same, or the package containing the same, through the custom-house, or submitting them to the officers of the revenue for examination." What is smuggling for the informer when he claims his reward must also be smuggling for the goods as to which he informs.

§ 2553. *Construction of technical words.*

But, it is asked here, and the question is one which can be asked with equal significance in many cases — How does it appear that the goods which the grand jury have designated as smuggled are smuggled goods, within the legal acceptance of the word? The answer is, that, when technical words are used in an indictment, they must be taken to be intended to have their technical meaning. In an indictment for uttering counterfeit money, it is sufficient to say that the defendant "uttered" the money, without stating the circumstances which are supposed to amount to an uttering. Under the statute making it an offense "to impair the queen's current coin," it is sufficient to use the words "did impair;" and, under another statute, to say, "did deface." Archb., 748, 749. Where the act reads, "shall import or receive into the United Kingdom counterfeit coin," it is sufficient to say, "did import from beyond the seas." Archb., 751. The present indictment is within the principle of these precedents. The real difficulty of the defendants does not lie in the form or the matter of the indictment, but in the fact that the charge made does not conform to the proofs which they suppose the government to have, and upon the argument this was put forth as matter of complaint, and the district attorney was challenged to admit that none of the goods referred to in the indictment were smuggled goods; but it cannot in this way be made to appear that the indictment is bad. Nor is a motion like the present adapted to secure relief from such a difficulty.

§ 2554. *An insufficient allegation of illegal importation.*

I have now considered the objections urged against the first three counts of the indictment. It remains to consider the fourth and last count. This count is likewise based upon section 4 of the act of 1866. The difference between it and the other counts is, that, in assigning the illegality of the original importation, it uses simply the words of the statute, averring only that the goods had been imported and brought into the United States contrary to law. If the act of 1866 is confined in operation to a single form of illegality, it might be questioned whether a count like this, in an indictment for a secondary offense, would not be supported by the authorities already referred to; and, certainly, there is weight in the argument derived from the repealed provisions of section 16 of the act of 1842, the provision of the moiety act of 1874, and the general features of the revenue laws, to show that illegalities and frauds committed in regard to the value, description, invoice and ascertainment of the amount of duties to be paid upon goods which come into the custody and under the supervision and scrutiny of the officers of the customs are excluded from the operation of the act of 1866. But there are other forms of illegality, as, for instance, the introduction of prohibited goods, where the intent to avoid payment of duties does not exist, the introduction of goods packed in prohibited methods, and the like, which do not appear to be so excluded, and, if several forms of

illegality are intended to be covered by the words of the act, it would seem that the illegality should be designated with more particularity than is afforded by the words "imported contrary to law." When the language of a statute comprehends, under general terms, divers forms of illegality, having different characteristics, it may well be considered proper to require something more than the words of the act. In cases of receivers, it is usual to state whether the goods received were goods stolen or goods obtained by false pretense. For this reason, and because such a count, based upon this same statute, has been condemned in a reported case in this circuit—the case of Thomas, above referred to,—I am of the opinion that the fourth count of this indictment should be rejected.

My determination upon this motion, therefore, is, that the fourth count of the indictment be quashed, and that, as to the other counts, the motion be denied.

UNITED STATES *v.* BETTILINI.

(Circuit Court for Florida: 1 Woods, 654-660. 1871.)

Opinion by FRASER, D. J.

STATEMENT OF FACTS.—The indictment in this case is found for the offense of knowingly effecting an entry of goods contrary to the provisions of the third section of the act of March 3, 1863, entitled "An act to prevent and punish frauds upon the revenue; to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes" (12 Stat., 739). The said section reads as follows: "If any person shall, by the exhibition of any false sample, or by means of any false representation or device, or by collusion with any officer of the revenue, or otherwise, knowingly effect, or aid in effecting, an entry of any goods, wares or merchandise at less than the true weight or measure thereof, or upon a false classification thereof, as to quality or value, or by the payment of less than the amount of duty legally due thereon, such person shall, upon conviction thereof, be fined in any sum not exceeding \$5,000, or be imprisoned not exceeding two years, or both, at the discretion of the court." The first ground of objection is that every count in the indictment is double, and that the duplicity consists in this, that the prisoner is charged with both knowingly effecting an entry, and knowingly aiding in effecting an entry, of the goods at the custom-house.

§ 2555. *The offenses of effecting a false entry of goods, and of aiding in effecting such false entry, may be charged conjunctively in the same indictment.*

The offense created by the act is a misdemeanor where all are principals. The offense of effecting an entry, and of aiding in effecting an entry, may be committed by different persons, yet they are different stages of the same offense, and may be charged conjunctively in one count against the same person, and the proof of either will sustain the charge. This has been the uniform ruling of this court, and this case is no exception to those already determined. In this respect the indictment is not defective. *United States v. Mills*, 7 Pet., 140 (§§ 2452-53, *supra*); *Whart. Cr. L.*, sec. 390, and note.

The next objection is that the offense is not set out in the indictment with sufficient certainty; that the facts or circumstances which constitute the definition of the offense in the act are not set forth, and that, therefore, the indictment is bad. Mr. Chitty, in his *Criminal Law*, vol. 1, p. 281, says: "It is a general rule that all indictments upon statutes, especially the most penal, must

state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it."

§ 2556. *An indictment under section 3 of the act of March 3, 1863 (12 Stat., 739), charging the commission of the offense "by fraudulent means," and not specifying the means, is bad for want of certainty.*

It is argued that this rule is relaxed by the decision of the supreme court in *United States v. Mills*, 7 Pet., cited above, and that, in consequence of that decision, it is not necessary, in practice, to set out in an indictment any circumstances or facts to apprise the accused of the crime with which he is charged. The court say, in that case: "The general rule is, that in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony; and with respect to some crimes, when particular words must be used, and no other words, however synonymous they may seem, can be substituted." Thus far the court simply say that the pleader need not resort to technical words in describing the offense, but that the words of the statute shall be sufficient. "But that in all cases the offense must be set forth with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged." The supreme court, in this, makes a distinction between the technical words necessary to be used in describing an offense, and the circumstances necessary to show that an offense has been committed. Mr. Chitty makes the same distinction. In his work on Criminal Law, vol. 1, p. 283, he says: "It is, in general, necessary not only to set forth on the record all the circumstances which make up the statutable definition of the offense, but also to pursue the precise and technical language in which they are expressed." "The certainty essential to the charge consists of two parts, the matter to be charged, and the manner of charging it." 1 Chitt. Cr. L., 169, 170. The technical niceties, called by Lord Hale unseemly niceties, which were allowed to prevail in the early English cases, were regretted by many eminent and learned judges in England—Lord Hale, Lord Kenyon, Lord Ellenborough and Lord Mansfield being among the number; but these regrets related to mere formal objections based upon the manner of charging the offense in the use of words, or even in the omission of a letter. Chitt. Cr. L., 170 *et seq.*; 2 Hale's Pl. Cr., 193.

But none of the judges have gone so far as to admit that it would be safe in practice to relax the rule which requires clearness and certainty as to the matter charged. This embraces "a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, that the accused may know what crime he is called upon to answer; that the jury may be warranted in finding a verdict; and that the court may see such a definite offense upon the record; that the judgment and punishment which the law prescribes may be applied; that the defendant may plead the conviction or acquittal, should he be again called to answer a charge for the same offense; and, I may add, that it may be impossible to convict an innocent person by dispensing with proof of the facts and circumstances which constitute the crime." 1 Chitt. Cr. L., 172. "Therefore, an indictment charging the defendant with obtaining money by false pretenses, without stating what were the particular pretenses, is insufficient." 1 Chitt. Cr. L., 171. For the defendant must be advised, not only of what he has to answer, but the court must be advised what the pretenses are; for it is not every false pretense which

will bring the case within the meaning of the law. *Rex v. Goodhall*, Russ. & Ry., 461; Whart. Cr. L., secs. 2086, 2087.

But it is argued on the part of the prosecution that in this country the courts have modified this rule, and dispensed with the degree of certainty formerly required in setting out an offense in an indictment, and that now it is necessary only to charge the offense in the words of the act creating it; that in this case the facts and circumstances could not be set out because unknown to the attorney for the United States; and that this case is governed by rules and principles entirely different from a case arising under the law for obtaining goods by false pretenses; that the false representation or device or collusion with an officer of the revenue, or the exhibition of any false sample, is not a material part or element of the offense, and therefore need not be set forth in describing it, and that the words "or otherwise" employed in the statute, so far enlarge the definition of the offense, as to make what precedes them entirely immaterial, and do in effect obliterate it altogether, and bring within the meaning of the act any entry made by the payment of less than the amount of duty legally due thereon, though such entry was made through ignorance or mistake, and with no intention to defraud the revenue. To sustain this view the attorney for the United States adduces a decision of the district court of the United States, for the eastern district of Michigan, in a case arising under the same act of congress and the same section of the act as the case here under consideration. *Int. Rev. Rec.*, vol. 13, pp. 195-6.

Before referring to this decision it may be well to dispose of some of the positions asserted in the argument as just stated. It is clear that the supreme court, in the case of *The United States v. Mills*, above cited, and which is relied upon to sustain the position that certainty and particularity are no longer necessary in charging the matter of the offense, does not sustain that position, but quite the contrary, as has been shown above; that it changed in no respect the rule laid down by *Chitty*, as the exponent of the most learned, wise and just tribunals of England, making a distinction between formal and technical niceties in words, and the statement of substantial matters — and that is certainly substantial matter which is descriptive of the offense, and which must be proved as laid — and nothing can be proved to sustain the indictment which is not charged therein.

The reason given for not having set out the circumstances of the offense, that it was impossible because they could not be known, is untenable, because the grand jury could find no bill without proof of such facts, and they must be within the knowledge of the prosecuting officer before he can conclude that such offense has been committed, and before he will consent to lay a bill before the grand jury, unless the position be true that the words "or otherwise," in the statute, must be construed to create an offense under the act, in which there is neither intent nor ingredient of fraud. If such be the correct construction of those words, then the indictment need not charge that the entry was effected by false sample, false representation or device, or by collusion, but simply that the entry was effected at less than the true weight or measure thereof, for that would be otherwise than by false representation or device. But the rule that effect must be given to all the words of an act, and that none of the provisions of an act must fail unless so repugnant that they cannot be reconciled, must not be overlooked. Congress surely meant something by the words, "by the exhibition of any false sample, or by means of any false representation or device, or by collusion with any officer of the revenue;" and also

meant something by the words "or otherwise." Congress intended to make any fraudulent means, whether by sample, representation, device, collusion or otherwise, an ingredient of the offense; and if the fraudulent entry were effected by any other means than by false sample, false representation or device, or collusion with an officer of the revenue, such fraudulent means would be included in the words "or otherwise" in the act. There is no other reasonable construction by which all the provisions of the act can stand together. The words "or otherwise" must be interpreted to mean or by any other fraudulent means whatsoever, or they mean nothing and are mere surplusage. The construction which gives them effect, and does not destroy the effect of the other provisions of this section of the act, is clearly correct. The means used in effecting the entry is made by the act the very gist of the offense, and without which no offense can be committed, and if so, the means by which it was effected must be set out and clearly stated in the indictment. Such facts and circumstances as will show that a false sample was exhibited, in what false and to whom exhibited, what false representations were made, and to whom, what false device was used and how, with what officer of the revenue the collusion was had, or how or by what other fraudulent means, if any, the entry was effected. It is admitted by the learned judge, in the case of *The United States v. Ballard*, *supra*, that the means adopted to commit the offense would inevitably constitute one of its elements, but for the concluding clause "or otherwise;" that "these words render that unlimited and general, which, by the preceding clauses, without these words, would be limited and specific," and that that clause does not, like what precedes it, relate simply to the means by which the offense is committed, but also to the manner in which the entry is made, and that, therefore, "the facts answering to the preliminary clauses of the section may or may not be alleged in the indictment at the option of the pleader;" and as a consequence, if not alleged, they need none of them to be proved in order to convict the defendant. With this view I cannot agree, as it would seem entirely to change the rule above stated for the construction of statutes, and introduce into the criminal practice a laxity and uncertainty always carefully avoided by the purest and wisest tribunals in the administration of criminal justice.

It is evident, by reference to and comparison of some of the decisions of the ablest judges both in England and this country, that the rule as to certainty of the matter charged has not been changed or modified. *Rex v. Holland*, 5 Term R., 623; *Commonwealth v. McAtee*, 8 Dana (Ky.), 29; *People v. Taylor*, 3 Denio, 91; *Biggs v. People*, 8 Barb., 547. All the counts in the indictment which profess to charge an offense to have been committed under the section and act above referred to are defective in not having set out the circumstances required, as I have shown above. And this is in accordance with the ruling of this court in the case of *The United States v. Conant*, and has been the uniform ruling in all similar cases. Upon a thorough re-examination of the authorities, I see no reason for changing or reversing those decisions or for adopting a different rule. Other defects have been pointed out in this indictment, but I do not deem it necessary to examine it further, as the question discussed disposes of the case. The indictment must be quashed.

§ 2557. **Assault.**—An indictment for assault with intent to kill is not sufficient, under a statute punishing assault and battery with intent to kill. *United States v. Lloyd*, 4 Cr. C. C., 468; *United States v. Turley*, 4 Cr. C. C., 334.

§ 2558. An indictment for assault and battery with intent to kill was held sufficient,

although it did not allege that the assault and battery was wilful, unlawful or malicious, and did not set forth the manner of the beating or the weapon. *United States v. Lloyd*, 4 Cr. C. C., 472.

§ 2559. An indictment under the penitentiary act for the District of Columbia, for assault and battery with intent to kill, need only describe the offense as it is described at common law, with the addition of words charging the intent to kill. It need not set forth the manner and extent of the assault, nor name the weapon used. The indictment need not charge the assault to have been felonious or malicious, nor that the homicide, if it had been perpetrated, would have been felonious or malicious, since the statute does not require the assault to have been so made. Such an indictment does not require evidence of malice prepense, or other matter going to constitute the offense of murder, if death had ensued. *United States v. Herbert*,* 5 Cr. C. C., 87.

§ 2560. In bankruptcy.—An indictment against a bankrupt for filing fraudulent schedules need not allege that the defendant at that time had taken the oath of allegiance. *United States v. Clark*,* 1 Low., 402.

§ 2561. An indictment under section 44 of the bankrupt act of 1867, for obtaining goods upon credit, is insufficient if containing only general averments of the pendency of the bankrupt proceedings. All facts must be averred to show the jurisdiction of the court in that proceeding. *United States v. Prescott*,* 2 Abb., 169; 2 Biss., 325.

§ 2562. An indictment under section 44 of the bankrupt act of 1867, for obtaining goods upon credit, should specify the goods purchased as definitely as in the declaration in an action in trover. *Ibid*.

§ 2563. In an indictment under section 44 of the bankrupt act of 1867, for obtaining goods upon credit, the word feloniously should be omitted, because the offense is a misdemeanor. *Ibid*.

§ 2564. An indictment, under section 44 of the bankruptcy act of March 2, 1867, punishing the offense of making a conveyance with intent to keep property from an assignee in bankruptcy, which merely avers the commencement of proceedings in bankruptcy pursuant to the act, without in any way describing the proceedings, except by the names of the creditors, is insufficient. It must appear from the indictment that proceedings in bankruptcy had been commenced before a court of competent jurisdiction, in which an assignee could be appointed. It should state the time, place and tribunal before which the proceedings were had. *United States v. Latorre*,* 8 Blatch., 134. The defendant was indicted for attempting to account for a part of his property by fictitious losses, and for secreting certain of his property after the commencement of proceedings in bankruptcy. It was objected that the offenses charged were not alleged to have been committed after the commencement of proceedings in bankruptcy. The averments were as follows: That the defendant, on his own petition, filed, etc., was lawfully adjudged a bankrupt, and, after the commencement of proceedings in bankruptcy, in the said case, he was required by the court to attend and submit to an examination on oath, etc.; that he did attend, etc.; that he was then inquired of, etc., and that he then and there, with intent to defraud his creditors, falsely and fraudulently attempted, etc. *Held*, that the averment was sufficient. *United States v. Crane*,* 3 Cliff., 211. An averment that certain money belonged to the defendant, and was assignable under the bankrupt act, is a sufficient averment that the money was the property of the defendant. *Ibid*.

§ 2565. Section 5132 of the Revised Statutes punishes a person respecting whom proceedings in bankruptcy are commenced, who, with intent to defraud, wilfully and fraudulently conceals from his assignee, or omits from his inventory, any property or effects required by the title to be described therein. It is held that an indictment under this section, which alleges that the defendant has concealed property which was of a kind required to be described in his inventory, and that it was a great part of what should have come to the assignee, is sufficient though it does not allege directly that the property withheld belonged to the bankrupt on the day when the proceedings were begun. The allegation as to time is a mere formal defect, and section 1025 of the Revised Statutes requires the courts not to hold an indictment insufficient for any defect or imperfection in matter of form only, which shall not tend to prejudice the defendant. *United States v. Jackson*,* 2 Fed. R., 502.

§ 2566. Carrying away free negro.—An indictment under the seventeenth section of the penitentiary act of March 2, 1831, declaring that if any free person shall carry away any free negroes, etc., he shall be punished, etc., need not allege that the defendant is a free white person, since the language of the act applies to free colored persons as well. *United States v. Henning*, 4 Cr. C. C., 645.

§ 2567. Civil rights.—An indictment under the act of April 9, 1866, alleging that a certain person of the African race, a citizen of the United States, is denied the right to testify, etc., need not allege that white citizens enjoy the right to testify. The court will take notice of the provisions of the state law. *United States v. Rhodes*,* 1 Abb., 23.

§ 2568. An indictment under the civil rights statute, for refusing a colored person any privileges accorded to white persons, must allege that the person to whom the privileges were denied was a citizen of the United States. *United States v. Taylor*,* 9 Biss., 472.

§ 2569. An indictment under the enforcement act of May 31, 1870, should state that the offense charged was committed against the person injured by reason of his race, color or previous condition of servitude. *United States v. Cruikshank*, 1 Woods, 319; S. C., 2 Otto, 543 (CONST., §§ 898-911).

§ 2570. A statute provided for the punishment of all persons who conspire "to injure, oppress, threaten or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States." An indictment under the act charged a conspiracy to hinder and prevent certain citizens in the free exercise and enjoyment of "every, each, all, and singular the several rights and privileges granted," etc. *Held*, that the indictment was defective because it did not specify, as it should have specified, some particular right. *Ibid*.

§ 2571. To sustain an indictment under the sixth section of the enforcement act of May 31, 1870, it must appear that the right which the conspirators intended to hinder or prevent was one granted or secured by the constitution or laws of the United States. If it does not so appear, the alleged criminal matter has not been made indictable by any act of congress. An indictment under this law for conspiracy to prevent and delay citizens of a state in the free exercise and enjoyment of their lawful right and privilege to assemble for a lawful and peaceful purpose is insufficient, because the right existed previous to and independent of the constitution. So also indictments for conspiring to prevent citizens of a state from carrying arms; for conspiring to deprive citizens of a state of their lives and liberty; for conspiring to prevent certain citizens of the United States within a certain state from enjoying the equal protection of the laws of the state and of the United States, where it is not alleged that this was on account of the race, color, etc., of the parties; for conspiring to prevent certain citizens of a state from voting at an election in the state, where it does not appear that it was on account of the race, etc., of the citizens named; and for conspiring to commit a breach of the peace against citizens of a state on account of their having voted at an election held in the state. All these counts are bad for the same reason as above set forth, viz., that the charges mentioned do not show the intent of the defendants to hinder or prevent the enjoyment of any right secured by the constitution. *Ibid*.

§ 2572. An indictment that avers in substance that one Ah Koo was deprived of a right secured to him by the sixteenth section of an act of congress of May 31, 1870, in this, that there was exacted from him \$1 by the defendant, who was then and there a duly elected collector of taxes in Trinity county, under color of a certain law of the state of California, which the indictment particularly sets forth, is held to be insufficient for not averring that Ah Koo was a foreign minor and within the provisions of the state law. The object of this act was to forbid the execution of state laws which by the act itself are made void. *United States v. Jackson*,* 3 Saw., 59.

§ 2573. Common scold.—An indictment charging the defendant with being a common slanderer, or an indictment charging the defendant with being a common brawler, is not good, for want of that technical description to charge the defendant as a common scold or baratrix, which is the only indictable offense of this class. *United States v. Royal*,* 3 Cr. C. C., 618.

§ 2574. Contempt.—An indictment for using contemptuous and threatening language to a justice of the peace, in the exercise of his official duties, should set forth the words, the day and the month, and should also state that the magistrate was in the exercise of his judicial functions. *United States v. Beale*, 4 Cr. C. C., 313.

§ 2575. Corruption in office.—An indictment against a justice of the peace for corruptly taking insufficient security for the appearance of one indicted and arrested for a criminal offense need not state in what respect the security taken was insufficient, nor set out the security taken, nor aver that the defendant ordered the offender to be discharged from arrest. *United States v. Clark*, 4 Cr. C. C., 506. The indictment should set out affirmatively sufficient allegations to make out the offense charged, and leave nothing to be supplied by inference or proof. An indictment of an officer for malfeasance in office, which charges that the defendant received items in account to which he was not entitled, and thereby wilfully and corruptly was guilty of malfeasance, is not sufficient. It must specify those items definitely. Especially so, when a statute of the territory, after enumerating the fees to be allowed to the officer, declares that he shall for all services not enumerated be allowed a reasonable compensation. *McCarthy v. Territory of Wyoming*,* 1 Wyom. T'y, 311.

§ 2576. Cutting timber.—If the indictment under the act of March 2, 1831, forbidding the removal of timber from public lands, contains the proper averment specifying the lands by township, range, section and quarter section, it is not necessary to aver that the timber was

removed from the lands on which it was grown and cut. *United States v. Schuler*,* 6 McL., 28.

§ 2577. An indictment for cutting timber on public lands, contrary to the act of congress, need not specify every kind of timber cut. Under the allegation of "other timber," proof of the cutting of any kind may be made. *United States v. Redy*,* 5 McL., 358.

§ 2578. An indictment, under the act of 1831, declaring the act of "cutting any live oak or red cedar, or other timber from any lands of the United States, with intent to export, use or employ the same in any manner whatever other than for the use of the navy of the United States," to be a misdemeanor, which charges the offense in the language of the statute, describing the place specially by county, township, range and section, is sufficient. The indictment need not specify the class of lands on which the trespass was committed so as to distinguish between lands reserved and those not reserved for naval purposes by the act of 1817, since the act of 1831 extends the provisions of the former act to all the public timber, whether naval or otherwise. *United States v. Thompson*,* 6 McL., 56.

§ 2579. No criminal intent need be averred in an indictment under the above act. The law will presume the criminal intent from proof of the acts set forth in the language of the statute. *Ibid.*

§ 2580. An indictment, based on the act of March 2, 1831, punishing any person who "shall cut, or be employed in cutting, or shall remove, or be employed in removing, or aid and assist in removing, any live oak or red cedar trees, or other timber, from the lands of the United States, with intent to export, dispose of, use or employ the same in any manner whatsoever, other than for the use of the navy of the United States," which charges the removal to have been "from lands of the United States at the mouth of the river Muskegon aforesaid," is held to be insufficient in describing the *locus in quo*. The lands of the United States being divided and subdivided by official surveys and plats, the description required by the statute demands that the indictment should conform to the statutory designation, exhibiting the range, township, section and quarter section on which the trespass was committed. That the indictment follows the exact language of the statute does not render the above description sufficient, since the description is not sufficiently certain to apprise the defendant of the particular matter with which he is charged. *United States v. Schuler*,* 6 McL., 28.

§ 2581. An indictment under the above act need not allege the removal to have been done knowingly. The guilty knowledge will be presumed from proof of the act, leaving to the defense to rebut such presumption by evidence showing mistake or ignorance of section lines, etc. *Ibid.*

§ 2582. Defrauding government.—An indictment for a fraud on the government in procuring money on a fraudulent pension certificate should allege the circumstances constituting the fraud with such particularity as will enable the accused to prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. *United States v. Goggin*, 1 Fed. R., 49; 9 Biss., 269 (§§ 2052-53).

§ 2583. Fraud is an inference of law from certain facts, and the indictment must aver all the facts which constituted the fraud. Whether an act has been fraudulently done is a question of law. *Ibid.*

§ 2584. An indictment for defrauding the United States, which describes the fraudulent means by which the defendant received the money from a navy agent, and also describes in the same count the fraudulent means by which he procured a requisition covering the amount to be issued by the navy agent upon the treasury, cannot be objected to as stating two distinct offenses in the same count. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 2585. Although an indictment avers that the defendant was the fourth auditor of the treasury at the time he did the act complained of, and sets forth so much of his duty as fourth auditor, and so much of the duty of the navy agent, as is supposed to be necessary or proper to show how the defendant's letter written to the navy agent and his draft drawn on that officer might deceive or impose upon him, so as to induce him to pay the draft; and how his pretense that a certain sum was required for the use of the navy, for payment of arrearages, might deceive or impose upon the secretary of the navy, so as to induce him to increase a certain requisition in favor of the navy agent, and to show why these officers should have given their confidence to the defendant; yet this averment of the official character and duties of the defendant is not an averment that the acts with which he is charged were committed by him in or by virtue of his office, or constituted any violation or neglect of his duties, and cannot be considered as a charge of malversation in office. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 2586. An indictment intended to be for fraud must aver the means by which the fraud was effected. An indictment for fraud upon the United States, in obtaining public money from a navy agent, perpetrated by false pretenses, must aver what was pretended, and that what was pretended was false, and wherein and in what particular it was false. An aver-

ment that the defendant did, "ostensibly for the public service, but falsely and without authority, cause and procure to be issued from the navy department a certain requisition," etc., does not amount to an averment that the accused pretended or affirmed to the secretary of the navy, or any other officer of the navy department, that the requisition was for the public service; nor is an averment that the letters were sent to the navy agent, and the drafts were drawn on him and sold, and the requisition upon the treasury was obtained, "as false pretenses," sufficient in this respect. *Ibid.*

§ 2587. Under section 5438, United States Revised Statutes, which provides that "every person who makes or causes to be made, or presents or causes to be presented, for payment or approval," any claim against the government, knowing it to be false, shall be guilty, an indictment which charges that the accused did "unlawfully make a claim against the government of the United States," well knowing the same to be false, etc., is insufficient. It should charge that the claim was made "for payment or approval." It is sufficient to charge a presentation to the "First Auditor of the Treasury," without naming the person who held such office. The different items of an account may be included in one count of the indictment; it is not necessary that there should be separate counts for each false item. *United States v. Ambrose*,* 2 Fed. R., 764.

§ 2588. Duties.—Written instruments do not enter into the gist of the offense created by section 5445 of the Revised Statutes, which provides that "every person who, by any means whatever, knowingly effects or aids in effecting any entry of any goods, wares or merchandise, at less than the true weight or measure thereof, or upon a false classification thereof as to quality or value, or by the payment of less than the amount of duty thereon, shall be fined," etc. It is not necessary, therefore, that an information for this offense should set out, according to their tenor, the written instruments, by means of which the offense was committed. *United States v. Moller*,* 16 Blatch., 65.

§ 2589. In an indictment for smuggling it seems that it is not sufficient to allege that the importation was contrary to law. The facts constituting such illegality must be shown, or the particular illegality intended to be proved must be stated. *United States v. Thomas*,* 2 Abb., 119; 4 Ben., 370.

§ 2590. Election laws — Fraudulent registration.—An indictment for fraudulently registering as a voter is insufficient which simply charges that the defendant fraudulently registered, though those are the words of the statute. The indictment must point out the fraud which it is supposed the defendant committed, so that he can know what it is that he is called upon to explain and be enabled to prepare his defense. *United States v. Hirschfield*,* 13 Blatch., 830.

§ 2591. An indictment for fraudulently registering as a voter is insufficient which does not show the facts which precluded the defendant from registering. To allege that it was because he was an alien is insufficient. *Ibid.*

§ 2592. In considering the sufficiency of an indictment under the laws of the United States for fraudulently registering or attempting to register at a congressional election, the court have a right to take judicial notice of state statutes referred to in the indictment. *United States v. Quinn*, 8 Blatch., 67.

§ 2593. — allegation as to race and color.—The fourth section of the act of congress of May 30, 1870, punishes any person who, "by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay or prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote, or from voting at an election. It was held by Bond, J., that an indictment under this section against judges of a municipal election in a state for unlawfully preventing and obstructing from voting at such election persons duly qualified, and an indictment for refusing to register as voters certain citizens, need not aver that the acts charged were done on account of race, color or previous condition of servitude, or that they were done under color or in execution of any state law. But Hughes, J., held that the indictments were insufficient without the allegation as to race, color, etc., and the division was certified to the supreme court. *United States v. Petersburg Judges of Election*,* 1 Hughes, 493.

§ 2594. — charging that voter was qualified.—In an indictment under section 3511, Revised Statutes, for unlawfully preventing a qualified voter from freely exercising the right of suffrage, etc., it is sufficient to charge that the person who was prevented was a qualified voter. The facts on which the right to vote depends need not be set out. *United States v. Cahill*,* 3 McC., 200; S. C., 9 Fed. R., 80.

§ 2595. An indictment found under section 19 of the act of May 31, 1870, declaring that if, at any election for representative in . . . the congress of the United States, any person shall, . . . by . . . bribery, reward, or offer or promise thereof, . . . prevent any qualified voter of any state of the United States . . . from freely exercising the right of suffrage, . . . such person shall be deemed guilty of a crime, which alleges

that the person attempted to be bribed claimed a right to vote, is not sufficient. This is not an averment that the person was a qualified voter. *United States v. Hendric,* 2 Saw., 479.*

§ 2596. — **election of congressman.**—An indictment under section 5511, Revised Statutes, for unlawfully preventing a person from voting, must allege that the election was for a representative in congress, and that the voter was prevented from voting for a representative; it is not enough to allege that the election was one at which a representative was voted for. *United States v. Cahill,* 3 McC., 200; S. C., 9 Fed. R., 80.*

§ 2597. — **bribing a minor.**—In an indictment based on section 19 of the act of May 31, 1870, an allegation that the defendant knowingly gave A. a bribe to vote, the said A. being then under twenty-one years of age, is held to mean that the defendant knew A. to be under age when he offered the bribe. *United States v. O'Neill,* 2 Saw., 481.*

§ 2598. — **counseling and advising.**—Under the act of 1870, an allegation in an indictment that the accused offered a certain person \$2.50 to vote, amounts to an averment that he counseled and advised him to vote. *United States v. Hendric,* 2 Saw., 476.*

§ 2599. — **surplusage.**—In an indictment found under section 19 of the act of May 31, 1870, for knowingly offering a bribe to a voter who had already voted at the same election, in order to induce him to vote again, the allegation that the voter was thus prevented from freely exercising the right of suffrage may be treated as surplusage. *United States v. Johnson,* 2 Saw., 482.*

§ 2600. — **place of holding election.**—The allegation in the above indictment, that an election was had at a precinct in the county of Multnomah and state of Oregon, is equivalent to an allegation that such election was held at a precinct in the representative and judicial district of Oregon; the law being, and the court taking judicial notice, that said district and state are identical in area. *Ibid.*

§ 2601. The allegation in this indictment that the election was held at East Portland precinct is equivalent to an allegation that it was held in East Portland precinct. This allegation is also a sufficient averment that East Portland precinct is an election precinct. *Ibid.*

§ 2602. — **legal election.**—The averment that the offense was committed with reference to an election held in a certain precinct, on a certain day, for a representative in congress, may be presumed to intend a legal election. *Ibid.*

§ 2603. — **election presumed.**—From an averment that the person whose bribery was attempted had already voted at South Portland precinct, it may be implied that there was an election there. *Ibid.*

§ 2604. — **bribe offered.**—The allegation that "the defendant did give to Robert Bruce the sum of \$2.50 to vote at said election," makes it sufficiently certain that the bribe was given to induce Bruce to vote. *Ibid.*

§ 2605. — **voting without a right to vote.**—Under section 5511, Revised Statutes, declaring that "if, at any election for representative or delegate in congress, any person knowingly personates and votes, or attempts to vote, in the name of any other person; . . . or votes more than once at the same election for any candidate for the same office; or votes at any place where he may not be lawfully entitled to vote; or votes without having a lawful right to vote," he shall be punished, etc., an indictment for voting without a lawful right to vote should allege that the defendant voted knowing that he had no right to vote. The word "knowingly" is understood and implied in each clause of this sentence. *United States v. Watkind,* 7 Saw., 85.*

§ 2606. — **registration — Refusal to answer questions.**—Section 2026, Revised Statutes, provides that the chief supervisor of elections shall require of the supervisors of elections, when necessary, lists of persons who may register and vote, or either, in their respective election districts, and cause the names of those upon any such list, whose right to vote or register is honestly doubted, to be verified by proper inquiry and examination at the respective places assigned by them as their residences. Section 5523 provides for the punishment of those who refuse to answer such inquiry, or give false information in respect to such inquiries. It is held that an indictment under this latter section, which does not aver that the refusal to answer by the defendant was made at the place assigned by him in the registration list as his place of residence, is insufficient. *United States v. Davis,* 6 Fed. R., 682.*

§ 2607. **Fraud** is an inference from certain facts, and is not sufficiently set forth in an indictment, unless all the facts are averred which in law constitute fraud. An averment that the act was done with intent to commit fraud is equivalent to an averment that it was done fraudulently, and no such averments can supply the place of an averment of the facts from which the legal inference of fraud is to be drawn. *United States v. Watkins,* 3 Cr. C. C., 411.*

§ 2608. Deceit is an essential ingredient of fraud. There may be injuries to the public without deceit, and they may be indictable at common law, but they cannot be frauds. The particular deceitful practices, by means of which the fraud is alleged to have been committed, must be specially set forth. *Ibid.*

§ 2609. **Gaming.**— Under an act prescribing a punishment for keeping a room to be used or occupied for gambling, the information need not set forth the names of the persons engaged at play in the house complained of. *Chase v. The People*,* 2 Colo. T'y, 509.

§ 2610. Under a statute punishing the offense "of keeping a faro-bank or other common gaming table," an indictment which charges the keeping of "a gaming table called a faro-bank" is insufficient. It should charge the keeping of a common gaming table, or it should charge the keeping of a faro-bank. *United States v. Cooley*, 4 Cr. C. C., 707; *United States v. Milburn*, 4 Cr. C. C., 719.

§ 2611. Under an act punishing the offense "of keeping a faro-bank, or other common gaming table," and the offense "of keeping a faro-bank or gaming table," an indictment for keeping "a faro-bank" is bad, likewise an indictment for keeping "a certain public gaming table called a faro-bank," and likewise an indictment for keeping "a gaming table." *United States v. Ringgold*, 5 Cr. C. C., 378; *United States v. Milburn*, 5 Cr. C. C., 390.

• § 2612. **Homicide—Common law form.**— An indictment for murder in the common law form, charging the act to have been done "wilfully, feloniously, and with malice aforethought," is sufficient, under a statute defining the crime as "perpetrated without authority of law, and with a premeditated design to effect the death of the person killed or of any other human being." The indictment in such a case need not follow the words of the act. *Territory v. Bannigan*,* 1 Dak. T'y, 451.

§ 2613. Under a statute which divides the offense, which at common law was murder in the first degree, into two separate and distinct grades,—murder in the first and second degrees,—an indictment which is good at common law for murder in the first degree is sufficient. The offense need not be charged to have been committed under the specific circumstances named in the statute, and in the terms used in the statute. *Leschi v. Washington Territory*,* 1 Wash. T'y, 13.

§ 2614. — **conviction of lower degree.**— Under section 1035, Revised Statutes, providing that "in all criminal causes the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment," one indicted for murder under section 5339 of the Revised Statutes may be found guilty of manslaughter under section 5341, when the allegations in the indictment, leaving out the allegations as to malice, constitute the offense of manslaughter, and when the acts charged, if proved to have been done unlawfully and wilfully and with malice, constitute murder within the former section, but if proved to have been done unlawfully and wilfully, without malice, constitute manslaughter within the latter section. *United States v. Leonard*,* 18 Blatch., 187.

§ 2615. — **certainty.**— In an indictment for murder the utmost precision and definiteness of allegation is necessary. *United States v. Scott*, 4 Biss., 29 (§§ 2222-27).

§ 2616. — **"in the fury of his mind."**— An indictment for manslaughter need not aver that the act was done by the prisoner "in the fury of his mind." *United States v. Frye*, 4 Cr. C. C., 539.

§ 2617. — **describing wound.**— An indictment for murder on the high seas need not state the length and depth of the wound. *United States v. Maunier*,* 1 Hughes, 412.

§ 2618. — **aiding and abetting.**— Every person present at a murder, willingly aiding or abetting its perpetration, is guilty of murder, and may be indicted and convicted as principal in the first degree. So an indictment is good which charges the accused with murder by being present and doing acts aiding and abetting its perpetration. *United States v. Douglass*,* 2 Blatch., 207.

§ 2619. **Larceny.**— In an indictment for stealing a check it is not necessary to set out the check *in hæc verba*, but it is sufficient if set out according to its legal effect. *United States v. Wilson*,* 1 Cr. C. C., 104.

§ 2620. An indictment for stealing "sundry pieces of silver coin of the value of twenty-five dollars, of the goods and chattels of," etc., is too vague. *United States v. Kurtz*,* 4 Cr. C. C., 674.

§ 2621. Where a statute makes it a felony to steal the notes of any bank established by a charter from the United States, or some individual state, the indictment must state to what particular bank the note belonged, and by what authority it was chartered. *United States v. Porte*,* 1 Cr. C. C., 369.

§ 2622. "One silver coin of the value of fifty cents, of the goods and chattels of," etc., is a sufficient description of the property stolen. *United States v. Rigsby*,* 2 Cr. C. C., 364.

§ 2623. An indictment is not good which describes the goods as belonging to A. B., deceased. *United States v. Mason*,* 2 Cr. C. C., 410.

§ 2624. Where two are indicted separately for the same theft, and one is convicted, it is necessary, on the trial of the other, to prove that it was a joint theft, and that both were present at the act of taking the goods; but it is not necessary to charge in the indictment that the theft was joint. *United States v. Holland*,* 3 Cr. C. C., 254.

§ 2625. An indictment for stealing the goods of the wife from her milliner's shop should allege that the goods belonged to the husband. *United States v. Murphy*,* 4 Cr. C. C., 681.

§ 2626. Under the penitentiary act of March 2, 1831, which enacts "that every person convicted of feloniously stealing, taking and carrying away any goods or chattels, or other personal property of the value of \$5 or upwards, or any bank-note or promissory note, or any other instrument for the payment or delivery of money, or other valuable thing, to the amount of \$5 or upwards, shall be sentenced to suffer punishment and labor," the amount as well as the value of the note must be averred in the indictment. But the description "one hundred silver coins of the value of \$75," is sufficiently certain. *United States v. Barry*, 4 Cr. C. C., 606.

§ 2627. Under the penitentiary act of March 2, 1831, punishing "every person convicted of feloniously stealing, taking and carrying away . . . any bank-note, promissory note or other instrument of writing, for the payment of money," an averment that the note stolen was a note of the Union Bank of Georgetown, to the amount of \$10, of the value of \$10, is sufficient. It is not necessary to allege it to be a bank-note for the payment of money to the amount of \$10. *United States v. McDaniel*, 4 Cr. C. C., 721.

§ 2628. **National banks.**—Under section 5209 of the Revised Statutes, which makes it an offense for any cashier of a national bank to make any false entry in any report or statement of the association with intent to defraud the association, or to deceive any officer of the association, or agent appointed to examine the affairs of such association, the counts in an indictment which allege only an intent to deceive the comptroller of the currency are of no value, since that officer is not an agent appointed to examine into the affairs of a national banking association. A count which charges the making of a false report of the condition of the bank, whereas the offense created by the statute consists in making a false entry in a report, would not for that reason be insufficient to support a verdict, and therefore will not be quashed on a motion made after a plea has been entered. *United States v. Bartow*,* 10 Fed. R., 874.

§ 2629. **Offenses on the high seas — Jurisdiction — Murder.**—In an indictment for murder in a federal court, the allegation was that the killing was done on board a ship owned by, and belonging to, certain persons named, who are alleged to be citizens of the United States, and to have been done upon the high seas within the admiralty and maritime jurisdiction of the United States and of the particular court, and out of the jurisdiction of the courts of the United States. *Held*, that the indictment was sufficient to give the court jurisdiction of the case. *United States v. Plumer*, 3 Cliff., 62.

§ 2630. In an indictment for murder on the high seas it is sufficient to describe the vessel as an "American vessel then and there belonging to a citizen or citizens of the United States," though the registry act says "ships and vessels of the United States," as these phrases are used indiscriminately in penal statutes. *Ibid*.

§ 2631. — **assault.**—An indictment under the twenty-second section of the crimes act of March 3, 1825, for an assault with a dangerous weapon, committed on the high seas, need not allege the act to have been done feloniously, or with intent to perpetrate a felony. The act contemplates a misdemeanor and not a felony. *United States v. Gallagher*,* 2 Paine, 447.

§ 2632. An indictment for an assault on board of a vessel belonging in whole or in part to a citizen of the United States must allege that the place where the assault was committed was out of the jurisdiction of any state of the United States; "in the harbor of Guantanamo, in the Island of Cuba," is not sufficient. *United States v. Anderson*,* 17 Blatch., 238.

§ 2633. — **larceny.**—It is held that an indictment for larceny upon the high seas, on the act of congress of 1790, need not state whom the goods belonged to. If it states that the goods belonged to some one unknown to the jurors, it is sufficient. *United States v. Davis*,* 2 N. Y. Leg. Obs., 85.

§ 2634. — **revolt.**—An indictment which charges the defendant in the same count with *making a revolt* and with *confining the captain* of the vessel is bad, the first offense being a capital one, created by one section of the act of congress, and the second being a misdemeanor, created by another section. *United States v. Sharp*,* Pet. C. C., 131.

§ 2635. An indictment for an attempt to commit a revolt on ship-board need not allege that the master was in the peace of the United States, or that he was a citizen of the United States. *United States v. Thompson*,* 1 Sumn., 170.

§ 2636. In an indictment of the members of the crew of an American vessel for disobeying the master and for endeavoring to make a revolt on the high seas, it is not necessary to allege that the defendants were citizens of the United States. Nor need such fact be proved at the trial, there being no proof to the contrary. It is not clear that such offenders could not be punished although they were not citizens of the United States. *United States v. Crawford*,* 1 N. Y. Leg. Obs., 388.

§ 2637. — **plundering a wreck.**— It is immaterial that an indictment for plundering a wreck alleges that the money taken was "belonging to the vessel," and the proof shows that it was taken from the wreck. The words of the statute are "from or belonging to the" vessel. *United States v. Pitman*, *1 Spr., 196.

§ 2638. **Pension laws.**— It is usually sufficient to charge the offense in the very language of the statute; and hence a count, in the language of the statute creating the offense, which charges the defendant with "transmitting to and presenting at the office of the commissioner of pensions," for the purpose of defrauding the United States, a forged writing purporting to be in support of a claim by a surviving soldier to bounty land, cannot be objected to on the ground that it sets forth two distinct and separate offenses — that of "transmitting to" and that of "presenting at." *United States v. Armstrong*, *5 Phil., 273.

§ 2639. An indictment for withholding pension money charged that the defendant withheld a part of a pension from two minor pensioners, in that he failed to pay over to the guardian of the minors moneys collected by him as her agent. *Held*, that the indictment was bad for not alleging that the person who was entitled to the pension was not the person from whom it was withheld. *United States v. Chaffee*, *4 Ben., 330.

§ 2640. In an indictment for withholding money from a pensioner it is sufficient to charge that the defendant was instrumental in presenting the claim of the pensioner without stating the particular circumstances in which the instrumentality consisted. *United States v. Connelly*, *9 Biss., 338.

§ 2641. **Piracy.**— The United States having power to punish piracy and piratical murder on board of all vessels found on the high seas, which have no national character, and whose ownership cannot be determined, it is not necessary that the possible foreign nationality of the vessel should be negated in the indictment for such offenses. *United States v. Demarchi*, *5 Blatch., 84.

§ 2642. **Rape.**— An indictment for rape is not defective because it alleges that the woman was gotten with child. *United States v. Dickinson*, *Hemp., 1.

§ 2643. **Robbery.**— An indictment for forcibly taking bank-notes from another, to his great loss and damage, must allege whose property the bank-notes were. *United States v. McNemara*, *2 Cr. C. C., 45.

§ 2644. **Resisting an officer.**— An indictment for assaulting an officer employed in enrolling for purposes of a draft of soldiers must contain an averment that the assault had some relation to the performance of his duties by the officer. *United States v. Gleason*, *Woolw., 75.

§ 2645. An indictment under section 22 of the act of April 30, 1790 (1 Statutes at Large, 117), which makes it an offense knowingly and wilfully to obstruct, resist or oppose any officer of the United States in serving or attempting to serve or execute any legal process whatsoever, must show by proper averments that the process was legal, not only in form and purpose, but as emanating from some tribunal, judge or magistrate authorized by the laws of the United States to issue such process. An averment that the warrant was duly issued is insufficient. The facts of such issue must be set forth, and when the authority of the person issuing the process is dependent on the existence of certain facts, these facts must be shown to have existed; and the fact that such facts did exist cannot be shown by the records of the court in which the indictment is pending, if they are not alleged therein. An indictment must contain every allegation necessary to show that the offense has been committed and cannot be aided by the records of the court. *United States v. Stowell*, *2 Curt., 153.

§ 2646. An indictment for forcibly resisting an officer of the customs, contrary to the act of March 2, 1799, need not set forth that the goods were illegally imported, or that the inspector had probable cause to suspect an illegal importation, or was searching for the purpose of ascertaining their character. These are properly matters of evidence. *United States v. Bachelor*, *2 Gall., 14.

§ 2647. Under the act of April 30, 1790, punishing any person who "shall knowingly and wilfully obstruct, resist or oppose any officer of the United States in serving or attempting to serve or execute any mesne process or warrant, or any rule or order of the courts of the United States, or any other legal or judicial writ or process whatsoever," an indictment for resisting an officer in executing a warrant of attachment upon the filing of a libel against a vessel need not show a good, valid and sufficient libel, or that the averments in the libel were true. *United States v. Tinklepaugh*, *3 Blatch., 425.

§ 2648. A deputy marshal is an officer of the United States authorized to serve process within the meaning of the above act, and the resistance of a deputy is punishable by the act. *Ibid*.

§ 2649. In an indictment for resisting an officer in his search for concealed spirits, it is not necessary to aver that the defendant concealed the spirits for which the officer was searching. The defendant might be liable though he owned neither the spirits nor the building in

which they were concealed, and did not make or keep the spirits. *United States v. Fears,** 3 Woods, 510.

§ 2650. An indictment for hindering or obstructing an officer should show the authority under which the officer was acting, for it is no offense to hinder or obstruct an officer who is acting without authority. *Ibid.*

§ 2651. *Slave trade.*—An indictment for causing a vessel to sail from a port to engage in the slave trade charged that the act was done by the defendant "as master, for some other person, the name whereof being to the jurors yet unknown," etc. *Held*, that this being a fact, the objection that the name of the owner of the vessel did not appear was not available in arrest of judgment. *United States v. La Coste*, 2 Mason, 143.

§ 2652. Where a statute makes it criminal to cause any vessel to sail or be sent away with intent to employ her in the slave trade, an indictment charging the defendant with causing a vessel to sail with the intent that she should be employed in the slave trade is bad. *United States v. Gooding*, 12 Wheat., 400.

§ 2653. *Riot.*—An indictment for riot which alleges that the defendants assembled to disturb the peace, and, being assembled, did certain acts, is sufficient. *United States v. Fenwick,** 4 Cr. C. C., 675.

§ 2654. An indictment charging the defendants with inciting others to insurrection, tumult and riot is good. It need not aver that insurrection, tumult and riot were excited thereby. *Ibid.*

§ 2655. *False pretenses.*—If three join in making a false pretense and one of them obtains the money, an indictment against all should aver that they all received it. If it avers that one obtained the money, the others cannot be held guilty upon it. *Jones v. United States,** 5 Cr. C. C., 647.

§ 2656. *Practicing medicine without a license.*—The application of external remedies to the eyes is not the practice of the medical, but rather of the chirurgical, art, and the offense of practicing such an art without a license or diploma, as required by local statutes, is not sufficiently charged in an indictment averring that the defendant "did practice . . . in the medical art, and receive payment for his services, without first having obtained a license, . . . and without the production of the diploma;" the statute requiring such a license or diploma mentioning both the medical and chirurgical profession. *United States v. Williams,** 5 Cr. C. C., 62.

§ 2657. *Selling liquor.*—It is not necessary to specify the kind of liquor sold, or the name of the person to whom it was sold, in an information for selling liquor without a license. *United States v. Gordon*, 1 Cr. C. C., 53.

§ 2658. *Selling liquor to Indians.*—An indictment under section 2139, Revised Statutes, punishing "Every person, except an Indian in the Indian country, who sells, exchanges, gives, barter or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent," must allege that the defendant is not "an Indian in the Indian country." *United States v. Winslow,** 3 Saw., 337.

§ 2659. *Disorderly house.*—Where the indictment charges that the defendant undertook to keep a disorderly house as a common tavern without authority therefor, and did keep the same as a common tippling house, and therein sold spirituous liquors to all persons calling for the same, to be drunk in and about the house at all times, day and night, Sundays and other days; and permitted idle and ill-disposed persons there to assemble and continue drinking and tippling, to the common nuisance, etc., it sufficiently charges the keeping of a common disorderly house. *United States v. Columbus,** 5 Cr. C. C., 304.

§ 2660. *Second offense.*—In an indictment for stealing, a charge, as for a second offense, which avers that, heretofore, to wit, on the 2d day of October, 1832, at the circuit court of the District of Columbia for the county of Alexandria, then duly sitting, the said Henry Thompson was tried and convicted of larceny, as by the said record of said court it doth appear," was held to be insufficient. *United States v. Thompson*, 4 Cr. C. C., 335.

§ 2661. *Public minister.*—In an indictment for imprisoning a public minister it is not necessary to charge that the defendant was an officer authorized to execute process. *United States v. Benner,** Bald., 234.

§ 2662. *Neutrality.*—Under the neutrality act of 1818, declaring it to be a misdemeanor "if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be entered or enlisted, in the service of any foreign prince," etc., an indictment for hiring or retaining, etc., must allege the intent of the person hired. *United States v. Kazinski,** 2 Spr., 7.

§ 2663. *Performing marriage ceremony.*—Where an act is by statute forbidden to be done by persons of certain description only, an indictment, grounded on such a statute, must, by substantive averment, bring the traverser within that description. And hence under an act

declaring that "if any minister shall join in marriage" certain persons described, without the consent of the parent or guardian, he shall be fined a certain sum, the indictment must charge affirmatively that the defendant was a minister at the time when he committed the alleged offense. And if the act requires that he should be such a minister as is by another section of the same act authorized to celebrate rites of marriage, the indictment must show him to be such a minister as is authorized by that section. To call the defendant "Andrew Thomas McCormick, clerk," is not a sufficient allegation that he was a minister authorized to solemnize marriage, and was so authorized at the time of the commission of the alleged offense. (FITZHUGH, J., dissented from this last proposition.) *United States v. McCormick*,* 1 Cr. C. C., 593.

§ 2664. *Unlicensed captain, mate, pilot, etc.*—An indictment under section 4438 of the Revised Statutes, declaring that "it shall be unlawful to employ any person, or for any person to serve, as master, chief mate, engineer or pilot on any steamer, who is not licensed by the inspectors, and any one violating this act shall be liable to the penalty of \$100 for each offense," need not allege knowledge on the part of the defendant that the engineer employed was not licensed. Nor need such knowledge be proved on the trial. *United States v. Sims*,* 9 Fed. R., 443.

§ 2665. *Treason.*—An indictment for treason under the act of July 17, 1862, prescribing the punishment for treason, need not use specifically the term "levying war;" it will be sufficient if the indictment follows the language of the act. *United States v. Greathouse*, 4 Saw., 457; 2 Abb., 361 (§§ 1183-94). Must allege a specific act. 2 Burr's Tr., 415.

§ 2666. *Libel.*—An indictment for libel charged that B., the defendant, on a certain date, "in the county of Washington and District of Columbia, of his malice, etc., did compose and write a certain false, etc., libel of and concerning the said C., in the form of a newspaper article, printed in a newspaper called and known as the Detroit Free Press, printed in the city of Detroit, . . . which said scandalous, etc., libel he, the said B., afterwards, to wit, on the day and year aforesaid, and in the county and district aforesaid, did then and there unlawfully, etc., publish and cause to be published." *Held*, that the indictment was insufficient, as it failed to allege any distinct publication of the libel in the District of Columbia. *In re Buell*, 3 Dill., 116 (§§ 3193-87).

§ 2667. The want of a distinct allegation of the publication of a libel is fatal to an indictment therefor. *Ibid*.

XXVII. MISCELLANEOUS QUESTIONS OF PRACTICE.

SUMMARY—*Power of district attorney over pending cases*, § 2668; *on preliminary examinations*, §§ 2669, 2670.—*Copy of indictment*, § 2671.—*Directing a verdict*, § 2672.—*Arraignment; standing mute*, § 2673.—*Separate trials*, § 2674.—*Affidavits of jurors to impeach their verdict*, § 2675.—*Procedure; effect of state laws*, § 2676.—*Proceedings before commissioners; commitment*, §§ 2677, 2678; *place of commitment*, § 2679.

§ 2668. While a charge is under investigation, before either a commissioner or the grand jury, the district attorney has no absolute power over the case. It is only after the indictment is found and before the trial is commenced that his power over the case may be said to be absolute. *United States v. Schumann*, §§ 2680-82. See § 2947.

§ 2669. A United States commissioner, being an examining and committing magistrate, bound to hear all complaints of the commission of any public offense against the laws of the United States in his district; to cause the offender to be arrested, and to examine into the matters charged; to summon witnesses for the government and the accused; to commit for trial or discharge from arrest, according to the evidence, is alone accountable for the discharge of these duties, and in their discharge he is not subject to the control of the district attorney or any other officer. *Ibid*.

§ 2670. The district attorney may appear before the commissioner, and attend the presentation of the evidence; but in that position he is only counsel for the government; he cannot direct what finding the magistrate shall make, or what course he shall pursue. The magistrate should hesitate to continue an investigation after the district attorney has abandoned it. Yet there are cases in which it is his duty to proceed, notwithstanding the abandonment of the cause by the district attorney. *Ibid*.

§ 2671. Where a prisoner, indicted for a capital offense, after he had pleaded not guilty and a postponement for several weeks, was about to be put on trial, objected that he had not received a copy of the indictment until the day preceding, and, at his suggestion, the trial was postponed four days to enable him to make more thorough preparation for the trial, and no further objection was made at any stage of the trial until his counsel, in making his closing

argument, contended that the objection was fatal and the prisoner entitled to acquittal, and the court then gave the prisoner an opportunity to retrace his steps, and withdraw the case from the jury and be arraigned anew, and the offer was declined, a motion for a new trial, based on the ground that the prisoner was not furnished with a copy of the indictment in accordance with the twenty-ninth section of the crimes act of 1790, providing that "in other capital offenses" the accused "shall have such copy of the indictment and list of the jury two entire days before the trial," was refused. *United States v. Curtis*, § 2683. See § 2708.

§ 2672. The court has no power in a criminal case to direct a verdict of guilty. The accused is entitled to a trial by jury, and the credibility of the government's witnesses, even when uncontradicted, is a question for the jury. The most the court can do is to direct what the verdict ought to be if the jury find certain facts. *United States v. Taylor*, §§ 2634-56. See § 2769.

§ 2673. Under section 1032 of the Revised Statutes, a prisoner standing mute, when arraigned on *information*, may have a plea of not guilty entered for him the same as when arraigned on *indictment*. The word indicted, as used in said section, may fairly be construed to include an *information*. *United States v. Borger*, §§ 2687-90. See § 2340.

§ 2674. Where several persons are jointly indicted for a capital offense, they have no right to demand a separate trial without the consent of the prosecution; but the question whether they shall be tried separately rests in the discretion of the court. *United States v. Marchant*, §§ 2691-93. See § 2729.

§ 2675. It is unsafe to lay down any general rule as to the admissibility of affidavits of jurors to impeach their own verdict. Such evidence should be received with great caution. But cases might arise in which they could not be refused without violating the plainest principles of justice. But an affidavit of a juror that, while the case was on trial, he read in a newspaper the report of the evidence already given in the trial, but that it did not influence his verdict in any degree, does not state any facts which would be ground for a new trial. *United States v. Reid*, §§ 2694-99.

§ 2676. No law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in trials for offenses against the United States. Section 34 of the judiciary act of 1789 did not give the states power of prescribing rules of evidence in trials for offenses against the United States. *Ibid.* See § 2897.

§ 2677. By section 1014, Revised Statutes, conferring criminal jurisdiction on commissioners, and declaring that proceedings before them shall be agreeably "to the usual mode of process" in the state wherein they are appointed, it was the intention of congress to assimilate all proceedings for holding persons accused of crime to answer before a court of the United States to proceedings had for similar purposes by the laws of the state where such courts are held. *United States v. Harden*, §§ 2700-2707. See § 2937.

§ 2678. Commissioners having authority to commit defendants to county jails, the *mittimus* must be directed to the marshal, commanding him to convey the prisoner into the custody of the jailor, and it must command the jailor to receive the prisoner and keep him in close custody until discharged. A copy of such *mittimus* must be delivered to the jailor. A jailor ought not to receive a prisoner without some written authority to detain him, except under the order of a court in session. *Ibid.*

§ 2679. The powers and duties of a commissioner are co-extensive with the limits of the judicial district in which he is appointed, and he may, in the first instance, commit a prisoner to the jailor of the county in which the United States court is held. But if the commitment be in another county within the district, without qualification, the commissioner has no further power over the prisoner except to bail him. In such case the marshal should not remove the prisoner to the place of trial without applying to the court for a writ of *habeas corpus*. But the necessity of such a writ may be dispensed with by forming the *mittimus* so as to direct the marshal to deliver the prisoner to the jailor of the county of his residence, and if bail be not given before the ensuing trial term, to take the prisoner and deliver him to the jailor of the county in which the court is held. *Ibid.* See § 2937.

[NOTES.— See §§ 2708-2941.]

UNITED STATES v. SCHUMANN.

(Circuit Court for California: 2 Abbott, 523-526; 7 Sawyer, 439-442. 1866.)

STATEMENT OF FACTS.— The opinion in this case is given in answer to a question by a United States commissioner as to the power of the district attorney over cases pending before such commissioner.

Opinion by FIELD, J.

We have looked into the question upon which the commissioner has asked the opinion of the court as to the control of the district attorney over criminal proceedings pending before him; and will briefly state the conclusion we have reached. The district attorney, we are informed, asserts an absolute right to dismiss any criminal proceedings before the commissioner both before and after the examination of the accused. The commissioner, on the other hand, denies such control, and insists that his authority is independent of any action of the district attorney, and is to be exercised in all cases as his judgment may dictate upon the evidence presented. The office of commissioner was created by the act of February 20, 1812, and his duties were at first limited to taking acknowledgments of bail and affidavits. By several subsequent acts his powers have been greatly enlarged. Among other things, he is invested with all the authority to arrest, imprison or bail offenders against the laws of the United States which any justice of the peace or other magistrate of any of the United States can exercise under the thirty-third section of the judiciary act of 1789. That section provides that, "for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense."

§ 2680. *A United States commissioner, in exercising the functions of his office as an examining magistrate, is not subject to control by any other officer.*

The same act also authorizes the commissioner, upon any *hearing* before him, when the offense is charged to have been committed on the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States, in his discretion, to require a recognizance from witnesses for their appearance at the trial. He is thus made a magistrate of the government, exercising functions of the highest importance to the administration of justice. He is an examining and committing magistrate, bound to hear all complaints of the commission of any public offense against the laws of the United States in his district; to cause the offender to be arrested; to examine into the matters charged; to summon witnesses for the government and for the accused, and to commit for trial or to discharge from arrest according as the evidence tends or fails to support the accusation. For the faithful discharge of his duty in these particulars he alone is accountable. He has no divided responsibility with any other officer of the government, nor is he subject to any other's control.

§ 2681. *The district attorney has no power to dismiss a case pending before the commissioner for examination.*

The district attorney may appear before the commissioner and attend to the presentation of the evidence, but in that position he is only counsel of the government; he cannot direct what finding the magistrate shall make, nor what course he shall pursue. The magistrate will, indeed, in any case, hesitate to continue an investigation after the prosecution has been abandoned by the legal officer of the government. Still there may be cases where he will be justified, and more, bound to take such a course. While the charge is under investigation, before either the commissioner or the grand jury, the district attorney has no absolute power over the case. His duty requires him to attend the sessions of the grand jury; to advise that body of the law upon points

desired; to examine witnesses; and, when directed, to draw indictments. But he cannot control the action of that body, and, by declaring that the government will not prosecute any particular case, prevent its consideration. The duty of that body is to inquire into all matters charged to be offenses against the United States, committed or triable in the district, and its power is in this respect unlimited.

§ 2682. *After indictment found, and until trial commenced, the district attorney may abandon the prosecution at his pleasure; after the trial has commenced, he may enter a nolle prosequi with the consent of the defendant.*

It is only at a later stage of the proceedings that the prosecution comes entirely under the direction of the district attorney. After indictment found, and until trial commenced, his authority may be said to be absolute. He can then abandon the prosecution at his pleasure. He can enter a *nolle prosequi*, even without the consent of the court. He can do this before the arraignment of the accused; or he may do it after issue joined; he can do it at any time until the jury is impaneled; and after the trial has commenced he can do it with the consent of the defendant. Having power to this extent over the prosecution after indictment found, it might seem to be a matter of little practical importance, whether the proceedings terminate at his instance before the commissioner, or subsequently by a *nolle prosequi* before the court. But the question is not as to what course the prosecuting attorney of the government may subsequently pursue in case his direction to the commissioner is disregarded, but how far that officer is bound to act upon the direction; and we are clear that he must act upon his own judgment of the law and evidence, and not upon that of any other person. And it is important that each officer of the government should take his appropriate share of responsibility, without reference to the possible action of others.

UNITED STATES v. CURTIS.

(Circuit Court for Massachusetts: 4 Mason, 232-247. 1826.)

STATEMENT OF FACTS.—Indictment for murder on the high seas. Motion for new trial and in arrest of judgment, because a copy of the indictment was not furnished the accused two days before the arraignment, pursuant to the statute of 1790.

§ 2683. *The copy of the indictment is to be furnished two days before the trial, not two days before the arraignment.*

Opinion by STORY, J.

If the court entertained the slightest doubt upon the present question, as it is a capital case, we should take further time for deliberation. But having carefully examined all the authorities which have been cited, and deliberately considered them, I shall now proceed to state the opinion which we have formed.

The point submitted is, that the prisoner was entitled of right to a copy of the indictment, two days, at least, before his arraignment thereon; that no copy was in fact furnished him, until after his arraignment; and that this omission now entitles him to have a new trial, or to have the judgment arrested. In point of fact the prisoner was arraigned, and pleaded not guilty, before the district judge, on the 29th day of November last; and at the same time, at his request, counsel were assigned to him by the court, and he selected, on that occasion, the gentlemen who so ably defended him at the trial. From various

causes the trial was postponed until the 15th day of December instant; and when the prisoner was, at that time, about to be put on trial, he objected that he had not received a copy of the indictment until the day preceding; and, at his suggestion, the trial was then postponed until the 19th day of the month, to enable him to make more thorough preparations for the trial. No suggestion was made at that time of a desire to retract his plea; nor any hint of the objection since raised, that he ought to have received a copy of the indictment before his arraignment; nor that he desired to have a new arraignment. At the trial no such objection was raised before the jury was sworn; nor indeed was the objection stated until all the evidence was fully gone through, and the counsel, closing for the prisoner, was about to finish his argument. He then contended that the objection was fatal to the trial, and the prisoner was entitled to a verdict of acquittal. The court immediately suggested, both to the prisoner and to his counsel, that if the prisoner, even at that time, was desirous to retrace his steps, and withdraw the cause from the jury, and to be arraigned anew, after receiving a copy for two or more days, there would be no objection on the part of the court, whatever might be their opinion of the law of the point, to allow him that indulgence. Both the prisoner and his counsel declined the offer, and put the prisoner upon his legal rights, without intending to waive any of them in the present posture of the cause. Under these circumstances the court have a right to conclude that no actual prejudice has been intended, or has in fact occurred to the prisoner; that the slip, if any, was wholly without motive; and that the point is one to be decided as of mere strict right. It has in fact been so argued at the bar; and certainly if well founded, and the prisoner is now entitled to the benefit of it, however formal or inconsequential the error may seem to the merits of the case, he may now demand from the court its full legal effect.

The argument proceeds upon the foundation of being fully sustained by the twenty-ninth section of the crimes act of 1790, ch. 9. That section declares "that any person who shall be accused and indicted of treason shall have a copy of the indictment and a list of the jury and witnesses to be produced *on the trial* for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors, delivered unto him at least *three* entire days *before he shall be tried for the same*; and in *other capital offenses* shall have such copy of the indictment and list of the jury *two* entire days at least *before the trial*. And that every person so accused and indicted for any of the crimes aforesaid shall be allowed and admitted to make his defense by counsel learned in the law; and the court, before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required, immediately upon his request, to assign to such person such counsel, not exceeding two, as such person shall desire," etc., etc. This being a statute of our own government, it is doubtless the right and duty of the court to give it a sound and reasonable construction, according to the true import of its terms. But in giving such construction it is highly proper to consider what has been the construction, if any, put upon like words by other courts, and especially by the judges of England, from which country we derive our notions of the common law, and much of our jurisprudence.

The question is, What is meant in this statute by the words "before he shall be tried," and "before the trial," for they are doubtless equivalent? Do they mean that the copy shall be delivered two days before the jury is sworn to try the cause upon the issue of fact; or do they mean, before the party is arraigned

on the indictment and put to plead, and before it is ascertained whether, by his plea, there will be a trial by jury or not? I will state, in the first place, what, in the opinion of the court, would be the true construction of the statute, supposing the point were, for the first time, suggested for argument; and in the next place, how far that construction is affected by any English authorities. And we are clear in opinion that, upon the statute itself, the true meaning is that the copy should be delivered two days before the cause is tried by the jury, and not before the party is arraigned on the indictment.

The reasons that lead us to this conclusion are, first, that this is the natural exposition of the intent and object of the enactment; and, secondly, that it is the legal and technical meaning of the word "*trial*," in the sense of the common law. It is admitted that the legislature may use technical words in an untechnical sense; and when from the context this is ascertained, it is the duty of the court to construe the words according to the legislative intent. It is equally its duty to follow such intent, when the legislature uses untechnical words in a technical sense. In each case, indeed, the duty of the court is the same, to carry into effect the object of the legislature, so far as it is expressed, and to give a suitable exposition of the terms, according to the fair import of the language. But where the legislature uses words which have an appropriate sense in the common law, that sense is supposed to be the one intended by the legislature, unless the context shows that a different sense was in fact intended.

Now, in the sense of the common law, the arraignment of the prisoner constitutes no part of the trial. It is a preliminary proceeding; and until the party has pleaded, it cannot be ascertained whether there will be any trial or not. The elementary books are full to this purpose. Mr. Justice Blackstone, in the passage cited at the bar (which is a mere transcript from Lord Hale), says, "to arraign is nothing else but to call the prisoner to the bar of the court to answer the matter charged upon him by the indictment." 4 Bl. Com., 322; 2 Hale, P. C., 216, ch. 28. If, upon the arraignment, the prisoner pleads guilty, there can be no trial at all; for there remains no fact to be tried; the whole charge of the indictment is admitted, and nothing remains but to pass the proper judgment of the law upon the premises. The same may be said as to other pleas, as a pardon, *autrefois convict* or *acquitt*, which, if admitted, supersede any trial. Indeed, the very forms of the proceeding upon the arraignment are so complete evidence of the legal meaning of a trial, that of themselves they are decisive. When the prisoner, upon his arraignment, pleads not guilty, he is then asked how he will be tried, and the response, in case of a trial by jury is, that he will be tried by God and his country. 1 Chitty, Cr. L., 416, 417. "When, therefore," says Mr. Justice Blackstone, "a prisoner, on his arraignment, has pleaded *not guilty*, and for *his trial* hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors," etc., etc. 4 Bl. Com., 350. So Lord Hale says, "after the prisoner hath pleaded and put himself upon the country, the next thing in order of proceeding is *the trial* of the offender." 2 Hale, P. C., 259, ch. 34. And Sir Michael Foster, in treating on the subject, in the very paragraph preceding that cited at the bar, says he will range the proceedings under the following heads: "What privileges the prisoner is entitled to, and what is incumbent on him *previous to the trial*, and what *during the trial*." Foster, C. L., 227. See, also, Hawk. P. C., B. 2, ch. 28, 39, 40. And under the former he places all the privileges of a copy of the indictment and list of jurors, etc., allowed by the law

of England in cases of high treason. And the like distinction between the arraignment and trial was taken in *Layer's case* in 1772 (4 Bl. Com., 322; *Wait's case*, 1 Leach, C. C., 33, 43; 1 Chitty, Cr. L., 415, 417), and is universally recognized. The very form, too, of calling the prisoner, when he is to be put on his trial by the jury, shows the legal sense of the terms. He is then told by the clerk, in the language of the law, that he is now set at the bar to be tried, and he is to make his challenges before the jurors are sworn. 1 Chitty, Cr. L., 532. In short, so far as authorities or reasoning or forms go, there can be no legal doubt, that, by the term "*trial*," is generally intended, in the law, the actual trial of the prisoner by the jury. The constitution of the United States, too, in the sixth amendment, which provides that the accused shall enjoy the right to a speedy and public trial by jury, manifestly uses the term in the same sense; and indeed it pervades the general structure of our laws.

There is not the slightest reason, in our judgment, for presuming that congress, in this section of the act of 1790, used the term in any different or wider sense. On the contrary, every portion of its language is entirely consistent with and supports this construction. The object of the legislature was to enable the party to make his defense in the best and most perfect manner. Not only is a copy of the indictment, but a list of the witnesses, in treason, and a list of the jurors in all capital cases, to be delivered to the prisoner. But unless he has already been arraigned, and has pleaded, how can it be supposed that witnesses or jurors can be necessary? The witnesses can only be heard upon an issue of fact; and the jury can only try an issue of fact. Until, therefore, there has been an arraignment and plea, on which a trial may be had, it would hardly seem worthy of legislative interposition to prescribe the delivery of a list of witnesses or of jurors. If, then, the natural interpretation of the clause, so far as witnesses and jurors are concerned, is, that the list should be delivered three or two days before the time of the actual trial by the jury, the same interpretation must be applied to the copy of the indictment; for the same language, in the same connection, is applied to both.

It has been said that a copy of the indictment may be important in some cases, to enable the prisoner to plead. Without question it may be so; but in such cases he would, upon the ordinary principles, be entitled to a copy for that purpose. Even in England, where no copy is provided for in any capital trials, except for treason, it is not uncommon to grant the prisoner a copy at his request, where it is shown to be important to his pleading or defense. 1 Chitty, Cr. L., 404. But it is one thing for the legislature to prescribe a thing, as a matter of right, in all cases before arraignment and pleading; and quite another thing, to grant it as a matter of fair discretion, in the course of judicial proceedings, where it may further public justice.

It has been further said that a copy of the indictment can be of no use, unless for the purpose of pleading. But this is certainly a mistake. It is of great importance to ascertain, in many cases, the precise form of the charge in order to shape the evidence so as to meet it, or to disprove the material allegations. In indictments for treason, the overt acts must be laid in the indictment, and it is, or may be, of the very highest importance to the prisoner to know the precise form of every charge of this nature, so vital to the indictment. The same thing may be said, in many cases of homicides, as to the manner of the death, the instrument which inflicted it, and the place where done, etc. If in a case of murder the means of the death are not proved by the evidence, substantially,

as laid in the indictment, the party is entitled to an acquittal. If, for instance, the death in the present case had been laid in the indictment to have been by drowning only, and not by a hatchet, and the proof had established the latter mode of death, the prisoner must have been acquitted. So where the indictment alleges the offense to be committed on the high seas, this is vital to the jurisdiction of the court in many cases; so that, if not substantially proved, the indictment fails, even though the place may be within the general admiralty jurisdiction. Some crimes by statute are only punishable when committed on the high seas, and some are punishable when committed in any other place within the admiralty jurisdiction. The distinction may often be most material to the defense at the trial. It cannot, then, be admitted for a moment, that in a capital case a copy of the indictment may not essentially aid the prisoner in his defense, both in point of merits and legal exceptions. It can rarely happen that the want of a copy at the time of arraignment can prejudice the prisoner, because it must be presumed that every court, solicitous for justice, will grant a copy and delay the pleading for a reasonable time to enable the party to avail himself of all his rights. In point of fact, in criminal cases, few defenses do arise of which the prisoner has not the full benefit under the plea of *not guilty*; and other pleas are of rare occurrence.

Such is a summary of the reasoning which induces the court to declare that if the point were entirely new it would feel bound to decide that the true construction of the statute, whether considered upon its obvious terms or intent, requires that the copy of the indictment should be delivered two days at least, not before the *arraignment* of the prisoner, but before his *trial by the jury*. But in cases of this sort the court will listen to the opinions expressed on like occasions by other judicial tribunals with the most anxious attention; and if, upon similar words in any statutes having similar objects, a different construction has been maintained and acted upon, it ought to have very great weight here.

Let us see, then, how the case stands upon the statutes and authorities cited at the bar. The statutes cited are the statutes of 7 W. 3, ch. 3, § 1; and 7 Anne, ch. 21, § 11, respecting trials for treason. Before I proceed to comment on them, I would state that the latter section (11th of 7 Anne, ch. 3), on which so much reliance has been placed, is a mere supplement to, and not a total repeal of, the former. It authorizes a list of the witnesses to be delivered, which was not provided for by the statute of 7th of William; and requires that the list of jurors should be delivered *ten* days before the trial, the statute of William requiring it only *two* days; and also a copy of the indictment *ten* days before the trial, the statute of William requiring it only *five* days. In all other respects it left the statute of William in full force and operation; and therefore the statute of Anne, being a mere supplement, has been governed by the construction previously put upon the statute of William, substituting only the enlarged period of ten days for the prior periods. This accounts at once for the reason why the statute of Anne has never received any judicial construction. In point of fact, it did not take effect, as indeed it was upon its own terms not to take effect, until after the death of the Pretender, which did not occur until the reign of George III. Indeed, the first trial for treason, upon which the statute of Anne operated, was that of Lord George Gordon, in 1781. The case is reported in Douglas, 590, and upon that occasion the attorney-general moved that a list of the jurors, intended to be returned by the sheriff for the trial of the prisoner, should be delivered to the prosecutor that a copy

might be delivered to the prisoner ten days before his arraignment, that having been the construction put upon the terms, "*before the trial*," in the statute of William. A rule upon the sheriff was granted accordingly; and the attorney-general remarked upon the peculiarity of the statutes; and said, "as there is no issue till arraignment, there can be no jury, strictly speaking, because no jury process can be awarded until issue joined." And the reporter in a note observes that the statute of Anne is but an *extension* of that of William; and thence deduces the inference (at least by implication) that the construction of both statutes on this point must be the same. The practice, then, must be considered as regulated exclusively by the statute of William; and I will now proceed to examine the terms of that statute. Upon that examination, I think it will conclusively appear that the construction put upon it by the English judges is perfectly correct; and that the presence of language not existing in the statute of the United States, compelled them to desert the ordinary sense of the word "*trial*," in order to carry into effect an apparent and expressed object of the legislature, that the copy of the indictment should be delivered before the arraignment. It provides that "all and every person and persons whatsoever, that shall be accused and indicted for high treason, etc., or for misprision of such treason (for other capital offenses are not comprehended in the English statutes), shall have a *true* copy of the whole indictment, but not the names of the witnesses, delivered unto them or any of them, five days, at the least, before he or they *shall be tried* for the same, whereby to enable them and any of them respectively to advise with counsel thereupon, *to plead and make their defense*, his or their attorney, etc., requiring the same, and paying the officer his reasonable fees for writing thereof, not exceeding five shillings for the copy of every such indictment." Now it is to be observed that in this clause a copy of the indictment only (and not of the list of jurors) is provided for, and the avowed object is to enable the prisoner to advise with counsel, and *to plead and make defense*. According to the course of practice in England, the prisoner is obliged to *plead, instantur*, upon his arraignment; and, therefore, the very object of parliament, expressed on the face of the enactment, would be defeated, unless the copy were furnished five days before the arraignment.

The courts, therefore, in construing the statute upon its plain intendment, were driven to say that the terms "*before he or they shall be tried*," must, in this connection, be construed to mean before arraignment, because in no other way could the object be effected. And this exposition is so reasonable and just that the only surprise is, that it should ever have been made a question. Sir Michael Foster, in the passages cited at the bar (Foster, C. L., 228, 230), gives the reason for it, which has been already stated. See 1 East, P. C., 111, 112, 114, 115; 4 Bl. Com., 351; Hawk., B. 2, ch. 39; 1 Chitty, Cr. L., 405. The statute proceeds, in the next sentence, to recognize the true legal difference between the *arraignment* and *trial*, for it declares "that every such person so accused and indicted, *arraigned or tried* for any such treason as aforesaid, etc., shall be received and admitted to make his and their full defense by counsel learned in the law," etc. Here the arraignment and trial are distinguished, as progressive acts, and that counsel are to be permitted in each; and thus, in the former clause, the inartificial use of the words, "*shall be tried*," is completely established. The provision that the prisoner "shall have copies of the panel of the jurors who are to try them, duly returned by the sheriff, and delivered

unto them, etc., two days, at the least, *before he or they shall be tried for the same,*" stands in another (the seventh) section of the act. I have been curious to ascertain whether, under the act of William, it was the practice to deliver the list of jurors also before the arraignment. In Sir Michael Foster's report of the trial of the rebels in 1746, he speaks expressly as to the delivery of the copy of the indictment before the arraignment; but says nothing as to the list of jurors. And in his subsequent discourse he alludes to the provision, as to the list of jurors, in very general terms, leaving it somewhat doubtful whether the list of the panel was ever delivered until after the arraignment and plea, and trial assigned. Foster, C. L., 1, 230. But upon examination of the case of *The King v. Rookwood*, in 4 St. Tr., 661, 667, the very point arose, and Lord Chief Justice Holt and the other judges on that occasion held that the list of jurors was to be given, not before the arraignment, but two days before the trial by the jury. In fact, in that case the jury were not summoned until after the prisoner had been arraigned and pleaded. The practice under the statute of Anne, from necessity, led to the delivery of all the copies before the arraignment, because it expressly requires that the lists of the witnesses and jurors "*shall be also given at the same time that the copy of the indictment is delivered to the party indicted.*" Doug., 591.

From this examination of the statutes of William and Anne, it is apparent that the terms are not the same with our act of congress, and that the courts have been driven to give an exposition of the provisions different from their natural import, in consequence of explanatory phrases, which could in no other way be rationally interpreted. There is no reason to suppose that the learned judges would have given a different exposition from that which we think the true one of the act of congress, if the language had been in all respects the same as ours. In point of authority, then, there is nothing binding on the conscience of the court, or that justifies it in abandoning the natural sense of the words used in the act of congress.

But suppose the acts were the same, and required the same interpretation, and that the prisoner was entitled to a copy of the indictment and list of jurors before arraignment, the question would still remain, whether he could now avail himself of this omission. A party may have a legal right to an exception, which he cannot take in every stage of the cause. The law points out an order in its proceedings, and requires that the party should take his exceptions, and demand his privileges, at such time as general justice and convenience require; otherwise he is deemed to waive them. A party is certainly at liberty to waive any privileges introduced solely for his own benefit; and if he is satisfied with going on without them, and sustains no prejudice thereby, there seems no ground to arrest the judgment, or grant a new trial upon this account.

The law is perfectly settled upon this subject in England under the strictest construction of the statutes of William and Anne. We have seen that the prisoner is entitled to "*a true copy of the whole indictment;*" and yet, if he has received an imperfect copy, or if, being entitled to a copy of the caption of the indictment, he has received a copy without the caption, and he proceeds to plead, it is too late to take the exception. Sir Michael Foster (Foster, P. C., 230) says, "*but if the prisoner pleadeth without a copy of the caption, as some of the assassins did, he is too late to take the objection, or indeed any other objection that turneth upon a defect in the copy; for by pleading he admitteth that he hath had a copy sufficient for the purposes intended by the act.*" Now a false

or imperfect copy is, in intendment of law, no *true copy*, and therefore is none. But the sole object of the act being to enable the party to plead, if he is willing and ready to plead without a true copy, the law supposes his defense does not turn upon any such fact; and that he is sufficiently apprised of the whole charge, and of his own defense to it.

Mr. East, in his very accurate work on Crown Law (1 East, P. C., 113), lays down the rule even more broadly. He says, "but, after *pleading*, it is too late to object, *either to the want of a copy*, or to any insufficiency in it; for that admits it to be sufficient." And he is well warranted in the statement, for in the case of *Rex v. Cook*, reported in 4 Hargrave, St. Tr., 738, 746; S. C., 13 How. St. Tr., 311; and very accurately, on this point, also, in 2 Salk., 634, it was so expressly decided by the court. In that case the prisoner, after plea, but *before the jury was sworn*, took an exception by his counsel that he had not had a copy of the indictment, and therefore he could not be tried. But the court said, "By the words of the act (statute of W. 3) he is to demand it, and he has it to enable him to plead, and till then he is not to plead. In this case he has pleaded; therefore this benefit is waived, and the prisoner has admitted he has a copy, or did not think it for his service to require it, but was able to plead without the help of it." The same doctrine is recognized by all the other elementary writers to which we have had access. 1 Chitty, Cr. L., 405. The same point was decided in *Rookwood's Case*, 4 State Trials, 661, 667. It was, in fact, decided and acted upon by the circuit court, sitting in Rhode Island, on a trial for murder, in the case of *United States v. Cornell*, 2 Mason, 91, 103.

In the case now at bar, the prisoner has been held to no strictness whatsoever. After he had pleaded, after his cause was fully before the jury, the court, in tenderness to human life, was willing to allow him to withdraw the cause from the jury; not, indeed, as a matter of *right*, but of *discretion*. He declined it; and if ever the waiver of a benefit was intentional, and without prejudice to the party, I am justified in saying that the present is such a case.

It remains only to remark upon some cases cited from the Massachusetts reports. This court is entirely satisfied that those cases were rightly decided. The case of *Commonwealth v. Andrews*, 3 Mass., 126, turned upon the well-known principle that an accessory could not be tried without his own consent, unless his principal were also on trial, or had been convicted. And if he were tried by his own express consent, no judgment could pass upon him until the principal was subsequently convicted. The court said that they would not presume the assent of the prisoner to the trial, much less his desire to be tried before the principal was tried and convicted, from the mere fact that he was put on trial. It did not appear that he knew his rights, or that he had given any consent; and that in criminal cases an express relinquishment of a right should appear, before the party should be deprived of it: The right here attempted to be presumed to be waived was vital to the whole prosecution; and the language of the court must be interpreted to refer to such cases.

In *Commonwealth v. Hardy*, 2 Mass., 303, the question was a question of jurisdiction. The statute of 1805 declared that "all indictments, which may be found for any capital offense, shall be *heard, tried and determined*, etc., by three or more of the said justices" of the court. The arraignment of the prisoner for a capital offense was before *one judge* only. The court held the arraignment was *coram non judice*; and that the intent of the statute was, that a prisoner capitally indicted should not be put upon his defense, unless three

justices at least were present. The case is so plainly right on the very words of the statute, "*heard, tried and determined,*" that it is scarcely susceptible of legal doubt.

This is the substance of what I have to say as to the opinion formed by the court. Our judgment is that the motions be overruled. (a)

DAVIS, J., concurred.

UNITED STATES v. TAYLOR.

(Circuit Court for Kansas: 3 McCrary, 500-506; 4 Federal Reporter, 470-475. 1882.)

STATEMENT OF FACTS.—Information for a violation of the internal revenue laws. The errors assigned are the direction of the court to the jury to return a verdict of guilty, and the overruling of a motion for a new trial.

§ 2684. *In a criminal case a court cannot direct a verdict of guilty.*

Opinion by McCRARY, J.

The single question to be determined is whether, in such a case as this, a court may direct a verdict of guilty. It is insisted on the part of the government that, the facts being admitted or settled beyond dispute, the question of guilt or innocence depends wholly upon a question of law, which the court must determine, and that, therefore, the court may direct a verdict either way, in accordance with its opinion of the law. This is the view which was taken by the court below. In so holding, the learned district judge was, no doubt, largely influenced by the ruling of Mr. Justice Hunt in the case of *United States v. Anthony*, 11 Blatch., 200. I find, however, upon an examination of the subject, that, with this single exception, the authorities are, with entire unanimity, against the right of a court in a criminal case to direct a verdict of guilty.

§ 2685. *Constitutional right to trial by jury. It cannot be waived.*

The constitution guaranties to every accused person "the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed." Sixth amendment. This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner's consent is erroneous. *State v. Mann*, 27 Conn., 281. It is very difficult to see upon what principle it can be maintained that an accused person has had a trial by an impartial jury, within the meaning of the constitution, in a case where the court has directed the jury, without deliberation, to find him guilty. It would seem that such a trial is, in substance and effect, a trial by the court quite as much as in a case where a jury is waived by consent of the accused. The constitution does not deal with the form, but with the substance, the essence, of the trial, and therefore requires a submission of the case to the jury for their consideration and decision upon it. There can, within the meaning of the constitution, be no trial of a cause by a jury unless the jury deliberates upon and determines it. It is doubtless true

(a) Since this opinion was delivered, I have had an opportunity to examine the case of *The King v. Rookwood*, 4 St. Tr., 661, at large. The very distinction insisted upon by this court was admitted and insisted upon by the counsel and court in that case. Lord Chief Justice Holt, in particular, stated that the interpretation of the first section of the statute of William, as to the time of delivering a copy of the indictment, was altogether governed by the explanatory words, "*to plead and make their defense,*" and that otherwise the interpretation would be the same as that of the seventh section, as to the list of jurors, viz., that the time of trial by the jury was intended, and not the time of arraignment. When it is considered that this case was decided the very year that the statute of 7 William 3 first took effect, and by such eminent judges as Lord Chief Justice Holt and Lord Chief Justice Treby, its authority is absolutely irresistible as to the true exposition of the statute of William. It confirms, in an unexpected manner, the view already suggested by the present judgment.

that, in a certain sense and to a limited extent, this doctrine makes the jury the judges, in criminal cases, of both law and fact; but this is the necessary result of the jury system, so long as the absolute right of the jury to find a general verdict exists, for a general verdict necessarily covers both the law and the fact, and embodies a decision based upon and growing out of both.

§ 2686. *Powers respectively, in criminal cases, of judge and jury.*

It has accordingly long been well settled that, while the court is the judge of the law and may instruct the jury upon the law, and while it is the duty of the jury to receive the law from the court, it is still within the power of the jury to render a general verdict, and thereby to decide on the law as well as the facts. It has never, to my knowledge, been claimed that if the jury disregard the law as laid down by the court, and render a general verdict of not guilty, the court can set it aside; and if this cannot be done by an order after verdict, how can the court do substantially the same thing by an instruction before verdict? The action of the court is, in effect, the same in either case; it is in effect a decision by the court, upon the law and facts, that the accused is guilty. The court must determine both the fact and the law, whether it directs a verdict of guilty, or sets aside a verdict of not guilty. It may be going too far to say broadly that the jury have a right to disregard the instructions of the court upon questions of law, although many courts have gone to this extent; but it is quite clear that the right to render a general verdict includes the power to decide both law and fact, and therefore necessarily the power to decide independently of the court.

In view of this, courts have usually gone no further than to say to the jury that while they may, by a general verdict, determine both the law and the facts, it is their duty to believe the law as laid down by the court. In the case of *United States v. Wilson*, 1 Bald., 108, the court, by Mr. Justice Baldwin, in charging the jury, commented upon the subject as follows: "In repeating to you what was said on a former occasion to another jury, that you have the power to decide on the law as well as the facts of this case, and are not bound to find according to our opinion of the law, we feel ourselves constrained to make some explanations not then deemed necessary, but now called for from the course of the defense. You may find a verdict of guilty or not guilty, as you think proper, or may find the facts specially and leave the guilt or innocence of the prisoner to the judgment of the court. If your verdict acquits the prisoner, we cannot grant a new trial, however much we may differ with you as to the law which governs the case, and in this respect a jury are the judges of the law, if they choose to become so. Their judgment is final, not because they settle the law, but because they either think it not applicable, or do not choose to apply it to the case. But if a jury find a prisoner guilty against the opinion of the court on the law of the case, a new trial will be granted. No court will pronounce a judgment on a prisoner against what they believe to be the law. On an acquittal there is no judgment; the court do not act, and cannot judge, there remaining nothing to act upon. This, then, you will understand to be what is meant by your power to determine upon the law; but you will still bear in mind that it is a very old, sound and valuable maxim in law that the court answers to questions of law and the jury to facts. Every day's experience evinces the wisdom of this rule."

That this charge presents the true doctrine upon the subject will be apparent from an examination of the following authorities, all of which sustain it, and some of which go even beyond it, and declare that the jury are the ex-

clusive judges of both law and fact in a criminal case. Several of them are exactly in point, holding that a direction to the jury to convict is erroneous, notwithstanding overwhelming evidence of guilt. *United States v. Battiste*, 2 Sumn., 243; *Com. v. Porter*, 10 Metc., 262; *Com. v. Van Tuyl*, 1 Metc. (Ky.), 1; *United States v. Stockwell*, 4 Cranch, C. C., 671; *Stettinius v. United States*, 5 Cranch, C. C., 573 (§§ 1927-31, *supra*); *Montee v. Com.*, 3 J. J. Marsh., 132; *Sims v. State*, 43 Ala., 33; *United States v. Hodges*, 2 Wheel. Cr. Cas., 477; *United States v. Wilson*, Bald., 78; *United States v. Fenwick*, 5 Cranch, C. C., 562; *United States v. Greathouse*, 2 Abb. (U. S.), 364 (§§ 1183-94, *supra*); 4 Bl. Comm., 361; *Tucker v. State*, 57 Ga., 503; *Huffman v. State*, 29 Ala., 40; *Perkins v. State*, 50 Ala., 154.

The rule is thus stated in *Com. v. Tuyl*: "The jury must derive a knowledge of the facts from the witnesses, and of the law from the court. They have, however, to pass upon both, and by making an application of the law to the facts of the case, decide whether the offense charged in the indictment has been committed. In this sense only are they the judges of the law of the case."

With respect to the ruling of Judge Hunt in *United States v. Anthony*, *supra*, it is proper to remark that he seems, upon reflection, to have doubted its soundness, as on the subsequent trial of the officers of election indicted with Miss Anthony for the same offense, and in which substantially the same testimony was introduced, he stated that instead of ordering a verdict of guilty he would submit the case to the jury with the instructions that there was no justification for the act of the defendants, and that in effect they were all guilty. See Whart. Cr. L. (7th ed.), § 82a.

It is now well settled in the federal courts that in civil cases, where the facts are undisputed and the case turns upon questions of law, the court may direct a verdict in accordance with its opinion of the law; but the authorities which settle this rule have no application to criminal cases. In a civil case the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside. It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law would be set aside. The same result is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. A verdict of acquittal cannot be set aside, and therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly. By his plea of not guilty the defendant must be understood as denying the truth of the information or indictment, and as not conceding the truth of what the witnesses for the government have sworn to. This is so notwithstanding the fact that no witness for the defendant contradicted the statements of the witnesses for the prosecution.

In this condition of the testimony it was the right of the jury to pass upon the credibility of the witnesses, even if unimpeached as to character, and to consider whether, upon applying all the tests of manner, clear or confused statement, prejudice and accuracy of memory, they were to be believed. It was within the province of the jury to disbelieve the witnesses for the government. And even in civil cases, so far as I know, no judge has ever gone further than to say, when the case was at all dependent upon oral testimony, that, if the jury believed all the testimony, they should find for the plaintiff or defendant.

The present case, in itself considered, is of little consequence, but the question involved is of far-reaching importance; for if the power to direct a verdict of guilty exists in this case, it exists and may be exercised in any criminal case, however important, and even if the punishment be death. In view of this, and especially in view of the opinion above cited of Mr. Justice Hunt, for whose judgment I entertain the highest respect, I have considered the case with great care. I have also consulted Mr. Justice Miller, who authorizes me to say that he concurs in the conclusion which I have reached, which is that the district court erred in charging the jury to find the defendant guilty, and in overruling the motion in arrest of judgment. The judgment of the district court is accordingly reversed, and the cause remanded for further proceedings in accordance with this opinion.

UNITED STATES *v.* BORGER.

(Circuit Court for New York: 19 Blatchford, 249-256; 7 Federal Reporter, 193-199. 1881.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—The defendant was convicted on a criminal information, filed against him by the United States attorney, prosecuting for the United States, under section 3894 of the Revised Statutes, for unlawfully and knowingly depositing in the mail of the United States, and sending to be conveyed thereby, a circular concerning a lottery. On being arraigned on the information the defendant stood mute, and the court directed a plea of not guilty to be entered for him, and it was entered. An objection by the defendant's counsel to such action was overruled by the court, and said counsel excepted to said ruling and to said direction. The defendant now moves in arrest of judgment on the above ground.

§ 2687. *It is proper to enter a plea of "not guilty" when a defendant stands mute.*

It is provided by section 1032 of the Revised Statutes as follows: "When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury." This section is based on the act of April 30, 1790, section 30 (1 U. S. Stat. at Large, 119); the act of March 3, 1825, section 14 (4 id., 118), and the act of March 3, 1835, section 4 (id., 777). The act of 1790 related to an indictment for treason, or one for any offense made capital by that act, and authorized the court to proceed to the trial of the person standing mute as if he had pleaded not guilty. The act of 1825 related to an indictment for any offense not capital, and gave a like authority.

§ 2688. *Under Revised Statutes, section 1032, the word "indictment" includes "information."*

The act of 1835 related to an indictment for any offense, and was in the terms of section 1032 of the Revised Statutes. The word "information" is not found in any of the statutes. It is contended for the defendant that the court had no jurisdiction to try him, because he was tried on an information and stood mute, and the court had no power either to enter a plea of not guilty for him or to proceed to his trial as if he had pleaded not guilty. It is con-

tended that this statute alone can be looked to as the source of authority; that, by mentioning an indictment, it excludes an information; that the word "indictment" cannot be construed to include "information;" and that the case is one of a *casus omissus*, so that no person who chooses to refuse to plead to a criminal information can be tried upon it. Provisions of statute are referred to which mention an information as well as an indictment, in the same enactment, and from this it is argued that, as an indictment is mentioned in the present instance and not an information *eo nomine*, the case of a person standing mute on an information is not provided for.

By subdivision 20 of section 639 of the Revised Statutes, cognizance of all crimes and offenses cognizable under the authority of the United States is given to the circuit courts. The offense in the present case is one which can be prosecuted by a criminal information. Article 3, section 2, of the constitution provides that "the trial of all crimes, except in cases of impeachment, shall be by jury," and article 6 of the amendments to the constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." If the United States have a right to prosecute the defendant for the offense alleged by a criminal information instead of an indictment, they have the right to try him for such offense, with a view to punish him, if he is convicted. He has a right to be tried by a jury, and by an impartial jury, and to have the benefit of the other safeguards provided by the constitution and the laws. But he has no right to defeat a trial by saying that he will not plead to the information. The court has power to try a person who refuses to plead to an information, or who wilfully stands mute, when arraigned on it, without entering for him a plea of not guilty, and has a right to proceed in such trial as if there were a plea of not guilty, even though no statute of the United States specifically prescribes such mode of procedure in the case of an information. It would have this power under the constitutional and statutory provisions before referred to, in the case of an indictment, even if there were no statutory provision in regard to standing mute on an indictment. So, it has like power on an information, without any such provision in regard to an information.

The question arose in regard to an indictment in the circuit court of the United States for the district of Maryland, in 1818, in *United States v. Hare*, 2 Wheel. Cr. Cas., 283, before Mr. Justice Duvall and Judge Houston. The defendants were indicted, under section 19 of the act of April 30, 1810 (2 U. S. Stat. at Large, 598), for robbing a mail carrier. The punishment was death. On being arraigned, they stood mute. The act of 1790 was the only statute on the subject. The offense was one not made capital by that act. It was contended for the defendants that the court had no power to enter a plea of not guilty for them or to try them. It was urged that the court must ascertain by a jury whether the muteness arose *ex visitatione Dei* or *ex malitia*; that, if it were found that the muteness were from the visitation of God, the court could proceed to trial as if there were a plea of not guilty; and that, if it were decided that the muteness was *ex malitia*, and the offense were a felony, there could be no trial, because no issue, and no conviction without a trial, because the offense was not of the highest degree, as treason, or of the lowest degree, as petit larceny. The question was thoroughly discussed by eminent counsel, and the court, taking a broad and comprehensive view of the question, held that it had no doubt of its power to proceed to the trial of the accused; that,

in view of the provisions of the constitution, that the trial of all crimes, except in cases of impeachment, shall be by jury, and that every person shall have a fair and impartial trial by jury, in a criminal prosecution, and in view of the cognizance given to the circuit court of all crimes and offenses cognizable under the authority of the United States, the accused could not, by any management, evade a trial by jury; that the prescription of the punishment implied conviction, and that implied a trial by a jury, conducted in the manner provided by law; and that the principle of the strict construction of a penal statute could not require it to be so construed as to prevent a trial altogether. The court ordered the trial to proceed as if the plea were not guilty.

The foregoing view is consonant with reason and with the only proper administration of the criminal law. In the present case, the court directed the plea of not guilty to be entered and that was done. This was a matter of form and was no prejudice to the defendant, and amounted to no more than ordering the trial to proceed as if such plea were entered. Irrespective of the foregoing views, the word "indicted," in section 1032, is fairly to be construed to include an information. An information generally differs in nothing from an indictment, in its form and substance, except that it is filed by the proper law officer of the government *ex officio*, without the intervention or approval of a grand jury. 2 Story on the Constitution, 4th ed., § 1786. In *The Queen v. Steel*, L. R., 2 Q. B. Div., 37, 40, Lord Coleridge says that a criminal information is a criminal cause or matter, only differing in mere form from an indictment, the queen's coroner preferring the information instead of the jurors presenting a bill, but, to all intents and purposes, the one being as much a criminal matter as the other. In *Bailey v. Kalamazoo Publishing Co.*, 40 Mich., 247, 255, it is held that, under a justification in a suit for a libel, there is no substantial variance between an allegation that a man has been indicted, and proof that he has been prosecuted and convicted, in a justice's court, on a criminal information.

§ 2689. *Qualifications of jurors; bias; prejudice; partiality.*

A motion for a new trial is made on the ground of alleged errors at the trial. One Luddington, having been called as a juror, was examined. He testified that he could not say positively whether he was a member of the Society for the Suppression of Vice. He continued: "I don't think I was ever proposed. I know Anthony Comstock indirectly, slightly. I have met him at his office in Nassau street in this city, and went there to see him in regard to some business of the society. I have not contributed to the society recently, but I have, perhaps, within two years given money to it. It was not within a year, but perhaps within two years, I contributed this money. I know the society is engaged in prosecuting men in the lottery business, from what I have seen in the papers during the last year or two. I know Mr. Comstock is the agent of the society to which I contributed funds. I think I could find a verdict fairly on the evidence, if it should appear on the trial that the defendant was engaged in the business of selling lottery tickets. I think I could give the testimony of the defendant proper weight if it was a question of credibility between him and Mr. Comstock. I could also give the testimony of the defendant proper weight if it became a question of veracity between him and Mr. Comstock, it being proven that defendant was engaged in selling lottery tickets. I don't know that I should give the testimony of Mr. Comstock more weight than I should that of the defendant, he being proved to be engaged in the lottery business. When I say I don't know, I mean that I should give the evidence

of the man I supposed was telling the truth more weight than the one I thought was not. I think the fact that the defendant was engaged in the lottery business would influence me in giving his testimony less weight than that of Mr. Comstock, if it was a question of veracity between them, because I would not like his business." The defendant's counsel challenged the juror for favor. The challenge was overruled, and the defendant's counsel excepted. It is contended for the defendant that the challenge should have been sustained; that, while a prejudice against crime does not disqualify a person from being a juror, the present case was one of a prejudice against the person on trial, and the juror was not impartial; and that the evidence showed not only a prejudice against the lottery business, but a prejudice against the defendant by reason of his being engaged in that business. This is an unsound view. Every good citizen, fit to be a juror, has, necessarily, and ought to have, a prejudice against crime; and a prejudice against a person who is engaged in a business prohibited by law, as in the selling of lottery tickets by the law of the state of New York, such selling being made a crime (1 R. S., 666, § 29), such prejudice arising solely from the fact of his being engaged in such business, is no more than a prejudice against the crime involved in being engaged in such business. If it were to be regarded as a prejudice against the person, no jury could ever be obtained to try a person indicted for any crime. This case falls within the principle of the case of *United States v. Noelke*, 17 Blatch., 554 (§§ 975-987, *supra*), decided by this court.

The juror showed himself to be competent. All he said was, that, if a question of veracity arose between the testimony of the defendant and that of Mr. Comstock, he thought that the fact that the defendant was engaged in the lottery business would influence him in giving the testimony of the defendant less weight than that of Mr. Comstock. Although a question arose as to whether the jury would believe the testimony of the defendant, no question of veracity arose between the defendant and Mr. Comstock on the trial. It did not appear that the defendant was a member of the society referred to. He had not contributed any money to it for over a year. The case is not within the *dicta* in *Commonwealth v. Eagan*, 4 Gray, 18.

§ 2690. *A jury is not bound to credit the testimony of a defendant because it is uncontradicted. Jurors are the judges of the credibility of witnesses.*

The court did not err in refusing to direct a verdict for the defendant. The question was one for the jury, and was presented to the jury in a proper manner by the court. There was no exception to the charge. It is contended that the jury were bound to believe the testimony of the defendant, it being uncontradicted. In *The Helen R. Cooper*, 7 Blatch., 378, it was said by Judge Woodruff, that, where a witness otherwise unimpeached is testifying under circumstances calculated to create a strong bias, and he states what is, in its nature, incredible, his testimony is not necessarily to be believed. The credit of testimony is left to the jury, who are judges of the probability or improbability, credibility or incredibility, of the witness and his testimony. The credit due to testimony is to be measured, in part, by the interest or bias of the witness, which may sway him to pervert the truth, and by his manner and deportment in delivering his testimony; and a jury, in weighing testimony, have a right to consider the consistency of the different parts of a narration, and the possibility and probability, or impossibility and improbability, of the matters related. *Best on Ev.*, 16, 18, 217. Even if the jury believed that the defendant was absent from his place of business at the time he says he was absent,

they may have convicted him, and properly, on the ground that it was incredible that he gave, in good faith, the instructions to which he testified, not to "give any letters out at all," because "it was against the law," his regular business being to violate the law by selling lottery tickets.

It was not error to refuse to charge the jury that they must believe the testimony of the defendant as to his absence and his instructions, and, therefore, acquit him. The motions must be denied.

UNITED STATES v. MARCHANT.

(12 Wheaton, 480-485. 1827.)

§ 2691. *Parties indicted jointly for a capital offense have no right to a separate trial.*

Opinion by MR. JUSTICE STORY.

The question which comes before us upon a certificate of a division of opinion of the judges of the circuit court of Massachusetts is this: whether two or more persons, jointly charged in the same indictment with a capital offense, have a right, by the laws of the country, to be tried severally, separately and apart, the counsel for the United States objecting thereto, or whether it is a matter to be allowed in the discretion of the court. We have considered the question, and are of opinion that it is a matter of discretion in the court, and not of right in the parties. And it has become my duty briefly to expound some of the reasons which urge us to that conclusion. The subject is not provided for by any act of congress; and, therefore, if the right can be maintained at all, it must be as a right derived from the common law, which the courts of the United States are bound to recognize and enforce. The crimes act of 1790, c. 9 (1 Stats. at Large, 118), provides in the twenty-ninth section for the right of peremptory challenge in capital cases; and this right, to the extent of the statute, must in all cases be allowed the prisoners, whether they are tried jointly or separately.

§ 2692. *Upon a joint trial, each prisoner is entitled to his full number of peremptory challenges, and a juror challenged by one is withdrawn from the panel as to all.*

Upon a joint trial, each prisoner may challenge his full number, and every juror challenged as to one is withdrawn from the panel as to all the prisoners on the trial, and thus, in effect, the prisoners in such a case possess the power of peremptory challenge to the aggregate of the numbers to which they are respectively entitled. This is the rule clearly laid by Lord Coke, Lord Hale and Sergeant Hawkins, and, indeed, by all the elementary writers. Hawk. P. C., b. 2, c. 41, s. 9; 2 Hale's Pl. C., 268; Co. Litt., 156; Beauchamp's Case, 9 Edw. IV., fol. 27, pl. 40; Plowd., 100; Kelyng, 9. One consequence of this, in ancient times, was that embarrassments often arose, at trials at the assizes, on account of a defect of sufficient jurors. The statute of Westminster 2, c. 38, ordained "that in one assize no more shall be returned than twenty-four." The common practice, under this statute, used to be for the sheriff to return forty-eight jurors, although the precept named but twenty-four. It was, indeed, held at an early period, that the statute of Westminster did not apply to criminal cases; but, notwithstanding this, the usual practice prevailed, unless the court directed a larger number to be returned. And it was not until the reign of George II. that a larger number was required by law to be returned at the assizes. The history of this branch of the subject is very clearly stated

in 3 Bac. Abr., tit. Juries, b. 6, and in Kelyng, 16. See, also, 2 Hale's P. C., 263. It is obvious that on joint panels, returned for joint trials, at the assizes, a defect of jurors might, from this limitation, often take place. And it became a question in very early times, whether, under such circumstances, the court had power, against the will of the prisoners, to sever the panel and to try them severally, if they insisted upon their right of several challenge. It was decided, upon full consideration, that the court had this power. To this effect are the cases in Plowden, 100; in Dyer, 152, b, and in Kelyng, 9; and the doctrine has received the sanction of Lord Hale, and other writers of the highest authority.

§ 2693. *The right of challenge is a right to reject jurors, not to select them.*

Whether, then, prisoners who are jointly indicted can, against their wishes, be tried separately, does not admit of a doubt. It remains to consider whether they can insist upon a several trial. The sole ground upon which this claim can rest must be, if maintainable at all, that they have a right to select their jury out of the whole panel, and that as, upon a joint trial, one may desire to retain a juror who is challenged by another, and, if challenged by one, he must be withdrawn as to all, this right of selection is virtually impaired. But it does not appear to us that this reasoning can, upon the principles of the common law, be supported. The right of peremptory challenge is not of itself a right to select, but a right to reject, jurors. It excludes from the panel those whom the prisoner objects to, until he has exhausted his challenges, and leaves the residue to be drawn for his trial according to the established order or usage of the court. The elementary writers nowhere assert a right of this nature in the prisoner, but uniformly put the allowance of peremptory challenges upon distinct grounds. Mr. Justice Blackstone, in his Commentaries (4 Bl. Comm., 353), puts it upon the ground that the party may not be tried by persons against whom he has conceived a prejudice, or who, if he has unsuccessfully challenged them for cause, may on that account conceive a prejudice against the prisoner. The right, therefore, of challenge does not necessarily draw after it the right of selection, but merely of exclusion. It enables the prisoner to say who shall not try him; but not to say who shall be the particular jurors to try him. The law presumes that every juror sworn in the case is indifferent, and above legal exception; for, otherwise, he may be challenged for cause. What jurors in particular shall try the cause depends upon the order in which they are called; and the result is a mere incident following the challenges, and not the absolute selection of the prisoner, resulting from his power of challenge.

This view of the general principle of the common law is very much confirmed by other considerations. It is laid down by Hawkins, Pl. Cr., b. 2, c. 41, s. 8, that, where several persons are arraigned on the same indictment, and severally plead not guilty, it is in the election of the prosecutor either to take out joint venires against them all, or several against each of them. This plainly supposes that it is in the election of the prosecutor whether there should be a joint or separate trial. If there had been any known right in the prisoner to control this election, it seems incredible that so accurate and learned an author should not have stated it, when the occasion indispensably required him to take notice of a qualification so important to his text. His silence is, under such circumstances, very significant.

But a still more direct conclusion against the right may be drawn from the

admitted right of the crown to challenge in criminal cases, and the practice under that right. We do not say that the same right belongs to any of the states in the Union, for there may be a diversity in this respect as to the local jurisprudence or practice. The inquiry here is, not as to what is the state prerogative, but simply what is the common law doctrine as to the point under consideration. Until the statute of 33 Edw. I., the crown might challenge peremptorily any juror without assigning any cause; but that statute took away that right, and narrowed the challenges of the crown to those for cause shown. But the practice since this statute has uniformly been, and it is clearly settled, not to compel the crown to show cause at the time of objection taken, but to put aside the juror until the whole panel is gone through. Hawkins, on this point, says (Pl. Cr., b. 2, c. 43, ss. 2, 3): "If the king challenge a juror before the panel is perused, it is agreed that he need not show any cause of his challenge till the whole panel be gone through, and it appears that there will not be a full jury without the person so challenged. And if the defendant, in order to oblige the king to show cause, presently challenge, *touts paravaile*, yet it hath been adjudged that the defendant shall be first put to show all his causes of challenge before the king need to show any." And the learned author is fully borne out by the authorities which he cites, and the same rule has been recognized down to the present time. Hale's P. C., c. 36, p. 271; 3 Bac. Abr., Jury, E., 10; *Rex v. Coningsmark*, 9 How. St. Tr., 1; *Rex v. Stapleton*, 8 id., 502; *Rex v. Borosky*, 9 id., 1; *Rex v. Grey*, id., 127; S. C., T. Raym., 473; *Rex v. Grahme*, 12 How. St. Tr., 646; *Rex v. Cook*, 13 id., 311; *Rex v. Tooke*, 25 id., 1, 24; 1 Chitty's Cr. L., 533; *Rex v. Campion*, 1 How. St. Tr., 1050.

This acknowledged right of peremptory challenge existing in the crown before the statute of 33 Edw. I., and the uniform practice which has prevailed since that statute, to allow a qualified and conditional exercise of the same right if other sufficient jurors remained for the trial, demonstrate, as we think, that no such power of selecting his jury belongs, or was ever supposed to belong, by the common law, to the prisoner; and that, therefore, he could not demand, as matter of right, a separate trial to enable him to exercise it. In a separate or joint trial he could, at any time, be defeated by the crown of such choice by its own admitted prerogative. The circumstances already alluded to, of the right of each prisoner on a joint trial to exercise his full right of peremptory challenge, and the small number of jurors usually returned on the panel at the assizes, accounts in a very satisfactory manner for the language used in some of the cases as to the necessity of directing separate trials where the prisoners refused to join in their challenges. The plain reason was that otherwise there could be no trial at all, for defect of jurors, at the same assizes; and, therefore, the court, in furtherance of public justice, were accustomed, without the consent of the prisoners, to direct a separate trial. In this way the reason of the practice is understood by Lord Hale (2 Hale, P. C., c. 34, p. 263), and by Hawkins (Hawk. P. C., b. 2, c. 41, s. 9), and by other more recent writers on common law. 1 Chitty's Cr. L., 535. See Starkie's Cr. Pl., 35. In this manner the language of Lord Holt in Charnock's case, 12 How. St. Tr., 1454; S. C., 3 Salk., 81, is to be interpreted; for it is manifest that he could not intend that there could not be a joint trial where the prisoners challenged separately, for no rule was better settled in his time than that they could. Indeed, in *Rex v. Grahme*, 12 How. St. Tr., 646, 673, the same

learned judge uses similar language in a sense which admits of no other interpretation; and this was the answer given to it when cited in a later case for the like purpose.

That case is *Rex v. Noble and others*, in 1713, before Lord Chief Justice Parker, and reported in the *State Trials* (9 Hag. St. Tr., 1; S. C., 15 How. St. Tr., 731). In that case, which was an indictment for murder, Noble moved the court for a separate trial, and the motion was denied. He was convicted, and when brought up for judgment he moved in arrest of judgment this very matter, that there was a mistrial, because, to use his own words, "we were severed in our challenges, and yet were tried together by the same jury;" and he relied upon the language of Lord Holt, in *Charnock's case*, as in point. The court overruled the objection and stated that Lord Holt's language referred solely to the public inconvenience on account of a probable defect of jurors, and not to any matter of right in the prisoners. Sentence was accordingly passed upon the prisoner, and he was executed. There is a curious and learned commentary appended in a note to this trial which was printed before the execution of Noble, in which an attempt was made to question the correctness of the decision. But it is therein admitted that Noble's counsel declined to argue the point, though requested; from which we cannot but infer that they thought the objection unfounded. The decision itself has never since been questioned or denied. We have, therefore, in the present case, not merely the absence of any authority in favor of the matter of right, but the course of practice, and the general reasoning deducible from the prerogative of the crown, against it; and, lastly, a direct authority, in times when the administration of criminal justice was unsuspected on the very point.

Such is the substance of the reasons which induce us to decide against the claim as a matter of right. In our opinion it is a matter of sound discretion, to be exercised by the court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence. A certificate is, accordingly, to be sent to the circuit court. (a)

UNITED STATES v. REID.

(12 Howard, 361-366. 1851.)

Opinion by TANNEY, C. J.

STATEMENT OF FACTS.—This case comes before the court upon a certificate of division between the judges of the circuit court for the district of Virginia.

Thomas Reid and Edward Clements were jointly indicted for murder, committed by them on the high seas, on board the American ship *J. B. Lindsey*. They were, by the permission of the court, separately tried, and upon the trial of Reid he proposed to call Clements as a witness on his behalf. The court rejected the testimony, being of opinion that, as he was jointly indicted with the prisoner on the trial, he was not a competent witness. Reid was found guilty by the jury.

At a subsequent day he moved for a new trial upon two grounds. 1. Because the testimony of Clements was improperly rejected; and, 2. For misbehavior in two of the jury who tried the cause. In support of the second objection, he offered in evidence the voluntary affidavits of the two jurors, one of whom deposed "that, while the case was on trial, and the jury were im-

paneled, a newspaper was sent to him by some of his family from his counting-room. It was a newspaper for which he was a subscriber, which was regularly left at his counting-house, and which he was accustomed to read. He looked slightly over it, and saw that it contained a report of the evidence which had been given in the case under trial, a part of which he read and put the paper in his pocket; that, while the jury were in their room deliberating on their verdict, he read over the report of the evidence in the newspaper; he read it from curiosity, and thought it correct, and that it refreshed his memory; but it had no influence on his verdict, and that he had made up his mind before he read it. There was no conversation about the newspaper report in the jury room, nor did he speak of it there to any one, nor does he know that the other jurors knew that the report of the evidence was in the newspaper they saw him reading." The other juror deposed "that he saw this newspaper while the jury was impaneled in the court-room, and, upon looking at it, saw that it contained a report of the evidence that had been given in the case under trial. He looked over a few sentences and put the paper aside, and did not see it afterwards. He did not think the report accurate; it had not the slightest influence on his judgment."

Upon the argument of the motion above mentioned the following questions arose: 1. Ought the court to have received the evidence of Clements in behalf of the prisoner; and does the refusal of the court to admit his testimony entitle the prisoner to a new trial? 2. Ought the affidavits of the two jurors to be received; and do the facts stated in them entitle the prisoner to a new trial? And upon each of these points the judges of the circuit court were opposed in opinion, and ordered that the questions be certified to the supreme court for its decision.

§ 2694. *Section 34 of the act of 1789 does not give the states power to prescribe rules of evidence in trials of offenses against the United States.*

The difficulty in the first question arose upon the construction of the thirty-fourth section of the act of congress of 1789. By a statute of Virginia, adopted in 1849, it is provided "that no person who is not jointly tried with the defendant shall be incompetent to testify in any prosecution by reason of interest in the subject-matter thereof." And if the section in the judiciary act above referred to extends to the testimony in criminal cases in the courts of the United States, then the testimony of Clements was improperly rejected. The section in question declares that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply. The language of this section cannot, upon any fair construction, be extended beyond civil cases at common law, as contradistinguished from suits in equity. So far as concerns right of property, it is the only rule that could be adopted by the courts of the United States, and the only one that congress had the power to establish. And the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the states. But it could not be supposed, without very plain words to show it, that congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of congress, and that the statute of Virginia was not

the law by which the admissibility of Clements as a witness ought to have been decided.

§ 2695. *Admissibility of testimony in the federal courts, by what law governed.*

Neither could the court look altogether to the rules of the English common law, as it existed at the time of the settlement of this country, for reasons that will presently be stated. Nor is there any act of congress prescribing in express words the rule by which the courts of the United States are to be governed in the admission of testimony in criminal cases. But we think it may be found with sufficient certainty, not indeed in direct terms, but by necessary implication, in the acts of 1789 and 1790 (1 Stats. at Large, 112), establishing the courts of the United States, and providing for the punishment of certain offenses. And the law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the state as it was when the courts of the United States were established by the judiciary act of 1789. The subject is a grave one, and it is therefore proper that the court should state fully the grounds of its decision.

§ 2696. *The colonists brought with them the common law and statutes of England, so far as they were applicable.*

The colonists who established the English colonies in this country undoubtedly brought with them the common and statute laws of England as they stood at the time of their emigration, so far as they were applicable to the situation and local circumstances of the colony. And among the most cherished and familiar principles of the common law was the trial by jury in civil, and still more especially in criminal, cases. And however the colonies may have varied in other respects in the modifications with which the common or statute law was adopted, the trial by jury in all of them of English origin was regarded as a right of inestimable value, and the best and only security for life, liberty and property.

§ 2697. *Compulsory process for witnesses at common law.*

But as the law formerly stood, the value of this right was much impaired by the mode of proceeding in criminal cases. For when a person was accused of a capital crime, and his life depended upon the issue of the trial, he was denied compulsory process for his witnesses; and when they voluntarily appeared in his behalf, he was not permitted to examine them on oath, nor to have the aid of counsel in his defense, except only as regarded the questions of law.

It is true that Lord Coke, in his 3 Inst., part 3, 79, declares in strong terms that the rule which prohibited the witnesses for the accused from being examined on oath was not founded in law. Yet the rule, at the period we speak of, was daily sanctioned and acted on in the English courts (2 H. Pl. of the Crown, 283; 4 Bl. Com., 355, 358, 359), and was in full force when the English colonies were planted in this country. This oppressive mode of proceeding had been abolished in England and the colonies also by different statutes before the declaration of independence. But the memory of the abuses which had been practiced under it had not passed away. And the thirteen colonies who united in the declaration of independence, as soon as they became states, placed in their respective constitutions or fundamental laws, safeguards against the restoration of proceedings which were so oppressive and odious while they remained in force. It was the people of these thirteen states which formed the constitution of the United States, and ingrafted on it the provision which secures the trial by jury, and abolishes the old common law proceeding which

had so often been used for the purposes of oppression. And the provisions in the constitution of the United States in this respect are substantially the same with those which had been previously adopted in the several states. They were overlooked in the constitution of the United States as originally framed. But as soon as the public attention was called to the fact, that the securities for a fair and impartial trial by jury in criminal cases had not been inserted among the cardinal principles of the new government, they hastened to amend it, and to secure to a party accused of an offense against the United States the same mode of trial, and the same mode of proceeding, that had been previously established and practiced in the courts of the several states.

It was for this purpose that the fifth and sixth amendments were added to the constitution. The sixth amendment provides that, in all criminal prosecutions, the party accused shall be entitled to a trial by jury, to be confronted with the witnesses against him, to have compulsory process for the witnesses in his favor, and to have the aid of counsel in his defense. The judiciary act of 1789, section 20, provides for the manner of summoning jurors, and directs that in all cases (of course including criminal as well as civil cases) they shall be designated by lot or otherwise in each state, according to the mode of forming juries therein as then practiced, so far as the law of the state shall render such designation practicable by the courts or marshals of the United States; and that the jurors shall have the same qualifications as were requisite for jurors by the law of the state of which they are citizens, in the highest court of law in the state. Both of these provisions are confined by plain language to the state laws as they then were. The crimes act, as it is usually called, of 1790, section 29, makes some further regulations, which it is not necessary here to specify, in relation to the proceedings and right of peremptory challenge in criminal cases before the jury are impaneled. But neither of these acts makes any express provision concerning the mode of conducting the trial after the jury are sworn. They do not prescribe any rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined. Yet, as the courts of the United States were then organized, and clothed with jurisdiction in criminal cases, it is obvious that some certain and established rule upon this subject was necessary to enable the courts to administer the criminal jurisprudence of the United States. And it is equally obvious that it must have been the intention of congress to refer them to some known and established rule, which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous. This is necessarily to be implied from what these acts of congress omit, as well as from what they contain.

But this could not be the common law as it existed at the time of the emigration of the colonists, for the constitution had carefully abrogated one of its most important provisions in relation to testimony which the accused might offer. It could not be the rule which at that time prevailed in England, for England was then a foreign country, and her laws foreign laws. And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of congress was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts. And this view of the subject is confirmed by the provisions in the act of 1789, which refers its courts and officers to the laws of the respective states for the qualifications of jurors and the mode of selecting them. And as the courts of the United States were in these re-

spects to be governed by the laws of the several states, it would seem necessarily to follow that the same principles were to prevail throughout the trial; and that they were to be governed in like manner, in the ulterior proceedings after the jury was sworn, where there was no law of congress to the contrary.

§ 2698. *No state law passed since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases.*

The courts of the United States have uniformly acted upon this construction of these acts of congress, and it has thus been sanctioned by a practice of sixty years. They refer, undoubtedly, to English works and English decisions. For the law of evidence in this country, like our other laws, being founded upon the ancient common law of England, the decisions of its courts show what is our own law upon the subject where it has not been changed by statute or usage. But the rules of evidence in criminal cases are the rules which were in force in the respective states when the judiciary act of 1789 was passed. Congress may certainly change it whenever they think proper, within the limits prescribed by the constitution. But no law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases; and the testimony of Clements was, therefore, properly rejected, and furnishes no ground for a new trial.

§ 2699. *Where jurymen in a criminal cause read a newspaper report of the evidence, while sitting, and swear that it did not influence them, it is not ground for a new trial.*

The first branch of the second point presents the question whether the affidavits of jurors impeaching their verdict ought to be received. It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably, such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice. It is, however, unnecessary to lay down any rule in this case, or examine the decisions referred to in the argument. Because we are of opinion that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial. There was nothing in the newspapers calculated to influence their decision, and both of them swear that these papers had not the slightest influence on their verdict.

We shall therefore answer the first question in the negative; and to the second, that the facts stated in the affidavits of the jurors do not entitle the prisoner to a new trial; and certify accordingly to the circuit court.

UNITED STATES v. HARDEN.

(District Court, Western District of North Carolina: 4 Hughes, 455-464; 10 Federal Reporter, 802-810. 1881.)

Opinion by DICK, J.

STATEMENT OF FACTS.—In this case the jailer of this county informs the court that he has in his custody the defendants, who were delivered to him by the marshal without any warrant of commitment, and he requests the court to make an order authorizing him to keep said defendants in his prison. The marshal informs the court that said prisoners were under proper warrants committed to jail in Henderson county for the want of bail required by a commissioner after a preliminary examination before him; and without any warrant they had been transported to this county for trial in this court. The marshal requests instructions as to how he shall act in such cases, as they are of fre-

quent occurrence, and he never has a warrant authorizing transportation, but he has always regarded it as his duty to have such prisoners in court for trial.

As it is important that there should be connection, uniformity and regularity in all criminal proceedings, I deem it proper to deliver a written opinion upon the questions presented by the jailer and the marshal in this case, and also upon some other subjects which have been called to my attention by United States commissioners. In doing so I will briefly state some of the powers and duties of commissioners as examining and committing magistrates. The circuit court is authorized by statute to appoint as many commissioners in the district as it may deem necessary; and when so appointed they should exercise the powers which are or may be expressly conferred upon them by law. They are not strictly officers of the circuit court, but exercise somewhat independent powers. They may be controlled by the court by general rules and by the mandatory writs by which courts of superior jurisdiction can control the action of courts and officers of inferior jurisdiction and powers. The forms and mode of procedure before commissioners are not expressly marked out and defined in any statute of the United States.

§ 2700. *Under Revised Statutes, section 1014, it is the duty of commissioners to conform in criminal cases to the practice of the states in which they act.*

Section 1014, Revised Statutes, in conferring criminal jurisdiction upon such officers, declares that proceedings before them shall be agreeably "to the usual mode of process" in the state where they are appointed. We may well infer that it was the intention of congress to assimilate all proceedings for holding persons accused of crime to answer before a court of the United States to the proceedings had for similar purposes by the laws of the state where such court is held. We must therefore look to the laws of this state to see what powers and duties are imposed upon justices of the peace, and what are the forms and modes of proceeding used by them as examining and committing magistrates. Since the adoption of the present state constitution various statutes have been enacted which have enumerated with great particularity and precision the powers and duties of justices of the peace both in civil and criminal cases. The old system has been revised, amended and greatly improved both by the legislature and the decisions of the supreme court, so that now there is scarcely ever any occasion to refer to the old English statutes and decided cases for information and guidance upon the subject. But as courts of justices of the peace had their origin in the common law, questions of "new impression" may still arise, in the determination of which we may have to refer to that bountiful source of legal knowledge and wisdom.

§ 2701. *General duties of justices of the peace in committing persons to prison.*

The laws of this state impose upon justices of the peace many important duties, and confer upon them extensive powers for the purpose of preserving the good order of society, by suppressing disturbances, and bringing violators of the criminal law to speedy justice. They are conservators of the peace, and when a felony or breach of the peace is committed in their presence they may issue a warrant of arrest without any previous affidavit, or they may verbally order the defendant to be taken into custody. If a crime has been committed out of their presence they must issue a warrant, founded upon an affidavit of some credible person, showing probable cause for believing that the crime alleged has been committed by the person charged. When an alleged offender is brought before a justice of the peace for examination, he is entitled to have

a fair and full investigation of the matters charged in the warrant, and the justice must advise him of his legal rights on examination, and allow him a reasonable time to summon witnesses, and consult with and employ counsel to aid him in his defense. Bat. Rev., ch. 33.

These imperative duties necessarily confer upon the magistrate the power of continuance to a future day. The rights and privileges expressly conferred by law upon a defendant would be of little benefit if he cannot give bail during the continuance of his case, for if he is committed to prison he will not have convenient opportunity of preparing his defense. I believe that the right of thus being relieved from imprisonment when arrested, in a bailable case, is a right which cannot lawfully be denied when an examination is properly continued to a future day. There is no statute in this state which expressly confers upon a magistrate the power to take bail for appearance before him at a future day; but from the regard which the law has for the liberty of the citizen, and the "reason of the thing," I believe he has such power. I am fully aware of the principle of law that the powers of courts of limited jurisdiction cannot be *extended* by implication, but when imperative duties are imposed and certain express powers are conferred upon such courts by law, they can properly use the auxiliary means and methods necessary to perform such duties and fully exercise such powers, if such means and methods are according to the course and practice of courts of common law in administering ordinary and substantial justice. This course is certainly allowable in courts whose powers and forms of procedure originated in the common law. Such powers have always been exercised by examining magistrates in this state, and have never been denied by the supreme court. They were claimed and exercised by Chief Justice Marshall on the preliminary examination of Burr.

I am inclined to believe that when bail is taken in such cases by justices of the peace, it should be by bond in the nature of a recognizance, where the principal and sureties sign their names, as courts of justices of the peace are not courts of record, authorized to take acknowledgment of recognizances for future appearance before them. If a defendant should make default I have not formed a decided opinion as to the proper manner of enforcing the forfeiture, and I am not aware of any decision of the supreme court on the subject. Although courts of justices of the peace are not in matters of this kind strictly courts of record, judicial proceedings before them resemble records in the conclusiveness of their effects, but they do not conclusively prove themselves; yet when proved they have the power and effect of judgments of courts of record. *Reeves v. Davis*, 80 N. C., 209. Justices of the peace are required by law to keep dockets and enter a summary of their proceedings therein, and it seems to me that any judgment entered by them upon a bond which they had the power to take in the name of the state, after proceeding in conformity with the course and practice of courts of record in such matters, would be a valid judgment and could be enforced.

If an examination before a justice of the peace is continued to a future day, the officer having the defendant in custody has no power to commit him to prison without a *mittimus* from the justice, and the officer cannot certainly be required to keep a prisoner for a long time in his own personal custody. In *State v. James*, 80 N. C., 370, it is decided that a verbal order of a justice of the peace sending a prisoner to jail, whether made before or after the examination on a warrant, is not a sufficient authority to the officer to whom such order is given. If a defendant, on a continuance, fails to give the bond required,

then he may be committed to prison for such failure, but the examination must be had in a very short time, unless postponed at the request of the prisoner. I feel sure that a magistrate has no right to commit to prison a defendant before time for examination, when the defendant is ready to give bail in a bailable case, and when no sufficient cause of commitment judicially appears, and when the law requires every *mittimus* to show on its face a good cause of commitment. If, then, a defendant, on an examination before a justice of the peace on a charge of crime, is entitled to have time to make preparation for a full and fair investigation, and the right to give bail for an appearance at a future day, the bail bond thus given must be valid and enforceable, if there should not be a compliance with the condition of such bond. I deem it proper to have considered thus far some of the powers and duties of justices of the peace in criminal matters in this state, as commissioners are required to exercise many of these powers in performing their duties in enforcing the criminal laws of the United States, and such questions have been brought to my attention by the marshal and commissioners in the course of official duty.

§ 2702. *Powers and duties of United States commissioners in committing persons to prison.*

- United States commissioners are not conservators of the peace and have no control of police regulations in their districts except where express powers are conferred by a statute of the United States. Their powers and duties in criminal matters are not, therefore, as extensive as those of justices of the peace, but are confined to those which they must necessarily exercise as examining and committing magistrates in enforcing the criminal laws of the United States, and within this limit of jurisdiction they must conform, as near as may be, to the forms and modes of procedure required by law of justices of the peace. They are not prosecuting officers, but exercise important judicial functions in passing upon questions involving the rights of the government and the liberty of the citizen. The government has appointed proper ministerial officers, and imposed upon them the duties of making diligent inquiry as to violations of law and bringing offenders to justice. I have heretofore given instructions to commissioners upon this subject by rules of court, and I will now only incidentally refer to matters embraced in such instructions. Some of the powers and duties of commissioners have been stated in an opinion in *United States v. Ebbs*, delivered at this term (10 Fed. R., 369), and I deem it unnecessary to restate them in this opinion, except when closely connected with other matters now under consideration.

Commissioners have authority to commit defendants to county jails, as there is a state statute which provides: "That when a prisoner shall be committed to the keeper of any jail in the state by the authority of the United States, such keeper shall receive the prisoner and commit him accordingly; and every keeper of a jail refusing or neglecting to take possession of a prisoner delivered to him by the authority aforesaid, shall be subject to the same penalties as for neglect or refusal to commit any prisoner delivered to him under the authority of the state." Bat. Rev., 695.

§ 2703. *Mittimus of a United States commissioner.*

The *mittimus* must be directed to the marshal, commanding him to convey the prisoner into the custody of the jailer, and it must also direct and command the jailer to receive the prisoner and keep him in close custody until discharged, or taken from his custody by some proper process of law. The marshal must deliver a copy of such *mittimus* to the jailer as his authority to hold the pris-

oner, and the original warrant, with due entry of service, must be returned to the proper officer.

§ 2704. *Duty of jailer.*

A jailer ought never to receive a prisoner into his custody without some written authority to detain him, issued by a person having power to grant such authority, except under the order of a court in session. When the marshal or his deputies have arrested a person, and there is some urgent necessity for committing him to jail, they ought to furnish a copy of the warrant to the jailer, and a written statement of the causes which induce the necessity for such commitment. Where the marshal or his deputy arrests a defendant on a *capias* from a court of record, he has power to take a recognizance of bail as sheriffs can do, and if the defendant fails to give bail he may commit him to a jailer, but he ought to give the jailer a written statement of the authority under which he makes such commitment.

This is not an absolute commitment, as the marshal can take the prisoner out of the custody of the jailer when it becomes necessary for him to complete the service of the *capias* by producing the body of the prisoner at the ensuing term of court. In this state the powers and duties of a justice of the peace are generally confined to his county of residence, and his warrants can only run within such limits. He may issue a warrant to arrest a person in his county for an offense committed in another county, and make examination of the matter, and may hold to bail or commit the prisoner to the jail of his own county or to the jail of the county in which the offense was committed. If he commits to the jail of his own county, I am inclined to think that his power ceases, and he cannot afterwards issue a warrant to transport such prisoner to another county for trial. This transportation can only properly be done by a writ of *habeas corpus* issued by a judge of a court of superior jurisdiction.

§ 2705. *A sheriff or jailer in Virginia may transport a prisoner to the proper county for his trial.*

In England it was provided by the *habeas corpus* act that if any subject should be committed to any prison, or in custody of any officer, for any supposed criminal matter, he should not be removed from such custody into the custody of any other officer unless it be by *habeas corpus* or some other legal writ. 1 Chit. C. L., 108. I believe, however, that the general practice in this state is that the sheriff or jailer, having a prisoner in custody, conveys him to the proper county for trial, upon the request of the prosecuting officer, without being required so to do by writ of *habeas corpus*. The writ of *habeas corpus* especially provided for in the statutes of this state and of the United States is the high prerogative writ of right granted upon the application of a person illegally imprisoned or in any way restrained of his liberty. We must look to the common law for guidance in the use of the ancillary writ of *habeas corpus* to remove a prisoner to take his trial in the county where the offense was committed. Power to award such writ is conferred in general terms by statute upon courts of the United States.

The powers and duties of a commissioner are co-extensive with the limits of the judicial district in which he is appointed, and he may in the first instance commit a prisoner to the jailer of the county in which the United States court is held, but I think it best for him to commit to the jailer of the county of residence, that the prisoner may have convenient opportunity of procuring sureties or bail. If the commitment be to the last-mentioned jail without any qualification, the commissioner has no further control over the prisoner except

to admit him to bail. Under a statute of this state justices of the peace have power to let to bail persons committed to prison charged with crime in all cases where the punishment is not capital; and the recognizance taken must be filed with the clerk of the court of trial. Bat. Rev., c. 33, § 38. Commissioners have similar powers in United States cases.

When a prisoner gives notice that he is prepared and desires to give bail, a commissioner is not required by law to go to the jail to accept such bail, but he may issue a warrant to the marshal or his deputy to bring the prisoner before him at some convenient place for the purpose of performing the legal duty of accepting bail. There is no express power conferred by statute to issue such warrant, but the power arises by necessary implication. It may be laid down as a general rule that where the law imposes upon a magistrate any duty or confers upon him power to act in any matter, by implication the power is conferred to issue his warrants to enable him to do that duty and fully exercise that power. A commissioner has no power to commit a defendant to prison or take him out of prison, except by a written warrant for that purpose.

§ 2706. *United States commissioner cannot commit a person to prison without issuing a written mittimus.*

Section 1030, Revised Statutes, directs that "no writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody, but the same shall be done on the order of the court or district attorney." From this grant of express power it seems that in the opinion of congress it did not exist as an implied power, and as the power is only granted to the court and district attorney, the statute may be regarded as restrictive, and intended to exclude all officers of the government not mentioned. Even without this constructive prohibition, commissioners in this state cannot by verbal order commit to prison, as the law requires justices of the peace to commit only by a written *mittimus* setting forth the cause of commitment.

§ 2707. *The powers of United States marshals (under Revised Statutes, section 788) are similar to those of sheriffs.*

When there is an order of commitment to a county jailer, and the marshal has executed the *mittimus*, he has no further control over the prisoner, and is not responsible for an escape from prison. 9 Cranch, 76. "For certain purposes and to certain intents the state jail, lawfully used by the United States, may be deemed to be the jail of the United States," and that keeper to be the keeper of the United States. Id. Section 788, Revised Statutes, provides that marshals in each state, in executing the laws of the United States, shall have the same powers as sheriffs in executing the laws of the state. I believe that marshals in this state have usually adopted the practice of the sheriff in removing prisoners to the proper place of trial without applying to a judge for a writ of *habeas corpus*. I regard this course as an unsafe practice, as an officer in transporting a prisoner ought always to be under the authority and protection of the law by having in his possession due process of law.

I think that the inconvenience of applying to a judge for a writ of *habeas corpus* can be easily obviated by a change in the form of the *mittimus* generally used by commissioners. They can direct the marshal to deliver the prisoner to the jailer of the county of residence, and if bail is not given before the ensuing trial term of the court, then he shall take the prisoner and deliver him to the jailer of the county in which such court is held. I think the first temporary commitment is allowable, as it is for the benefit of the prisoner and in no way savors of oppression. Such a *mittimus* will afford authority and pro-

tection to the marshal in transporting to the place of trial. As the marshal in this case followed the uniform practice of state sheriffs in transporting prisoners, I think his action is not censurable. I have directed the clerk of this court to enter of record an order requiring the jailer of this county to keep the prisoners in his jail until they are discharged according to law.

§ 2708. Copy of indictment and list of jurors and witnesses.— Under the act of April 30, 1790, entitling the prisoner to a copy of the indictment, and a list of the jurors, mentioning the names and places of abode of such jurors, to be delivered to him two entire days before the commencement of the trial, the arraignment is the commencement of the trial, and the two entire days must be exclusive of the day of delivery of the copy and the day of the arraignment. *United States v. Dow*, *Taney, 84. See § 2871.

§ 2709. The act of April 30, 1790, entitles the prisoners to a copy of the indictment and a list of witnesses, in all capital cases. An act of congress makes it a felony to counterfeit a bank-note of the United States. *Held*, that persons guilty of that offense are not entitled to the privilege. *United States v. Williams*, 1 Cr. C. C., 178.

§ 2710. It is held that in all cases where the statute requires a list of the witnesses to be introduced in support of the indictment to be delivered to the prisoner before the trial, a reasonable time must be allowed, after the list of witnesses is furnished to the prisoner, for the purpose of bringing testimony from the counties in which the witnesses live. The act requiring the notice to be given would be nugatory and delusive if an opportunity were not furnished to investigate the characters and trace the conduct of the witnesses whose names are thus furnished to the prisoner. *United States v. Stewart*, 2 Dal., 343.

§ 2711. After a plea of "not guilty," the court refused a request by the defendant to be furnished with the names of the prosecutor and the witnesses, stating that there was no practice justifying such a demand. *United States v. Butler*, *1 Hughes, 457.

§ 2712. Under the act of congress directing that persons indicted for treason "shall have a copy of the indictment, and a list of the jurors and witnesses," "mentioning the names and places of abode of such witnesses and jurors, delivered unto him at least three entire days before he shall be tried," a copy of the caption of the indictment must be delivered, and a list of the jurors and witnesses which does not specify their occupations, nor their places of abode except by mentioning the counties in which the jurors live, is not sufficient. *United States v. The Insurgents*, 2 Dal., 335.

§ 2713. Where the accused was arraigned and the indictment was read to him, and he was told that he could plead to it then and afterwards withdraw his plea, if he desired, for the purpose of entering a demurrer, motion or other plea, and the defendant pleaded "not guilty;" and the calling and impaneling of the jury did not take place until forty-seven days afterwards, during which time the plea was not withdrawn, and a list of the witnesses and the jury was delivered to the prisoner full two days before the trial, it was held that the rights secured to the prisoner by the act of congress requiring a copy of the indictment and a list of the jurors and witnesses to be delivered to the prisoner two entire days before the trial, was not prejudiced. And the court thought it immaterial whether the word *trial*, used in the act, meant the arraignment or the trial of the cause by the jury. *McCall v. United States*, *1 Dak. T'y, 320.

§ 2714. Where the prisoner was asked before his arraignment if he had received a copy of the indictment two entire days before his trial, according to the provisions of the act of April 30, 1790, and he admitted that he had, he was held to have waived this privilege, and could not, on a motion for a new trial, rely on the objection that the words "*a true bill*," indorsed on the indictment by the grand jury, were not indorsed upon the copy delivered to him. *United States v. Cornell*, *2 Mason, 91.

§ 2715. It is within the discretion of the court to order the list of witnesses examined before the grand jury to be furnished the accused in cases where there has been no preliminary examination. *United States v. Southmayd*, *6 Biss., 321.

§ 2716. It is not necessary in federal courts, in other than cases of treason, to supply the defendant with a list of the witnesses against him. *United States v. Wood*, *3 Wash., 440.

§ 2717. The provision of the act of congress, that a person indicted for treason shall have a list of the witnesses delivered to him at least three days before the trial, cannot be evaded by changing the order of proofs, and offering in rebuttal evidence which is properly evidence in chief. *United States v. Hanway*, 2 Wall. Jr., 139.

§ 2718. It is too late, after the indictment has been pleaded to and the case gone to trial, and the evidence for the prosecution closed, to object to any irregularities in the copy of the indictment delivered to the prisoner two days before the trial as required by the act of congress. *McCall v. United States*, *1 Dak. T'y, 320.

§ 2719. **Right to be confronted with witnesses.**—If a witness is absent by the procurement of the defendant, his testimony taken in a former trial is admissible in evidence. The constitutional provision that a defendant shall be confronted with the witnesses against him does not apply in such a case. It does not guaranty a person against the consequences of his own acts. *Reynolds v. United States*, 8 Otto, 145 (§§ 854-865).

§ 2720. The finding of a court upon the question whether or not a witness is absent by the procurement of the defendant, where evidence is sought to be introduced as to the testimony of the witness at a former trial, is to have the effect of the verdict of a jury upon a question of fact, and should not be disturbed, if at all, unless error is manifest. *Ibid.*

§ 2721. **Nature of accusation.**—The constitutional provision that the accused shall "be informed of the nature and cause of the accusation" does not require that a copy of the indictment be furnished to the accused before the trial at the expense of the government, no law having made provision therefor. *United States v. Bickford*, * 4 Blatch., 337.

§ 2722. That clause of the constitution which requires that the accused, in a criminal prosecution, shall be informed of the nature and cause of the accusation against him, clearly implies that the accusation be against him, and an allegation against no one in particular is insufficient. *Greene v. Briggs*, 1 Curt., 320.

§ 2723. The sixth amendment to the constitution of the United States, providing that in all criminal prosecutions the accused shall enjoy the right "to be informed of the nature and cause of the accusation," applies as well to preliminary proceedings for arrest, before indictment, as to the indictment itself. *In re Coleman*, 15 Blatch., 415.

§ 2724. **Reading indictment to defendant.**—Where a demurrer to the indictment has been filed and heard, and the defendant has pleaded to the indictment without demanding that it should be read to him, he cannot move in arrest on the ground that he was required to plead without having the indictment read to him, and that the indictment was not read to the jury. *United States v. Bickford*, * 4 Blatch., 337.

§ 2725. Where the indictment was read to the defendant and he pleaded "not guilty," and the district attorney stated to the jury, after they were sworn, the substance of the indictment, and informed them of the issues they were to try, it was held to be no objection that the indictment was not read to the jury. *People v. Shafer*, * 1 Utah T'y, 260.

§ 2726. **Right to withdraw plea.**—A defendant in a capital case who has withdrawn his plea of not guilty and entered a plea of guilty may be permitted to retract his last plea and plead not guilty again. *United States v. Dixon*, * 1 Cr. C. C., 414.

§ 2727. So where the accused pleaded guilty of a capital offense the court permitted him to withdraw the plea and plead not guilty. *Ibid.*

§ 2728. **Accused entitled to his money.**—A person arrested and held for trial may obtain a rule of court requiring that money found on his person, and seized and held by the committing magistrate, be delivered up to him pending the trial. *Ex parte Craig*, * 4 Wash., 710.

§ 2729. **Separate trials on joint indictments** are matters of discretion in the court, and not of right. *United States v. Wilson*, * Bald., 78. See § 2674.

§ 2730. **Compulsory process.**—The constitutional right of the accused in a criminal prosecution to have compulsory process for obtaining witnesses in his favor does not include the right to compel the attendance of a consul of a foreign government protected by a treaty between the United States and such government stipulating that their consuls shall never be compelled to appear in court as witnesses. *In re Dillon*, * 7 Saw., 561.

§ 2731. It is the duty of the court, on the application of a prisoner, to send for witnesses, wherever they may be had, within the jurisdiction of the court, and at the expense of the government, if the prisoner proves that he is poor and unable to bear the expense himself. *United States v. Kenneally*, * 5 Biss., 122.

§ 2732. The right of the accused under the constitution to obtain a subpoena *duces tecum* rests on the same ground as his right to process to compel the attendance of witnesses to testify orally. But the right to compel the production of a document is not co-extensive with the right to compel the attendance of a witness to testify orally. If it be apparent that for state reasons the papers cannot be introduced in evidence the subpoena will not issue. Where a subpoena *duces tecum*, directed to the consul of France, is asked for, it is the right and duty of the court to compel the defendant to show that the document is not an official paper protected by law from examination and seizure. *In re Dillon*, * 7 Saw., 561.

§ 2733. **Presence of accused.**—It is in the discretion of the court to allow one indicted for a misdemeanor to plead and defend, in his absence, by attorney. This discretion will be regulated by the following circumstances: 1. That it is not an offense for which imprisonment must be inflicted. 2. It must appear that imprisonment will not be inflicted. 3. The district attorney must consent, or else it must appear that his refusal is unreasonable and vexatious. 4. Sufficient cause must be shown for the absence of the defendant. 5. The special power of attorney to appear and defend in his absence must be executed by the defendant

and filed with the court. *United States v. Mayo*,* 1 Curt., 433; *United States v. Leckie*,* 1 Spr., 227.

§ 2734. It is a rule of law that no evidence is to be given against the prisoner but in his presence. This privilege is for the benefit of the prisoner, and it is competent for him to waive it. The point of time at which the consent of the prisoner is given that depositions taken abroad may be used upon the trial will not affect the competency of the testimony. *Evidence against Prisoners*,* 1 Op. Att'y Gen'l, 706.

§ 2735. The right of a prisoner to be present at his trial does not include the right to prevent the trial by unseemly disturbance. Where the prisoner was present while the jury were being impaneled and the evidence was being introduced, but was, on account of his unseemly conduct, removed by the court to an adjoining room, and detained, with liberty of access for his counsel, during a part of the opening of the case by the district attorney, and until he was willing to cease his disturbance, it was held that no error was committed. *United States v. Davis*,* 6 Blatch., 464.

§ 2736. It cannot be objected that the prisoners were not allowed to be placed near to the counsel for the purpose of instructing the counsel in their defense, when they were actually placed within a reasonable distance from their counsel, who had free access to them, but were not allowed to occupy the front seats which were constantly assigned to the gentlemen of the bar. *United States v. Gibert*,* 2 Sumn., 37.

§ 2737. Where a verdict of guilty was returned, and the defendant was called, and, not appearing, his recognizance was forfeited, the court refused to strike out the forfeiture and permit a motion in arrest of judgment, without the appearance of the defendant. *United States v. Askins*, 4 Cr. C. C., 98; *United States v. Erskine*, 4 Cr. C. C., 299.

§ 2738. In trials for misdemeanors the verdict may be rendered in the absence of the accused, if in the presence of his counsel. *United States v. Shepherd*,* 1 Hughes, 520.

§ 2739. The absence of the accused when the verdict is received and the judgment rendered does not affect the validity of the proceedings when it is in consequence of his escape during the trial. His right to be present was lost when he escaped. *United States v. Loughery*,* 13 Blatch., 267.

§ 2740. It cannot be urged that it does not sufficiently appear by the record that the defendant was present at the trial when the verdict was rendered, nor when the sentence of death was passed, when it appears from the record that the jury, on their oaths, do say, "we, the jury, do find the defendant Leschi guilty as charged in the indictment, and that he suffer death; and thereupon the defendant gives notice for a motion for a new trial;" and the sentence stated in the record recites, "and the defendant saying nothing why judgment should not be pronounced against him, it is considered by the court," etc. *Leschi v. Washington Territory*,* 1 Wash. Ty, 13.

§ 2741. **Limitations upon federal government.**—The provision in the fifth amendment to the federal constitution, that no person shall be held to answer for a capital crime, nor be deprived of life "without due process of law," and the provision in the sixth, that in all criminal prosecutions the accused shall enjoy the right "to be informed of the nature and cause of the accusation," are not limitations upon the state governments, and a state statute which disregards them is not for that reason void. *Twitchell v. The Commonwealth*, 7 Wall., 321.

§ 2742. The provision in the federal constitution that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted, applies to national and not to state legislation. *Pervear v. The Commonwealth*, 5 Wall., 475.

§ 2743. **Accused not required to be a witness against himself.**—Where a charge of misconduct is made against an officer, whether amounting to an indictable offense or only to his discredit as an officer, which might furnish grounds for his removal or impeachment, he is not bound to be a witness against himself. If he chooses to waive his right and submit to an examination, he may do so where public interests will not thereby be affected. No unfavorable implication ought to exist from a failure to testify when a person stands upon his rights in this respect. *United States v. Collins*,* 1 Woods, 499.

§ 2744. **Trial by jury; right of presentment.**—The act of the legislature of Dakota, conferring upon justices of the peace exclusive jurisdiction of all misdemeanors, where the maximum punishment fixed by law does not exceed \$100, or imprisonment in the county jail for a period of thirty days, or both such fine and imprisonment; also of all offenses under the laws of the territory, where the penalty is not specially provided for, is held to deprive the accused of the right of trial by jury, and of a presentment by a grand jury, secured by the constitution. *People v. Sponster*,* 1 Dak. Ty, 289.

§ 2745. **Returning the verdict.**—Where a jury wrote, signed and sealed up their verdict, and adjourned, and appeared at court the next day, and, on being called over, offered the written verdict, sealed up, to the clerk, the court said that the paper could not be received. The foreman then pronounced the verdict *viva voce*, and again offered the written verdict,

and the court declared that they could not open or receive it. *United States v. Vigal*, 2 Dal., 346, n.

§ 2746. Where it appeared that the direction in writing to the jury, that they might deliver a sealed verdict to the officer and might then separate, was exhibited to the counsel for the prisoner before it was sent to the jury by the court; that the jury strictly followed such direction; that the court received the sealed verdict from the officer the next morning in the presence of the jury and of the defendant, in open court, after the jury had then and there announced that they had agreed upon a verdict and that such sealed verdict contained it; that the verdict of guilty announced and recorded was the verdict contained in such sealed verdict; and that, on the polling of the jury, at the request of the counsel for the defendant, each juror stated that the verdict announced was his verdict, it was held that no error had been committed. *United States v. Bennett*, 16 Blatch., 338 (§§ 2490-89).

§ 2747. Proceedings before grand jury furnished to accused.—In the absence of strong reasons to the contrary, the proceedings before the grand jury should not be furnished to the defendant in a criminal proceeding. *United States v. Southmayd*, * 6 Biss., 321.

§ 2748. Special sessions.—Under the act of 1789, declaring "that the circuit courts shall have power to hold special sessions for the trial of criminal causes at any other time at their discretion," and "that in all cases punishable with death, the trial shall be had in the county where the offense was committed; or where that cannot be done without great inconvenience, twelve petit jurors shall be summoned from thence," the inconvenience of holding the trial in the county where the crime was committed is a question in the discretion of the court. Neither can a trial be held there on an indictment found at the general term. *United States v. Cornell*, 2 Mason, 91.

§ 2749. And where no objection is made by either party as to the time or place of trial, the court is not bound to order a special session; and where the prisoner might secure a trial in the county in which the act was done by continuing the cause to the next general session, such a privilege may be waived by him, and the court is not bound to make such a continuance without application. *Ibid*.

§ 2750. Instructions to the jury.—Upon the trial of an indictment against an internal revenue officer for perjury in making an affidavit in a proceeding against another revenue officer for bribery, that he saw the bribe taken, it is not error to instruct the jury that they might consider the circumstance that it was not until some months after the time at which the prisoner said he saw the bribe taken that he made the criminal complaint. *United States v. McHenry*, * 6 Blatch., 503.

§ 2751. It is the duty of the court in a criminal case to instruct the jury fully upon the whole law of the case as respects all the facts proved or claimed by the respective counsel to be proved. *Territory v. Bannigan*, * 1 Dak. T'y, 451.

§ 2752. It is not error to omit to instruct on a point on which no instruction is asked. *United States v. Conway*, 18 Blatch., 566 (§§ 351-353). Where an inaccurate instruction has been given it seems that a new trial will be granted, though there was evidence on which the jury might have convicted under proper instructions. *United States v. Moore*, 2 Low., 233 (§§ 1046-47).

§ 2753. It is held to be the practice of the court, in capital cases, to require counsel to state the points of law on which they rely and wish the instructions of the court, some time before the charge is given, that the court may have time to examine and consider them. *United States v. Gibert*, * 2 Sumn., 37.

§ 2754. Where, upon an indictment for murder, the distinction between murder and manslaughter, and the fact that malice is an ingredient in the first, was pointed out, and the jury found the prisoner guilty of manslaughter only, it was held, on appeal, that no question could be raised as to the charge in relation to the crime of murder, inasmuch as the prisoner had been acquitted of that crime. *Mackey v. The People*, * 2 Colo. T'y, 13.

§ 2755. In a criminal prosecution, the court instructed the jury that the failure of the defendant to call one Smith as a witness was a material feature in the case, and that it was for them to say whether the failure to call him was consistent with the statement of the accused, in view of the evidence in regard to Smith's connection with the affair. It was held that this instruction could not be objected to on the ground that the indictment showed that Smith was a party to the record, and he was therefore incompetent; since, in the absence of objection, Smith could be sworn in behalf of the defendant. *United States v. Schindler*, * 18 Blatch., 327.

§ 2756. — comment on the evidence.—It is not sufficient in any case for the jury to find testimony. They must not only believe the testimony to be true, but they must find the facts which the testimony is intended to prove. The jury ought not to find the defendant guilty, unless they should, from the evidence, find all the facts necessary to constitute the offense charged. An instruction, therefore, that if the jury believe the testimony in a certain statement the defendant is guilty, is erroneous. *Jones v. United States*, * 5 Cr. C. C., 647.

§ 2757. Upon the trial of an indictment for obtaining money under false pretenses, an instruction that all the precedent declarations and doings of the defendants, "in the said evidence in the case averred," are merged in the subsequent bill of sale and warranty, and that the prisoners upon this charge are entitled to acquittal, cannot be held to be error by the appellate court, where the evidence referred to does not appear. *Ibid.*

§ 2758. In a prosecution for obtaining money under false pretenses, the taking of a warranty in the transaction, if proved, is a fact for the consideration of the jury; and the inferences therefrom are to be made, or not, by the jury according to the preponderance of evidence; and where there is evidence on both sides, the court cannot instruct that there is no evidence on the one side, but should leave the matter to the jury. *Ibid.*

§ 2759. — as to sufficiency of proof. — An instruction that proof beyond a reasonable doubt is such as will produce an abiding conviction that the fact exists that is claimed to exist; that a balance of proof is not sufficient; that a juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt, unless he be so convinced by the evidence of the defendant's guilt that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interest, is held not to be erroneous. *Miles v. United States*,* 13 Otto, 301.

§ 2760. Under an indictment for murder, an instruction that "in determining the question of doubt you will act as a prudent, careful business man would act in determining an important matter pertaining to his own affairs," is erroneous. *Territory v. Bannigan*,* 1 Dak. T'y, 451.

§ 2761. — hypothetical. — A court cannot instruct a jury that certain facts constitute a certain offense, unless every essential fact necessary to constitute the offense be included in the statement. And every instruction given to the jury upon a hypothetical statement of facts must be as strictly justified by the hypothesis as an opinion given upon a special verdict must be by the facts found by the jury; and in neither case can the court infer any fact from the facts stated or found. Upon an indictment for larceny, an instruction which does not state, as a condition of the offense, the felonious intent or *animus furandi*, is erroneous. The instruction should also contain a condition that the taking was without the consent of the owner. The finding of facts from which such an inference might be drawn is not a sufficient finding to constitute the case stated, *per se*, larceny. *Weston v. United States*,* 5 Cr. C. C., 492.

§ 2762. — must define the offense. — In a capital case, where the evidence showed a sudden combat, with a very brief time intervening until the fatal shot was fired, and the court was asked by the defendant to instruct the jury that there was not sufficient cooling time between the combat and the shooting, and the court gave no instruction on this point at all, and made no reference to the distinction between murder and manslaughter further than to read to the jury from the statutes, such action on the part of the court was held to be an error for which the case would be reversed. *Territory v. Bannigan*,* 1 Dak. T'y, 451.

§ 2763. — using language of statute. — An instruction as to the law of murder, which uses the language of the statute defining murder, is not erroneous. *Phillips v. Wyoming Territory*,* 1 Wyo. T'y, 82.

§ 2764. — erroneous, not cured by correct one. — An erroneous instruction given in behalf of the people is not cured by a correct instruction covering the same point, given in behalf of the prisoner; for we cannot know by which the jury will be guided. *Mackey v. The People*,* 2 Colo. T'y, 13.

§ 2765. — refusal causing no injury. — A refusal to give a charge which worked no harm to the defendant is no ground for a new trial. *United States v. Learned*,* 1 Abb., 483.

§ 2766. — submitting matter of law. — An instruction which would submit to the jury matter of law will be refused. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 2767. — irrelevant. — It is not error to refuse a requested charge which is irrelevant. *Brand v. United States*,* 18 Blatch., 387.

§ 2768. — in writing. — Where a statute requires that the charge of the judge to the jury at the trial must be reduced to writing before it is given, unless the parties consent to its being given orally; and the written instructions form a part of the record, may be taken by the jury on retiring for deliberation, and are subjects of appeal, it is error for the court to give an instruction, without the consent of the defendant, which is not reduced to writing, nor filed with the other instructions in the case, but is simply referred to in writing as contained on a certain page in a law magazine. *Hopt v. People*, 14 Otto, 631 (§§ 3156-57).

§ 2769. Directing a verdict. — In a criminal prosecution it is only where the facts are not controverted, and where the inference to be drawn from them is certain, necessary and undisputed, or where there is no evidence tending to establish a necessary element in the case, that the trial court may peremptorily direct what verdict shall be given; and where it is a matter of judgment, discretion and sound inference what is the deduction to be drawn from undisputed facts, where different men, equally sensible and equally impartial, would

make different inferences, the decision must be by the jury under instructions from the court. *United States v. Babcock*, * 3 Dill., 577. See § 2672.

§ 2770. Inasmuch as the court has power, if the defendant is convicted by the jury on the evidence, to grant him a new trial, if it is of opinion that the verdict is against the evidence, it has also the power, if it is of opinion that a verdict of guilty would not be warranted by the evidence, to direct the jury to acquit the defendant on that ground. *United States v. Fullerton*, * 7 Blatch., 177.

§ 2771. It is within the power of the federal courts, even in capital cases, to take the case from a jury impaneled to try it, whenever, in the opinion of the court, it is necessary, or required by the interests of the public. *United States v. Morris*, * 1 Curt., 23.

§ 2772. Refusal to instruct that there is no evidence.—An exception to the refusal of the court to instruct the jury that there was no evidence in the case upon which the defendant could be legally convicted under the indictment does not raise any question as to the sufficiency of the indictment. *Brand v. United States*, * 18 Blatch., 384.

§ 2773. A private instruction by the judge, when the court is not in session, and after the jury has retired, made in answer to a written inquiry by one of the jurors, both the inquiry and the answer being delivered by the officer in charge of the jury, and had without the consent or knowledge of the defendant or his counsel, is irregular and objectionable, but is not ground for reversal where it is not clear that the prisoner was prejudiced by it. *Doyle v. United States*, * 10 Fed. R., 269.

§ 2774. It cannot be assigned as error that the court, after the argument of counsel, remarked to the jury, "that they had now heard the arguments of counsel and the charge of the court, and that the closing counsel had, in some degree, gone outside the case; that all the jury had to decide upon was the evidence given upon the trial—the law they were to take from the court." *Leschi v. Washington Territory*, * 1 Wash. T'y, 18.

§ 2775. Verdict.—In a criminal case moral certainty is all that is expected of the verdict of a jury. *United States v. Randall*, * Deady, 524.

§ 2776. If a verdict is so imperfect that no judgment can be given upon it, it must be considered as no verdict; and if the jury is discharged after giving such a verdict, the defendant has been in no jeopardy within the meaning of the constitution. *United States v. Watkins*, * 8 Cr. C. C., 441.

§ 2777. Where a verdict has been received and recorded, without objection by the defendant or his counsel, the court is not estopped from holding it to be so imperfect as not to justify a judgment thereon. *Ibid.*

§ 2778. A verdict which finds only one or two out of the many facts which are all necessary to constitute the offense, and saying nothing as to the residue, is not a technical partial verdict. *Ibid.*

§ 2779. If the verdict is general, and one count is good, the judgment will not be arrested. *United States v. Potter*, * 6 McL., 186; *United States v. Clark*, * 1 Low., 402.

§ 2780. The jury returned a general verdict, sealed, and on its being opened counsel for the defense desired to know whether the jury applied it to all the counts. One of the jurors stated that they had not considered a finding on each count necessary, and the court ordered the verdict recorded as returned, and polled the jury at defendant's request, each juror answering that the verdict was his. *Held*, no error. *United States v. Potter*, * 6 McL., 186.

§ 2781. If two offenses are described separately in two counts in one indictment, and there is a general verdict of guilty, the judgment will not be arrested as for a misjoinder unless the offenses are of a nature and character radically different, as well as requiring judgments different in kind and not merely in amount or degree. *United States v. Peterson*, * 1 Woodb. & M., 303.

§ 2782. Where a defendant is convicted on the first count in the indictment and acquitted on the second, the sentence of the court on the first count is a judgment by the court that the verdict on the second count does not make void the verdict on the first, and that judgment cannot be brought into review by a motion to vacate the judgment. *United States v. Malone*, * 9 Fed. R., 897.

§ 2783. Each count in an indictment is in theory a separate indictment. Where the prisoner is charged in two separate counts with having used two different stills at different times on the same day at the place described, it cannot be contended that, because the jury convicted the prisoner on one count and acquitted him on the other, they found him guilty and likewise not guilty of the same offense. *Ibid.*

§ 2784. The different counts in an indictment always relate to the same transaction, describing it in different ways, or with different circumstances, and the jury may apply their verdict to all or either of them, as the evidence shall warrant, or, if the verdict be guilty generally, the application will be made by the court. So it is no objection to a verdict on one count that the defendant has been acquitted on another. *United States v. Benner*, * Bald., 234.

§ 2785. Where the court can see and know judicially, from the several counts in an indictment, that the same offense is charged in them all, and that a conviction on one of the counts subjects the defendant to the same punishment as a conviction on them all, and will be a bar to subsequent punishment for the offenses charged in the rest, and the jury finds a verdict of guilty on all the counts but one, and makes no finding on that one, the court will sustain the verdict found, and enter a discontinuance of the count on which there is no finding, it appearing that no prejudice can result to the defendant by entering the discontinuance. *United States v. Keen*,* 1 McL., 429.

§ 2786. A special verdict which does not determine whether or not the offense was committed outside the jurisdiction of the court, when that question is in the case, is insufficient and must be set aside. *United States v. Jackalow*,* 1 Black, 484.

§ 2787. Where an indictment charges a defendant with two distinct offenses in two different counts, a verdict of "not guilty" on one count, and a disagreement as to the other, is not an acquittal on such other count, and as to this count in the indictment the defendant stands for trial as if no jury had ever been impaneled. *United States v. Davenport*,* Deady, 264.

§ 2788. For all the purposes of a verdict, an indictment in which there is a joinder of offenses or offenders is to be considered as a several and separate one as to each of such offenses and offenders. The jury may, therefore, find a verdict of guilty or not guilty as to some, and no verdict as to the others because they cannot agree thereon. *Ibid*.

§ 2789. Under an indictment for assault and battery on Moses Hepburn, with intent to kill him, a verdict of "guilty of an assault by shooting Moses Hepburn with intent to kill, but not with malice aforethought," is a sufficient verdict. For the shooting of a man is a battery, and, the statute not requiring that the act should be done with malice aforethought, the finding that it was not done with malice aforethought is an immaterial finding and is surplusage. *United States v. Lloyd*, 4 Cr. C. C., 472.

§ 2790. Where it did not appear by the verdict that the act was committed before the filing of the information, the judgment was arrested. *Commonwealth v. Leap*,* 1 Cr. C. C., 1.

§ 2791. Each juror must find the verdict he agrees to upon his own oath. The jury have no right to agree that the vote of a majority shall be adopted as the verdict to be returned. *United States v. Butler*,* 1 Hughes, 457.

§ 2792. Under a law requiring that "upon the trial of an indictment for murder the jury, if they find the defendant guilty, must inquire and in their verdict declare whether he be guilty of murder in first or second degree," a verdict of guilty as charged in the indictment is too general. The court cannot assume that they designed from a general verdict to fix the grade of the crime. *People v. Shafer*,* 1 Utah Ty, 260.

§ 2793. Under an indictment in the common law form, containing but one count, and that for murder in the first degree, a verdict of "guilty as charged in the indictment, and that he suffer death," is good, although the statute divides the offense of common law murder into two grades—murder in the first and second degrees. *Leschi v. Washington Territory*,* 1 Wash. Ty, 13.

§ 2794. A person indicted for murder on the high seas was found guilty upon all five of the counts in the indictment, and was sentenced thereon. *Held*, that there was no repugnancy between the verdict and the clause of the indictment which declared that the prisoner was first brought into that district after committing the "offense," as all counts were obviously directed to the same homicide. *United States v. Plumer*, 3 Cliff., 70.

§ 2795. Where, in defining manslaughter to the jury, the court used the language of the statute, which, following the common law, refers to voluntary and involuntary homicide, a verdict of guilty of involuntary homicide is not ambiguous or insensible, but sufficient. *Mackey v. The People*,* 2 Colo. Ty, 13.

§ 2796. A verdict of "not guilty, upon the plea of limitations, more than two years having elapsed from the committing of the offense to the finding of the indictment," is bad, because it is argumentative. (CRANCH, C. J., dissented.) *United States v. White*,* 5 Cr. C. C., 38.

§ 2797. A verdict upon an indictment for defrauding the United States, "of guilty of obtaining \$750 of the money of the United States, in his official capacity, and of applying the same to his own private use," was held to be an imperfect verdict, (1) because it did not profess to find all the material facts proved to the satisfaction of the jury, and submit the matter of law to the court, and find for or against, according to the opinion of the court upon the law; which would make it a special verdict; (2) because it did not negative any one of the facts necessary to the offense, nor find any fact inconsistent with the defendant's guilt; which would be in effect a general verdict; (3) because it did not find the defendant guilty of a less offense than the one charged, and acquit him of the greater; which would be a partial verdict; (4) because it did not find all the facts necessary to constitute the offense charged in the indictment. The court could not, therefore, render a judgment either for or against the defendant upon the verdict given. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 2798. Upon an indictment under the act of January 9, 1809, for loading goods on carriages, with intent to transport them out of the United States, the penalty for which was four times the value of the goods so intended to be exported, the verdict need not find the value of the property. *United States v. Gordon*, 7 Cr., 287.

§ 2799. The judgment on a joint indictment must be several. *United States v. Ismenard*,* 1 Cr. C. C., 150.

§ 2800. On an indictment at common law for manslaughter, the court rendered a judgment under the statute. *United States v. McLaughlin*, 1 Cr. C. C., 444; *United States v. King*,* 1 Cr. C. C., 444.

§ 2801. On a verdict of guilty of larceny at common law, the court rendered judgment under the statute. *United States v. Dixon*,* 1 Cr. C. C., 414.

§ 2802. Under an act in force in Washington Territory, providing that "every final judgment, order or decision of the district court in a criminal prosecution may be re-examined upon a writ of error . . . in the supreme court for error in law within two years," the overruling of a motion for a new trial is not such a final judgment or decision as may be re-examined on a writ of error in the supreme court. *Wassissimi v. Washington Territory*,* 1 Wash. T'y, 6.

§ 2803. Passing sentence.—Where the court, in passing sentence on a prisoner, omits to ask him if he has anything to say why the sentence should not be passed upon him, such omission will not be ground for reversal, and the appellate court will pass sentence anew. Nor will the case be reversed because the trial court passed two sentences on two different days. *Kinsler v. Territory of Wyoming*,* 1 Wyom. T'y, 112.

§ 2804. Vacating judgment.—The court has no power to vacate a judgment after the expiration of the term at which it was entered. *United States v. Malone*,* 9 Fed. R., 897.

§ 2805. The general power of the court over its own judgments, orders and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, cannot be denied. *Ex parte Lange*, 18 Wall., 163 (§§ 1767-74).

§ 2806. The court has power to set aside or modify its judgment in a criminal case, at the term at which the judgment was given. *United States v. Harmison*,* 8 Saw., 556.

§ 2807. The court has power at the same term, for proper cause, to set aside a judgment of conviction rendered on confession. *Basset v. United States*,* 9 Wall., 88.

§ 2808. Setting aside verdict.—A court is not authorized to set aside a verdict simply because, if they had been on the jury, they would have found a different verdict. It is not sufficient that the verdict may possibly be wrong, but that, after giving proper weight to all the evidence, it cannot be right. *United States v. Martin*,* 2 McL., 256.

§ 2809. A correct verdict should never be set aside on account of an error, actual or supposed, in the process or means by which it has been attained. *United States v. Mathoit*,* 1 Saw., 142.

§ 2810. Failure to move for judgment.—In criminal cases judgment is not pronounced except upon the motion of the prosecuting officer, and by omitting to bring up the prisoner, and declining to move for sentence, that officer may exercise a virtual prerogative of pardon. *United States v. Graff* 14 Blatch., 395.

§ 2811. Judgment on general verdict.—If a count in an indictment is double, or it is doubtful whether it is properly joined with the other, as being for an offense somewhat different in character and punishment, judgment after a general verdict will not be arrested, but will be rendered entirely on the other count. *United States v. Peterson*,* 1 Woodb. & M., 305.

§ 2812. Judgment on indictment for felony.—If the indictment really charges a felony, a judgment cannot be given upon it as for a misdemeanor. *United States v. Larned*, 4 Cr. C. C., 335.

§ 2813. Under a statutory provision that the jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or an attempt to commit the offense; and under an indictment for an assault with a deadly weapon with intent to kill; and upon a verdict finding the defendant "guilty of an assault with intent to do bodily harm, and without justifiable or excusable cause," a judgment for a felony cannot be sustained, the offense found being neither a felony at common law nor under the statute. *Territory v. Conrad*,* 1 Dak. T'y, 363.

§ 2814. Judgment entered by mistake.—A judgment entered by the clerk by mistake was set aside at the next term and the execution quashed. *United States v. McKnight*,* 1 Cr. C. C., 84.

§ 2815. Plea in absence of counsel.—Where the defendant, when arraigned, entered a plea of not guilty, without the presence or advice of his counsel, and under the assurance of the court that he would not thereby lose the privilege of every defense to the indictment, when his counsel came into court, that he was entitled to by law before the plea of not guilty was interposed, he was held entitled to withdraw the plea and enter a motion to quash the

bill. The court may control the order of pleading at his discretion. *United States v. O'Sullivan*,* 9 N. Y. Leg. Obs., 257.

§ 2816. Pleading.—In case of misdemeanor the defendant may avail himself of the statute of limitations upon demurrer. It is no objection to this that it does not appear upon the face of the indictment at what time it was found, because it will appear from the caption of the indictment, whenever the record is made up, at what time the indictment was found, and upon demurrer the judgment must be given upon the whole record. Nor can it be objected that the United States will thereby be precluded from replying, according to the proviso of the act, that the defendant fled from justice within the two years. *United States v. White*,* 5 Cr. C. C., 368; *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 2817. Where the accused was charged with issuing an obligation for a less sum than \$1, intended to circulate as money, it was held that a demurrer to the indictment only admitted the intent, and that as to the nature of the thing issued (an obligation payable in money) the judgment of the court was left as unfettered as if the question had been raised by a motion to quash. *United States v. Van Auker*,* 6 Otto, 366.

§ 2818. A plea to be good as a bar to the whole indictment must meet the whole case. If it does not it will be held bad on demurrer. And so where one was charged in five counts with selling lottery tickets and in two with keeping a gaming table, and he pleaded to the whole indictment that in issuing the tickets he acted as agent for a certain corporation, without pleading to the charges of keeping a gaming table, a demurrer to his plea was sustained. *Moore v. Mississippi*, 21 Wall., 636.

§ 2819. Misnomer cannot be taken advantage of by demurrer. It must be by plea in abatement, stating the true name of the defendant. *United States v. Howard*, 1 Saw., 507 (§§ 2402-2406).

§ 2820. Judgment is to be given on a demurrer to a pleading in a criminal case against the party committing the first fault in pleading. *United States v. Lawrence*, 13 Blatch., 295 (§§ 3468-74).

§ 2821. A plea in abatement to an indictment should conclude with a prayer that the indictment be quashed. *United States v. Hammond*, 2 Woods, 197 (§§ 1832-41).

§ 2822. A plea in abatement to an indictment which concludes with a prayer for a relief which the court cannot grant on such a plea is bad. *Ibid.*

§ 2823. Dilatory pleas in criminal cases are not favored, and the law requires that they shall contain all essential averments, pleaded with strict exactness. *United States v. Williams*, 1 Dill., 485 (§§ 1826-31).

§ 2824. Pleas in abatement to a criminal indictment are not favored, and they must contain all essential averments, pleaded with exactness. *United States v. Hammond*, 2 Woods, 197 (§§ 1832-41); *United States v. Reeves*, 3 Woods, 199 (§§ 1849-53).

§ 2825. That the information will not lie because of the recovery of a penalty by civil suit based on the same acts complained of, is not a question which is raised by demurrer. *United States v. Moller*,* 16 Blatch., 65.

§ 2826. The plea of not guilty puts the defendant for all purposes upon his trial by jury; and, as in a capital case the trial must be by jury, it is not necessary, after plea of not guilty, that the prisoner be asked how he will be tried and that he make the reply "By God and the country." *United States v. Gibert*,* 2 Sumn., 87.

§ 2827. All legal defenses to an indictment for a violation of law may be given in evidence under a plea of not guilty, and no special plea is necessary. *The Territory v. Reyburn*,* McCahon, 140.

§ 2828. In a criminal case, the plea of not guilty puts in issue the whole case on both sides, and under it the defendant may set up the statute of limitations. *United States v. Brown*, 2 Low., 287.

§ 2829. Plea of guilty.—Where, during the trial in a criminal case, and after the introduction of certain evidence, further evidence was waived, and an admission made by the counsel of the defendant, in his presence and hearing, of his guilt under the indictment, and a verdict of guilty rendered and recorded, with the consent of the defendant, the circuit court, on error, refused to consider whether the rights of the defendant had been sacrificed by his counsel, holding that the district court was the proper judge of that question. *Ralph v. United States*,* 9 Fed. R., 693.

§ 2830. The legal effect of the pleas of "guilty" and "*nolo contendere*" is the same so far as regards all proceedings on an indictment. *United States v. Hartwell*, 3 Cliff., 232.

§ 2831. The quashing of an indictment for insufficiency does not prevent the filing of an information. *United States v. Nagle*,* 17 Blatch., 258.

§ 2832. A motion to quash, made after plea, cannot be sustained, unless the indictment is so palpably insufficient as to satisfy the mind that no judgment could be rendered on it, in case of conviction. *United States v. Bartow*,* 10 Fed. R., 873.

§ 2833. The quashing of an indictment is entirely a matter of discretion on the part of the trial court, and it will not be done where the defendant has pleaded and has had ample time to make objection, but has delayed until the witnesses were summoned and the case was ready for trial, unless in a case entirely clear of doubt. The defendant will be left to his motion in arrest of judgment. *United States v. O'Brien*, * 7 Int. Rev. Rec., 62.

§ 2834. A motion to quash an indictment, founded on matter of fact, not appearing of record, must be supported by affidavit. *United States v. Coolidge*, * 2 Gall., 363.

§ 2835. Neither a motion to set aside nor a motion to quash will lie where the objection does not appear or arise upon the face of the indictment, or, perhaps, the records of the court. *United States v. Brown*, * 1 Saw., 531.

§ 2836. The affidavits of the defendant, impugning the conduct and judgment of the grand jury in acting on incompetent and insufficient evidence, cannot be considered upon the hearing of a motion to quash the indictment. *Ibid.*

§ 2837. Testing sufficiency of indictment.—The defendant has no right to insist that objections to the form and sufficiency of an indictment be discussed or decided during the trial of the facts by the jury. But it is not wholly incompetent for the court to entertain such questions during the trial, in the exercise of a sound discretion. *United States v. Gooding*, 12 Wheat., 460.

§ 2838. It is within the discretion of the trial court to refuse to entertain a motion to quash an indictment and require the party to plead in abatement, or to demur, in order to raise questions affecting the regularity of the finding of the indictment, or its formal or substantial sufficiency. *United States v. Stowell*, * 2 Curt., 153.

§ 2839. Where the defendant stated that he should endeavor to satisfy the court that there was no law to support the indictment, and submitted whether this should be done before the jury were sworn, or after, and before a verdict was rendered; or in arrest of judgment, should the verdict be against the defendant, the court thought it most proper to proceed in the ordinary way, leaving both law and fact to the jury under the charge of the court; or to a motion in arrest of judgment, should the jury find the defendant guilty. *Anonymous*, * 1 Wash., 84.

§ 2840. Arraignment.—A defendant was arraigned and pleaded not guilty, but this plea was withdrawn. A motion was then made to quash the indictment, but this was overruled. The clerk then re-entered the plea of not guilty and the case went to trial. The defendant challenged jurors and otherwise took part in the proceedings. His counsel stated to the jury that he was not guilty, and on the trial the record was read in the presence of the defendant and his counsel, but no objection was taken that the plea was not entered by the defendant. *Held*, that after verdict he could not take the objection. *United States v. Conklin*, * 17 Int. Rev. Rec., 76. See § 2678.

§ 2841. Where, by the practice of the court, a prisoner's box or dock is set apart, in which persons are to be placed by the marshal to be arraigned, the court will not permit a prisoner to plead without going into the dock. But if the prisoner acknowledges himself to be the person indicted he need not hold up his hand. *United States v. Pittman*, 3 Cr. C. C., 289.

§ 2842. Where such is the practice, the court will require that the prisoner be arraigned at the bar in the prisoner's dock. The prisoner will not be allowed to plead without being arraigned. *United States v. Pettis*, 4 Cr. C. C., 186.

§ 2843. An act of congress for the punishment of certain crimes directs that if any person indicted for any of the offenses, other than treason, set forth in the act for which the punishment is declared to be death, shall stand mute or will not answer to the indictment, the court shall proceed to trial as if he had pleaded not guilty. The act for regulating the postoffice establishment inflicts the punishment of death on persons who rob the mail with the use of weapons which jeopard the life of the carrier. It is held that standing mute to a charge of robbing the mail under such circumstances is equivalent to a plea of not guilty, although this offense is not mentioned in the first act referred to. *United States v. Hare*, * 2 Wheeler, 283.

§ 2844. Election.—Where one count in an indictment charges the stealing certain goods, and another count charges the receiving of the same goods knowing them to be stolen, the attorney for the government will not be compelled to elect on which to proceed. *United States v. Prior*, * 5 Cr. C. C., 37.

§ 2845. After a plea of "not guilty," the government will not be required to elect upon which of several counts it will proceed. *United States v. Butler*, * 1 Hughes, 457.

§ 2846. Where the several counts in an indictment charge substantially the same offense, and all relate to the same transaction, and the variation of form in which the offense is charged, in the different counts, is done with a view to meet the evidence, the prosecutor will not be compelled to elect, because the acts charged in some counts are punished with a heavier penalty than the acts charged in others. *United States v. Dickinson*, * 2 McL., 325.

§ 2847. *Nolle prosequi*.—The district attorney has the power, subject to the control of the court, to enter a *nolle prosequi* at any time before a jury is impaneled. *United States v. Stowell*,* 2 Curt., 153. See §§ 2668-70.

§ 2848. The prosecuting attorney may enter a *nolle prosequi* after verdict as well as before, without the assent of the defendant, as to a count or to a part of a count in the indictment. *United States v. Peterson*,* 1 Woodb. & M., 305.

§ 2849. As a *nolle prosequi* should be entered on the records of the court, in order to answer all the purposes for which it is intended, and cannot be so entered without the assent of the court, a motion to enter it, made by the district attorney, must be addressed to the discretion of the court. *United States v. Corrie*,* 23 Law Rep., 145.

§ 2850. Although, in a case calling for such action, the court may decline to grant a motion by the district attorney for leave to enter a *nolle prosequi*, until the government has had time to protect itself against collusion, yet the motion, when made before verdict, must be granted as a matter of right. *United States v. Watson*,* 7 Blatch., 60.

§ 2851. *Amendment*.—An information may be amended by filling up the blank of the date of the commission of the offense. In such a case leave was given to the defendant to plead *de novo* and a continuance allowed at his request. The court also gave leave in this case to amend the information by describing the kind of liquor sold. *United States v. Evans*, 1 Cr. C. C., 55.

§ 2852. Under the statute organizing the police court of the District of Columbia, providing that prosecutions in said court shall be by information under oath, an information cannot be amended, at the trial, in any matter material to the charge. Hence, an information for keeping a tippling-house at "No. 1801, Q. Street," cannot be so amended, at the trial, as to strike out the number of the house and the street as surplusage, since it must be proved as laid in the information. Such an amendment is not authorized by the act of June 25, 1873, which provides that technical and clerical errors may be amended in the police court at the time of the trial. *District of Columbia v. Herlihy*,* 1 MacArth., 436.

§ 2853. At common law, criminal proceedings are amendable in matters of form at all times, and in matters of substance, also, while they are in paper. As to amendments, at common law, there is no difference between civil and criminal proceedings. *Anonymous*, 1 Gall., 22.

§ 2854. *Interpreters*.—A sworn interpreter in a criminal trial may take the suggestions of others sitting by who are not sworn, as to the correctness of his interpretations. *United States v. Gibert*,* 2 Sumn., 37.

§ 2855. *Changing order of accused at the bar*.—It cannot be assigned as error that the court refused to have the order in which the prisoners were placed at the bar changed before the introduction of each of the witnesses for the government, who were excluded from the court room, after the first of these witnesses had been examined and had retired, there being no proof that communications were had between the witnesses as to the order of the prisoners. *Ibid*.

§ 2856. *Overruling demurrer*.—Where the court has overruled a demurrer to an indictment for a misdemeanor, and a judgment upon the demurrer must be a judgment of condemnation instead of *respondet ouster*, the court may permit the defendant to withdraw his demurrer and plead the general issue. Under the circumstances of this case the court granted the leave upon the condition that the defendant should waive his right of moving in arrest of judgment for any matters apparent upon the indictment. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 2857. *Security for fine and costs*.—After verdict in an assault and battery case the defendant in custody will be allowed to give security for fine and costs. *United States v. Greenwood*,* 1 Cr. C. C., 183.

§ 2858. *Prisoner acquitted and held for another offense*.—When, on a trial for larceny, in which the defendant was acquitted, it appeared that the accused was liable to be indicted for receiving stolen goods, the court ordered an indictment to be sent to the grand jury, and remanded the prisoner. *United States v. Madden*,* 1 Cr. C. C., 45.

§ 2859. *Indictment insufficient; accused held over*.—In this case the court held the indictment for murder insufficient; but the district attorney offered the evidence of one witness that the accused was guilty of the crime of murder, and the court remanded him to the custody of the marshal until discharged according to law. *United States v. Town-maker*,* Hemp., 299.

§ 2860. Where the defendant was acquitted of forgery upon a flaw in the indictment, the court remanded him to be tried at the next term upon a new indictment. *United States v. Smith*, 2 Cr. C. C., 111.

§ 2861. *Presentment equivalent to an acquittal*.—Under a practice, based upon a local statute, which requires that all indictments shall be preceded by presentments, and imposing upon the grand jury the duty of making a full investigation before presenting, a presentment

by the grand jury is equivalent to an indictment; and under such a practice a presentment which presents "W. E. for causing the death of W. K. by shooting him with a pistol in self-defense when he was attacked by and was retreating from the said K.," is equivalent to an acquittal and entitles the defendant to his discharge. *United States v. Elliott*,* 8 West. L. J., 183.

§ 2862. **Questions of defense and of jurisdiction.**—Former conviction and the statute of limitations are matters of defense to a criminal charge, and are questions for the determination of the tribunal having jurisdiction to try the charge, and not questions upon which the jurisdiction of the court to hear and determine the case depends, and they cannot, therefore, be inquired into on a petition for *habeas corpus*. *In re Bogart*, 2 Saw., 409.

§ 2863. **Indictment in another district.**—An indictment, found in another district, and proof that a warrant has been issued thereon, is sufficient to authorize a court or commissioner of another district to hold the person so named in custody, unless the indictment is so defective that no court would have acted upon it if it had been presented to it by a grand jury. *In re Clark*, 2 Ben., 541.

§ 2864. **Discharge of jury.**—Where a witness material to the prosecution, who is not a Quaker, and therefore not entitled to affirm, refuses to take the oath on conscientious grounds, and is committed for contempt, the court may, during the trial, discharge the jury, and suspend the cause until a future day, when perhaps the witness will be willing to be sworn. *United States v. Coolidge*,* 2 Gall., 363.

§ 2865. **Proof of perjury in same court.**—Upon the trial of an indictment for perjury, for false swearing in the same court in which the indictment is tried, it is not necessary to produce a copy of the record in proof of the crime, since the court is presumed to know its own record. *United States v. Erskine*, 4 Cr. C. C., 299.

§ 2866. **Capias as first process.**—Upon an indictment for unlawful gaming, a *capias* may be issued as the first process. *United States v. Cotton*, 1 Cr. C. C., 55.

§ 2867. **Promise of immunity.**—The fact that persons convicted of a crime were promised immunity from prosecution by the government does not, in the absence of the consent of the district attorney, present a cause for delaying judgment upon the verdict of guilty. The court can know nothing of the pledges of the executive part of the government, and can only communicate with it through the district attorney. *United States v. Blaisdell*,* 3 Ben., 132.

§ 2868. **Regularity of warrant.**—By submitting himself to the jurisdiction of the court, without objection to the warrant, under an information for misdemeanor, the accused precludes himself from interposing any objection to the regularity or validity of the warrant. *Chase v. The People*,* 2 Colo. T'y., 509.

§ 2869. **Trial by two judges, sentence by one.**—Where a trial and conviction in a capital case was had before both judges holding the circuit court, it is competent for the same court, held by one judge only, to pass sentence on the prisoner. *United States v. Gordon*, 5 Blatch., 18.

§ 2870. **Variance.**—Where the indictment for passing a counterfeit bank order or check alleged the order to be signed by *Jna. Hulse*, and the order offered in evidence appeared to be *Jno. Hulse*; and the place was called *Fayetville* in the indictment, and in the order it was *Fayetville*, the court left it to the jury to decide whether the name and place in the order were the same as the name and place in the indictment, it appearing in evidence that there was a branch of the Bank of the United States at Fayetteville, North Carolina, of which John Hulse was president. *United States v. Hinman*,* 1 Bald., 293.

§ 2871. **Forfeiture of ferry license.**—The question of an alleged forfeiture of a ferry franchise cannot be inquired into in a criminal prosecution for maintaining the ferry without a license. *The Territory v. Reyburn*,* McCahon, 139.

§ 2872. **All averments must be proved.**—Every material averment in an indictment must be proved by the prosecution, though negative in form, and they are not to be taken as true. *Ibid.*

§ 2873. **Statute uncertain.**—The court will not recommend to the jury to find the defendant guilty, however strong the evidence may be, where the statute creating the offense does not sufficiently define it, either explicitly or by reference to some other standard, to warrant the court in passing sentence in case of conviction. *United States v. Sharp*,* Pet. C. C., 118.

§ 2874. **Authority of district attorney.**—The prosecution of offenders is, by the act of congress of 1789, made the special duty of the district attorney. His control over and direction of cases thus committed to his charge is exclusive, until they come under the control of the court. After the case has become subject to judicial control, the district attorney acts with the express assent or tacit acquiescence of the court. *United States v. Corrie*,* 23 Law Rep., 145.

§ 2875. **Where an indictment is before a court and the district attorney moves for trial, it is immaterial that the defendant objects to the jurisdiction of the court on the ground that**

the president, through the attorney-general, has directed that he should not be prosecuted. The district attorney is the representative of the attorney-general, and his act in moving for trial is the act of the attorney-general, and is conclusive of his will in the premises. *United States v. Lawrence*, 13 Blatch., 295 (§§ 3468-74).

§ 2876. *Sending accused to another tribunal.*—A court having before it a criminal, accused of a capital offense, and whose case the grand jury are waiting to consider, will not, on application, send him to another tribunal for trial for a minor offense. *United States v. Corrie*,* 23 Law Rep., 145.

§ 2877. *Accused delivered to state officers.*—Where a person charged with the crime of murder by indictment in the circuit court of the United States was released on *habeas corpus*, because the place of the commission of the crime was within the limits of a state, and over which the United States had not exclusive jurisdiction, the court ordered the marshal to deliver him into the hands of any state officer in readiness to receive him. *Ex parte Sloan*,* 4 Saw., 380.

§ 2878. *Polling the jury.*—Although it is the practice of the court not to allow the defendant, as of right, to poll the jury when he has agreed that a verdict may be signed and sealed by the jurors and delivered in court, yet where the agreement is that the jury shall meet the court when it should again convene, the defendant is entitled to have the jury present in court when the verdict is opened and read, and if the jury are not in court when the sealed verdict is opened, the judgment will be reversed, it appearing by the defendant's motion to poll the jury that he did not waive his right. *Doyle v. United States*,* 10 Fed. R., 269.

§ 2879. *Party entitled to a discharge.*—The defendant was held by a commissioner to await the action of the grand jury, and committed on refusal to recognize. Upon a *habeas corpus* from the circuit court, that court made an order "that the defendant may depart without giving any recognizance, subject to the issuing of a new warrant, if ordered by this court." After this order, the grand jury met and adjourned without indicting the defendant. No information having been filed against him, and not being in custody, actual or constructive, he asked the court to pass upon the question whether he ought originally to have been committed or held to await the action of the grand jury. The court refused to pass upon the question, but held that the defendant was entitled to his discharge, and might have an order to that effect entered if he desired. *In re Esselborn*,* 8 Fed. R., 904.

§ 2880. If a person is arrested in the "Indian country" by the military authorities, under section 23 of the intercourse act, for a violation of sections 20 and 21 of the said act, and is detained more than five days before any attempt is made to remove him to be tried by the civil authorities, his detention thereafter becomes unlawful, and he is entitled to be discharged. *In re Carr*,* 3 Saw., 316.

§ 2881. *Affidavit before an army officer.*—The court committed a person upon a charge of introducing spirituous liquors into the "Indian country," contrary to section 20 of the intercourse act, upon an affidavit taken before a lieutenant of the army, it appearing to have been taken in pursuance of paragraph 1031 of the army regulations of 1831. *Ibid*.

§ 2882. *Review of decision of district court.*—Under the act of March 3, 1879, providing that the circuit court "shall have jurisdiction of writs of error," in certain specified criminal cases tried before the district court; that "in such case, a respondent, feeling himself aggrieved by a decision of a district court, may except to the opinion of the court and tender his bill of exceptions, which shall be settled and allowed according to the truth, and signed by the judge, and it shall be part of the record in the case;" that the respondent "may petition for a writ of error from the judgment of the district court, . . . which petition shall be presented to the circuit judge, . . . who, on consideration of the importance and difficulty of the questions presented in the record, may allow such writ of error," the only decisions of the district court which can be reviewed are those excepted to in that court. *Brand v. United States*,* 18 Blatch., 384.

§ 2883. *Keeping witnesses out of court.*—The court will, on motion, order the marshal to keep witnesses out of court during the examination of others, but will not order them to be kept separate from each other during such examination. *United States v. White*,* 5 Cr. C. C., 38.

§ 2884. *Compelling production of articles.*—Upon the trial of an indictment for prescribing medicine without a license or diploma, the court will not compel a witness, for whom the physician had prescribed, to produce the medicine or bottles which contained it, since the question as to the contents of the medicine is immaterial. *United States v. Williams*,* 5 Cr. C. C., 62.

§ 2885. *Prosecutor.*—There is no power conferred by statute or usage, upon the courts of the United States, to recognize a criminal suit as before them in the name of the United States, unless it is instituted and prosecuted by a district attorney legally appointed and com-

missioned conformably to the statute. *United States v. McAvoy*, 4 Blatch., 413. No private prosecutor is recognized, the United States attorney being the only prosecutor. *United States v. Stone*, 8 Fed. R., 232 (§§ 797-803).

§ 2886. **Liability for costs — No prosecutor.**— Where a statute provides for a prosecutor in certain cases of *trespass*, the word *trespass* does not extend to a case of horse-stealing. And as no prosecutor is required in such a case, the complaining witness is not liable for costs. *United States v. Flanakin*,* *Hemp*, 30.

§ 2887. A prosecutor liable for costs cannot withdraw a prosecution without the consent of the attorney for the United States. *Virginia v. Dulany*,* 1 Cr. C. C., 82.

§ 2888. **A matter of defense.**— In the trial of an indictment for practicing surgery without a license from a certain board appointed by a medical society authorized by statute to appoint such board, the court refused to permit the defendant to file an information in the nature of a *quo warranto* to try the question of the dissolution of the medical society, to be heard as a part of the case, but decided that it was competent for the defendant to show on the trial that the charter was vacated. *United States v. Williams*,* 5 Cr. C. C., 62.

§ 2889. **Continuance after trial commenced.**— When a jurymen is sworn in a case the trial is commenced, and when time for the beginning of a new term is reached and the jury is only partially completed, the trial may be continued into the next term, under section 746, Revised Statutes. *United States v. Loughery*,* 13 Blatch., 267.

§ 2890. **Publication of indictment.**— The handing of an indictment to the clerk by the foreman of the grand jury, and the entry of it on the record, is a sufficient publication. *United States v. Butler*,* 1 Hughes, 457.

§ 2891. **Keeping jury together.**— In capital cases the jury cannot be permitted to leave the presence of the court, even on an adjournment over night, except in charge of a sworn officer, and they must be kept together. The attorney for the prisoner cannot by consent relax this rule. Separation of the jury is error which vitiates the verdict. *People v. Shafer*,* 1 Utah T'y, 260.

§ 2892. **Objection too late.**— It is too late, after verdict of guilty on an indictment for bigamy, to object that the description of the woman named in the indictment as the person with whom the crime of bigamy was committed was not sufficiently specific. *Miles v. United States*,* 13 Otto, 304.

§ 2893. The objection that one of the jurors was asleep during a part of the trial cannot be taken after verdict. *United States v. Boyden*, 1 Low., 270 (§§ 2294-95).

§ 2894. **Appellate court may modify judgment.**— Where a defendant is legally and regularly convicted of a misdemeanor, and everything is right but the sentence, which is in excess and illegal, the supreme court of the territory has power to affirm the conviction, modify the judgment, and remit the case to the court below that the proper judgment may be there imposed. *Territory v. Conrad*, 1 Dak. T'y, 363.

§ 2895. **On affirmance of judgment.**— Where the circuit court affirms the rulings made at the trial of a criminal case in the district court, upon a writ of error to that court, it is not bound to affirm the sentence pronounced, but may pronounce final sentence and award execution in conformity with its own opinion as to the degree of punishment which ought to be imposed on the convict. *Bates v. United States*, 10 Fed. R., 92 (§§ 1010-14).

§ 2896. **Proof of contract.**— Where an indictment states a contract, which is not impertinent or foreign to the cause, it must be proved; and where the contract appears to be in writing, it must be produced or accounted for. *United States v. Porter*,* 3 Day (Conn.), 233.

§ 2897. The mode of prosecution prescribed by the statute creating the offense must be followed. *United States v. Taylor*,* 4 Cr. C. C., 731. See § 2676.

§ 2898. In the absence of statutory regulations, the federal courts are governed by the common law procedure in the administration of criminal law. *United States v. Nye*,* 4 Fed. R., 888; *United States v. Hammond*, 2 Woods, 197 (§§ 1832-41).

§ 2899. State laws do not control in criminal proceedings in the United States courts, either in the mode or form of charging the offense, in the rules of evidence or in the manner of conducting the trial. On the contrary, the proceedings throughout are according to the course of the common law, except so far as has been otherwise provided by the laws of congress or by constitutional provision. *United States v. Shepard*, 1 Abb., 431 (§§ 3195-99).

§ 2900. **Evidence — Notice.**— Upon indictment of an attorney for barratry, no evidence of specific acts can be given without notice; and notice given after the case has been on trial for a day is not reasonable notice. *United States v. Porter*,* 2 Cr. C. C., 60.

§ 2901. **Jury brought back to examine witness.**— Where a jury, after retiring, wished to come again into court and examine a witness, they were allowed to do so, but neither party was permitted to ask any questions or to make any motion to the court in the presence of the jury. *Virginia v. Zimmerman*,* 1 Cr. C. C., 47; *United States v. Greenwood*,* 1 Cr. C. C., 186.

§ 2902. *Limitations.*—Upon an indictment for burning the treasury buildings in the District of Columbia, the court refused to instruct the jury that the defendant was entitled to the benefit of the limitation of the statute, unless he fled from the United States, or concealed himself to avoid process; but instructed the jury that if the departure of the defendant from the District on the date of the burning, or at any time within two years thereafter, was for the purpose of avoiding punishment for the offense charged or for any other offense, this was fleeing from justice, and the statute of limitations was no bar, unless the prisoner afterwards returned to the county of Washington, and his return was so open and public, and under such circumstances, that opportunity was afforded to have arrested him by the use of ordinary means; and two years or more had elapsed from that date to the date of finding the indictment. (Two members of the court were not satisfied with this instruction, but gave it because it was not objected to by the prisoner's counsel.) *United States v. White*,* 5 Cr. C. C., 88.

§ 2903. The court will not quash an indictment, before any evidence is heard, on the ground that the statute of limitations has barred the action; because, until the facts shall appear upon the trial, it cannot appear that the defendant was not a person fleeing from justice, and therefore not entitled to the benefit of the limitation of time; and if he is entitled to its benefit he may have it upon plea, or upon evidence under the general issue. *Ibid.*

§ 2904. Where the defendant pleaded the general issue, and the jury found a general verdict against him, the court refused to arrest the judgment on the ground that it appeared on the record that the indictment was not found within two years after the commission of the offense (this being the statutory limitation), although the court was of opinion that such would have been ground of demurrer. *United States v. White*,* 5 Cr. C. C., 73.

§ 2905. On the trial of an indictment for burning the treasury buildings at Washington, D. C., the jury were instructed that if no indictment was found against the defendant within two years from the time the offense was committed, the statute of limitations was a bar; unless the defendant left the District, or any other place within the United States, for the purpose, or with a view, to avoid detection or punishment for the offense charged, or any other offense, or unless he concealed himself in any other way, for said purpose, or to prevent detection at any time within the said two years. The court were also of opinion that it was not necessary, in order to the defendant's having the benefit of the limitation, that the United States should have known that he was the person who burnt the treasury building. (HURSTON, J., dissented.) *Ibid.*

§ 2906. The statute of limitations cannot be taken advantage of by demurrer to the indictment, where the statute creating and defining the crime contains no proviso or exception, and the statute of limitations contains a proviso that nothing therein contained shall extend to any person fleeing from justice. *United States v. Cook*, 17 Wall., 168 (§§ 2054-58).

§ 2907. Where a paymaster in the army is indicted, under the act of August 6, 1846, for embezzling public moneys, the only limitation to the punishment of the offense is contained in the thirty-second section of the act of April 30, 1790. The third section of the act of 1801, relating to crimes arising under the revenue laws, is not a statute of limitation applicable to the offense. *Ibid.*

§ 2908. *Imprisonment for fine and costs.*—Where a person is convicted of a crime which is punished by a fine, a federal court may imprison the defendant until the costs are paid. *United States v. Robbins*,* 15 Int. Rev. Rec., 155.

§ 2909. Where a party is convicted of an offense and sentenced to pay a fine, the court may, in its discretion, order the defendant to be imprisoned until the fine is paid. *Ex parte Jackson*, 6 Otto, 737.

§ 2910. *Argument of counsel.*—Though as a rule, in capital cases, the junior counsel has a right to argue at length the law and the facts to the jury, and but one counsel is allowed to close, yet where no witnesses are produced by the defense except government witnesses which the state declined to examine, two counsel will be allowed to close on the law and the facts. *United States v. Mingo*,* 2 Curt., 1.

§ 2911. The attorney for the United States has always the right, in criminal prosecutions, to close the argument before the jury, upon the general issue. *United States v. Bates*, 2 Cr. C. C., 405.

§ 2912. Upon the trial of an indictment for libel, the counsel for the government may, after the evidence is closed, in his argument to the jury, read parts of the pamphlets containing the libelous matter, which pamphlets have been offered in evidence, whether the parts the counsel desires to read have already been read in evidence or not. *United States v. Crandall*,* 4 Cr. C. C., 683.

§ 2913. Counsel will not be permitted to argue to the jury a point of law in opposition to an instruction by the court; the right of the jury to decide the law is only the right to find a

general verdict. *United States v. Stockwell*, *4 Cr. C. C., 671; *Virginia v. Zimmerman*, *1 Cr. C. C., 47; *United States v. Cottom*, *1 Cr. C. C., 55.

§ 2914. *Bill of exceptions.*—Where it appears on the face of a bill of exceptions that it does not set forth all the evidence, such a bill cannot raise any point as to the propriety of the refusal of the court to instruct the jury that there was no evidence on which the defendant could be convicted, such refusal being excepted to at the time. Nor can the ruling of the court as to the sufficiency of the evidence on any point be drawn in question by a bill of exceptions which does not set forth all the evidence on that point, although such ruling was excepted to. *Brand v. United States*, *18 Blatch., 384.

§ 2915. The circuit court of the United States has no authority to allow a bill of exceptions in a capital case. *United States v. Gibert*, *2 Sumn., 37.

§ 2916. A bill of exceptions should not be allowed, when it was not made or tendered at the trial, nor until after a motion for a new trial and in arrest of judgment had been argued and the opinion rendered thereon, and where the verdict was satisfactory and the court feel no doubt about the law. *Ibid.*

§ 2917. *In District of Columbia.*—According to the practice in the circuit court of the District of Columbia, a cause once tried cannot be tried again at the same term, except by consent; but this does not apply to a case where the jury are discharged on failure to agree. *United States v. White*, *5 Cr. C. C., 38.

§ 2918. In order that business depending at the close of a special session may be removed to the next stated term, under the act of congress of March 2, 1793, declaring "that all business depending for trial at any special court shall, at the close thereof, be considered as of course removed to the next stated term of the circuit court," it must appear that the special session had jurisdiction of the cause, and that the session was lawfully holden. *United States v. Williams*, *4 Cr. C. C., 372.

§ 2919. The judiciary act of 1789, having declared "that the circuit courts shall have power to hold special sessions for the trial of criminal causes at any . . . time at their discretion," and the act of February 27, 1801, having declared that the circuit court of the District of Columbia should have all the powers vested by law in the circuit courts of the United States, the circuit court of the District of Columbia has power to hold special sessions for the trial of criminal cases. It has power to hold such special sessions for the trial of offenses against what are supposed to be the municipal laws of the District of Columbia, and is not limited in this respect to offenses against those laws of the United States which operate equally throughout the United States. At such a special session, the court is not limited to the trial of those causes only which existed at the time of the order for holding it. *Ibid.*

§ 2920. *Sending indictment to jury room.*—Although it is the practice to send the indictment with the jury when they retire to the jury room to deliberate, yet the judgment will not be arrested because this is inadvertently omitted, where there is no pretense that the defendant was injured by the omission. *United States v. Angell*, 11 Fed. R., 34 (§§ 733-737).

§ 2921. *On motion to quash.*—It is competent for the court to dispose of a motion, to quash an indictment founded on an agreed statement of facts, at the solicitation of the counsel for all the parties, without putting the accused to plead the matters alleged. *United States v. Tallman*, 10 Blatch., 21 (§§ 1845-48).

§ 2922. *Comparison of handwritings.*—Upon the trial of an indictment under section 5490, Revised Statutes, for abusing the mails, it is not error to refuse to permit the jury to inspect a copy of the letter proved to have been mailed, which copy was made by the accused in the presence of the jury. *United States v. Jones*, 10 Fed. R., 469 (§§ 991-993).

§ 2923. The statute of the state of New York, permitting a comparison of writings for the purpose of determining handwriting, has no effect upon criminal proceedings in the courts of the United States. *Ibid.*

§ 2924. *Two indictments pending against accused.*—Where, upon a conviction for assault and battery with intent to kill, a motion in arrest of judgment was made because there was pending at the same time another indictment, charging it as a simple assault and battery at common law, both indictments being found at the same time, and tried at the same time, by the same jury, who found the defendant guilty upon both, at the same time, the court refused the motion, these facts not appearing in the record of the case in which the defendant was found guilty of a battery with intent to kill. These facts will not constitute a ground for a new trial where the attorney for the United States has entered a *nolle prosequi* upon the common law indictment for simple assault and battery, so that no judgment can be entered upon the verdict in that case. *United States v. Herbert*, *5 Cr. C. C., 87.

§ 2925. *Acquittal of one joint defendant.*—Where an indictment founded on section 5470, Revised Statutes, charges two defendants with receiving and concealing, and aiding in con-

cealing, a certain article, knowing the same to have been stolen from the mail, and one of the defendants has been discharged from the indictment upon a plea of *autrefois convict*, the other may be tried upon it alone, and may be found guilty of the crime therein charged separately. *United States v. Montgomery*, 3 Saw., 544 (§§ 1109-17).

§ 2926. *Case reopened.*—In a prosecution for sending circulars relating to a lottery through the mail, the district attorney announced the testimony for the prosecution closed, and the defendant moved for an acquittal on the ground that no evidence had been introduced tending to show the existence of a lottery concerning which the papers in question were made. The district attorney then asked time to supply this proof, which was granted. *Held*, that it was within the discretion of the presiding judge to permit the case to be thus reopened. *United States v. Noelke*, 17 Blatch., 354; 1 Fed. R., 428 (§§ 975-937).

§ 2927. *Change of venue.*—The court refused to change the venue, upon the affidavit of the defendant that a fair and impartial trial could not be had in the county, where the defendant had, about a week before, offered himself as ready and pressed for trial, and the case of another party who was charged with same offense (with whom the defendant refused to be tried) stood first on the docket and had occupied all the intermediate time. *United States v. White*,* 5 Cr. C. C., 73.

§ 2928. Under a statute in Wyoming Territory declaring that if affidavit shall be made alleging the prejudice of the judge, a change of district shall be allowed; provided that if the objection be to the judge only, the court may, for the convenience of the parties, request the judge of another district to try the cause, in the county where pending, it is error for the court to refuse the application when properly made. *Hamilton v. Territory of Wyoming*,* 1 Wyom. T'y, 131.

§ 2929. *Continuance.*—The court refused in this case to postpone the trial until such time as the court could be held by the two judges, on the ground that difficult and important questions of law might arise, on which there might be a division of opinion between the judges, which the defendant could have certified to the supreme court under section 6 of the act of April 29, 1801. *United States v. Fullerton*,* 6 Blatch., 275.

§ 2930. A motion for a continuance, upon the affidavit of the defendant that he did not know that a certain person would be a witness in the case, and that certain absent witnesses could testify to his whereabouts at the date of the act charged, was refused by the court, these witnesses having been known to the defendant at the time of his arrest; and as he had already summoned witnesses to prove an *alibi*, the others could only corroborate. *United States v. White*,* 5 Cr. C. C., 73.

§ 2931. Although an accused may have compulsory process for witnesses in his favor before indictment found, yet, for the purpose of enabling him to put off the trial for the absence of material witnesses, the omission of taking out such process, before an indictment found, cannot be considered as negligence or want of due diligence, so as to deprive him of all the benefit of his affidavit proving their absence. The court, in allowing the motion in such a case, may do so upon condition of terms imposed on the defendant. *United States v. Moore*,* Wall. C. C., 23.

§ 2932. Where a witness was summoned and failed to attend, the court refused a continuance unless the prosecutor would make affidavit that he could not safely proceed without the witness. *United States v. Frink*,* 4 Day (Conn.), 471.

§ 2933. In a trial for stealing a horse, the court refused a continuance on the ground of the absence of a witness who would swear that he heard another man confess that he stole such a horse from the person whose horse was alleged to have been stolen. *United States v. Toms*, 1 Cr. C. C., 607.

§ 2934. The defendant was bound over by a state magistrate, and a bill of indictment was found for misdemeanor in the circuit court of the United States. The defendant moved for a continuance on the ground that his material witness was absent in another state before he was bound over, and was still absent. The question being whether the defendant had not been negligent in not obtaining compulsory process for the witness from the magistrate who took the recognizance, the continuance was granted on the ground that the state magistrate could not issue process for the defendant's witness in another state. *United States v. Little*, 2 Wash., 159.

§ 2935. Upon an information for keeping a room to be used or occupied for gambling, an affidavit in support of a motion to continue the cause, in which the affiant states that he expects to prove by an absent witness that he did not occupy the room charged to be kept for gambling purposes, and that he did not permit it to be used for gambling, is insufficient. Applications of this character should specify the precise matters which the applicant expects to establish by the witness, so that the court may judge of the materiality of the proposed evidence. *Chase v. The People*,* 2 Colo. T'y, 509.

§ 2936. The court may vacate an order granting a continuance in a criminal case, on the same day on which it is granted, and while the defendant is still in court. *Ibid.*

§ 2937. Commitment.—A warrant of commitment must be under seal, supported by oath, and must limit the time of imprisonment. *Ex parte* Sprout, 1 Cr. C. C., 424. See §§ 2377-79.

§ 2938. A warrant of commitment, which is not under seal, and which does not charge an offense under oath, is void. *Ex parte* Bennett, 2 Cr. C. C., 612.

§ 2939. A warrant of commitment, by justices of the peace in the District of Columbia, until the prisoner should find sufficient sureties to be bound with himself in a recognizance for his good behavior, or be otherwise discharged by due course of law, and which did not state some good cause certain, supported by oath, was held for that reason to be illegal. *Ex parte* Burford, 3 Cr., 443.

§ 2940. No person can be detained upon a commitment which does not show sufficient cause upon its face. *Ex parte* Williams, 4 Cr. C. C., 343.

§ 2941. A commitment for desertion by a justice of the peace, under the seventh section of the act of July 20, 1790, for the government and regulation of seamen in the merchant's service, should purport to be in the name of the United States, and not in the name of the state in which the proceeding is had. But in such a case the court will presume that the magistrate meant to commit in the exercise of a lawful jurisdiction, where it is apparent from the whole proceeding that the magistrate did commit the person under color and authority of the United States. *Ex parte* D'Oliveira, 1 Gall., 474.

XXVIII. NEW TRIAL AND ARREST OF JUDGMENT.

§ 2942. In general.—The federal courts may, on cause shown, grant a new trial in any criminal case. *United States v. Conner*,* 3 McL., 573.

§ 2943. The federal courts may grant new trials in capital cases on the request of the accused, though new trials were unknown at the ancient common law. *United States v. Williams*, 1 Cliff., 17.

§ 2944. New trials are granted for something wrong at the former trial, as the admission of incompetent evidence, the misbehavior of the jury, or wrong rulings or instructions of the judge; also, for other reasons, as the discovery of new and important testimony. They are within the discretion of the court, and are to be granted only in furtherance of justice. *United States v. Moore*,* 11 Fed. R., 243.

§ 2945. A verdict of guilty, in a criminal case, ought not to be set aside when it is warranted by any fair construction of the testimony, although the court, upon the same evidence, would come to a different conclusion. *United States v. Randall*,* Deady, 524.

§ 2946. The court has power to grant a new trial on the application of the prisoner. *United States v. Macomb*,* 5 McL., 236.

§ 2947. The opinion of the court upon a motion for a new trial in a criminal case is a matter of discretion and not error. *Ralph v. United States*,* 9 Fed. R., 693.

§ 2948. The court cannot grant a new trial because it differs from the jury as to the weight of the evidence. It cannot grant a new trial except in a clear case of wrong, and where manifest injustice will be done by sustaining the verdict. *United States v. Potter*,* 6 McL., 186.

§ 2949. The defendant, before sentence can be pronounced upon him, has a right to the judicial determination of his guilt by the court as well as by the jury. If the verdict does not satisfy the conscience of the judge, the prisoner is entitled to a new trial; and he is entitled to this judicial revision from the judge who sat upon the trial. Where both the judges composing the court die pending a motion for a new trial, and the court thereby becomes vacant, the newly commissioned judges will not award sentence on the verdict while the defendant insists on a new trial. *United States v. Harding*,* 1 Wall. Jr., 127.

§ 2950. Twice in jeopardy.—The courts of the United States have power to grant new trials in capital cases as well as in those which are not capital. The constitutional provision, that the accused shall not be subject to be twice put in jeopardy of life or limb for the same offense, does not prohibit this power. *United States v. Keen*,* 1 McL., 429. *Contra*, *United States v. Gibert*,* 2 Sumn., 37.

§ 2951. New evidence.—On a motion to set aside a verdict and for a new trial in a criminal case, the court will consider evidence not offered in the case, but which is known to the court to exist. *United States v. Randall*,* Deady, 524.

§ 2952. A court will not delay judgment in a criminal case merely to give the defendant time to discover, or to try to discover, new evidence on which to ask a new trial. *Ibid.*

§ 2953. A new trial will not be granted for newly-discovered evidence, in a case of assault and battery with intent to kill, where the affidavit states that the defendant expects to prove by that evidence that the person assaulted had a dirk or knife about his person at the time of the assault. *United States v. Herbert*,* 5 Cr. C. C., 87.

§ 2954. To justify the court in granting a new trial, on account of evidence discovered since the trial, it should be most manifest that injustice has been done to the prisoner, or that the new evidence would materially vary the complexion of the cause. *United States v. Cornell*, 2 Mason, 91.

§ 2955. When a motion for a new trial grounded on newly discovered evidence is considered, the court must judge, not only of the competency but of the effect of the new evidence. If with the newly discovered evidence before them, the jury ought not to come to the same conclusion, then a new trial may be granted, otherwise they are bound to refuse the application. *Leschi v. Washington Territory*,* 1 Wash. T'y, 13.

§ 2956. A new trial should not be granted for new evidence, where such evidence consists in the testimony of persons charged as joint offenders and acquitted, when they were incompetent witnesses at the trial. *United States v. Gibert*,* 2 Sumn., 37.

§ 2957. In a capital case the court ought not to grant a new trial for newly discovered evidence unless the fullest credit is given to the new evidence, and the court is of opinion that it outweighs in strength and clearness and force the evidence on the other side. *Ibid.*

§ 2958. To be entitled to a new trial on the ground of newly discovered evidence, the party must satisfy the court that the evidence has come to his knowledge since the trial—that he has discovered it. It matters not that the defendant knew the facts before the trial but did not communicate them to his counsel. It must also be satisfactorily shown that the newly discovered evidence is so material that it would probably produce a different verdict if a new trial were granted. *United States v. Smith*,* 1 Saw., 277.

§ 2959. Evidence insufficient—Objections.—A motion for a new trial on the ground that the evidence offered did not sustain a particular portion of the charge of the indictment will not be granted when it does not appear that the objection was definitely enough made on the trial to attract notice. *United States v. Jenther*,* 13 Blatch., 335.

§ 2960. A point regarding a defect in the evidence, not made at the trial, is not available as a ground for a new trial. Neither is it ground for arresting the judgment. *United States v. Byrne*,* 19 Blatch., 259.

§ 2961. Where, upon the trial of an indictment for assault and battery with intent to kill, there was evidence of the intent to kill, sufficient to be left to the jury, a new trial will not be granted on the ground that there was no such evidence. *United States v. Herbert*,* 5 Cr. C. C., 87.

§ 2962. Motion too late.—After a conviction, and a motion in arrest of judgment which went to the supreme court on a certificate of division, and after a decision by that court, it was held to be too late for the defendant to move for a new trial. *United States v. Simmons*,* 14 Blatch., 473.

§ 2963. Erroneous rulings.—A new trial may be granted in a criminal case on application of the defendant, especially when his conviction has been caused by erroneous rulings of the court. *United States v. Macomb*,* 5 McL., 236.

§ 2964. An erroneous charge defining reasonable doubt, in a criminal case, is not ground for a new trial when the facts admit of no doubt whatever of the prisoner's guilt, and the jury could not have been misled by the instruction. *Mackey v. The People*,* 2 Colo. T'y, 13.

§ 2965. A new trial must be granted for the improper rejection of testimony, as well as its improper admission, without reference to the opinion of the court as to its probable effect on the verdict. And the court will grant a new trial, although satisfied that the defense, sought to be set up by the evidence rejected, is a simulated one. *United States v. De Quilfeldt*, 5 Fed. R., 276 (§§ 9-13).

§ 2966. Not granted when verdict right.—A motion for a new trial is addressed to the discretion of the court, and will never be granted when the court sees that the verdict is clearly and unmistakably right. *United States v. Hartwell*, 3 Cliff., 233.

§ 2967. A ruling in favor of the accused will not be considered on a motion for a new trial. *United States v. Williams*, 1 Cliff., 18.

§ 2968. On admission of evidence.—On an indictment for loaning public money it is no ground for a new trial of the defendants that evidence of the confession of the principal is admitted before proof that the defendants were his confederates. *United States v. Hartwell*, 3 Cliff., 238.

§ 2969. Bad counts.—A verdict in a criminal case will not be set aside, though some of the counts in the indictment are bad, if some of them are good. *United States v. Plumer*, 3 Cliff., 67.

§ 2970. **Refusal of separate trial.**— A new trial will not be granted because the prisoners, charged with a joint piracy on the high seas, were not allowed a separate trial on motion made for this purpose. The granting of such a motion is a matter of discretion, and should not be allowed merely to permit the prisoners to make use of the testimony of each other in their defense. *United States v. Gibert*,* 2 Sumn., 37.

§ 2971. **To secure evidence of one acquitted.**— Where two were jointly indicted for a robbery, and one was acquitted, but the other convicted, it was held that the one convicted might have a new trial on the ground that his comrade was by acquittal made a competent witness, and the new trial was granted without disturbing the verdict as to the one acquitted. *United States v. Campbell*, 4 Cr. C. C., 638.

§ 2972. **Division of opinion.**— Though a division of opinion cannot be certified on a motion for a new trial, yet where there is a difference of opinion on such a motion, such a direction will be given to the case as will enable the defendant to obtain a certificate of division under the statute. A new trial will be granted, and the cause will be again submitted to the jury in the presence of the two judges, and the question or questions will be regularly certified. *United States v. Fullerton*,* 6 Blatch., 275.

§ 2973. **Defective verdict.**— Where, in a case of misdemeanor, the jury have returned a verdict so imperfect that no judgment can be given upon it, and such verdict has been received and the jury discharged, the court may issue a *venire de novo*. *United States v. Watkins*,* 3 Cr. C. C., 441.

§ 2974. **Surprise.**— Courts interfere with verdicts on the ground of surprise in testimony, with great reluctance. If the surprise was owing to the least want of diligence, the applicant will be without excuse, and his motion denied. One moving for a new trial on account of surprise must show that the contrary would be proved on another trial. *United States v. Smith*,* 1 Saw., 277.

§ 2975. **Absence of presiding judge.**— Where, before the commencement of the trial, the defendant and his counsel were expressly told by the court that if they desired a continuance on account of the absence of the presiding judge, they could have it, and they answered that they desired the trial to proceed, it was held that the absence of the presiding judge could not afford a ground for a new trial. *United States v. Martin*,* 2 McL., 253.

§ 2976. **Jury allowed to read newspapers.**— It is no ground for a new trial in a criminal case that the jury, being kept together for many days, were allowed by the officer in charge of them to read the newspapers, from which the officer had previously removed everything relating to the case, and the jurors make affidavit that they saw nothing in the papers relative to the case. *United States v. Gibert*,* 2 Sumn., 37.

§ 2977. **Use of ardent spirits by jury.**— It is not ground for a new trial, that, during a long and tedious criminal trial certain of the jurors, on stating that they were unwell, were allowed, on the consent of the counsel on both sides, to use such ardent spirits as were necessary for their health, and there is no evidence that this indulgence was abused or operated injuriously to the defendant. *Ibid*.

§ 2978. **Affidavits of jurors.**— On motion for a new trial in a criminal case, the affidavits of the jurors ought not to be received to impeach their own verdict. (Per TANEY, C. J., HALYBURTON, J., dissenting.) *United States v. Reid*,* 3 Hughes, 537.

§ 2979. **Papers taken to jury room.**— Where the jury took out with them the indictment, containing three counts, two of which the court had upon demurrer adjudged insufficient, the court held that although the jury might have supposed they were trying an issue upon all the counts, and may have given their verdict because they thought one of the bad counts was supported, they would not grant a new trial, being satisfied that the evidence was sufficient to support the good count. *United States v. Royall*,* 3 Cr. C. C., 620.

§ 2980. **Misconduct of jury.**— As a general rule it is not necessary, in order to justify the court in setting aside a verdict for the misconduct of a juror, to show affirmatively that such conduct influenced the jury or affected the verdict. The misconduct of a juror, if it occurs without the knowledge or participation of the party litigant, taints the verdict; that is, if it was of such a character that it might have had an undue influence. *United States v. Salentine*,* 8 Biss., 404.

§ 2981. A new trial will not be granted for the misconduct of a jury which was participated in by the defendant. *Ibid*.

§ 2982. A motion for a new trial was refused which was based upon the ground that, after the case had been submitted to the jury and they had retired to their room, they were furnished, at their own request, by the officer in charge of them, with several directories of the city of New York, nothing having appeared to show that this irregularity operated in any way to the disadvantage of the prisoner, and this irregularity having been made known to the court before the verdict was brought in, and the court having recalled the jury and directed them to retire to their room and banish from their minds any information they may

have obtained from the books, and to wholly disregard such information in coming to whatever result they might reach. *United States v. Horn*,* 5 Blatch., 102.

§ 2983. Arrest of judgment.—Judgments are arrested for matters apparent on the record. *United States v. Moore*,* 11 Fed. R., 248.

§ 2984. A fact outside of the record cannot be alleged in arrest of judgment. *United States v. Hammond*,* 1 Cr. C. C., 15.

§ 2985. A motion in arrest of judgment must be determined upon the allegations of the indictment alone. *United States v. Chaffee*,* 4 Ben., 330.

§ 2986. Upon a motion in arrest of judgment for repugnancy in the allegations of the indictment, the court cannot go outside of the indictment to inquire which of the conflicting allegations contains the truth. *United States v. Dow*,* Taney, 34.

§ 2987. On a motion in arrest of judgment any objection to an indictment is fatal which would have been good upon demurrer. *United States v. Goggin*, 1 Fed. R., 49.

§ 2988. A motion in arrest of judgment cannot be maintained for an error in fact committed by the grand jury and existing in the indictment. The remedy of the defendant is on the trial by an objection on the ground of variance to testimony offered, or it may be specially pleaded on leave, at the time of filing the general issue. *United States v. Stetson*,* 3 Woodb. & M., 164.

§ 2989. A motion in arrest of judgment must rest on exceptions in law to what is alleged as a fact. *Ibid.*

§ 2990. The rules of the court requiring sentence to be deferred to the next term after conviction in order to give opportunity in the mean time for a motion for a new trial or in arrest, a prisoner sentenced at the next term after conviction cannot, at the term following that of the sentence, and in the absence of a motion for a new trial, or in arrest according to the rules, by a motion to vacate the judgment, urge an objection which, if valid and taken in the manner prescribed by the rules, would have arrested the judgment. By omitting to comply with the rules, he is deemed to have waived the right to raise any question proper to be raised in the manner required by the rules. *United States v. Malone*,* 9 Fed. R., 897.

§ 2991. At common law a motion in arrest of judgment and for a new trial could not be made at the same time, though it seems that they may be in Kentucky. *United States v. Marks*, 2 Abb., 532.

§ 2992. A division of opinion may be certified to the supreme court in a criminal case, under section 6 of the act of April 29, 1803, on a motion in arrest of judgment. *United States v. Fullerton*,* 6 Blatch., 275.

XXIX. FELONIES AND INFAMOUS CRIMES.

SUMMARY—*Federal courts not bound by state laws*, § 2993.—*Infamous crimes defined*, § 2994.—*Offenses against revenue laws*, § 2995.—*Proceeding by information*, § 2996.—*Common law mode of prosecution*, § 2997.—*Passing counterfeit coin*, § 2998.—*Omission of property from inventory of bankrupt*, § 2999.

§ 2993. The federal courts are not bound to follow state laws on the question whether a given crime is infamous or not. *United States v. Wynn*, §§ 3000-3005.

§ 2994. Infamous crimes, within the meaning of the fifth amendment to the constitution, are such as are by statute declared to be so, or declared to be felonies. This is to be determined from the express language of the statute, and not from the punishment inflicted; and if the offense is infamous it can only be prosecuted by an indictment, otherwise an information is proper. *Ibid.* See § 3016.

§ 2995. An offense against the revenue laws of the United States is not an "infamous crime" in the sense in which that term is used in the constitution. The words "infamous crime" have a fixed legal meaning, and are descriptive of an offense that subjects a person to infamous punishment or prevents his being a witness. The fact that an offense may be or must be punished by imprisonment in the penitentiary does not necessarily make it, in law, infamous. *United States v. Maxwell*, §§ 3006-3009.

§ 2996. In cases in which the crime is not capital or infamous the prosecution in the federal courts may, in the discretion of the court, be by information, founded on sworn testimony of a credible person. *Ibid.* See § 3016.

§ 2997. Although there are no common law offenses against the United States, yet where congress declares an act to be a crime, a person charged with the commission of the same may be prosecuted therefor according to the course of the common law, unless the constitution or congress has otherwise provided. *United States v. Block*, §§ 3012-15.

§ 2998. The passing of counterfeit coin, with intent to defraud, in violation of the statute of the United States, is not an infamous crime, within the meaning of the fifth amendment, declaring that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." The offense may, therefore, be proceeded against by information filed by the district attorney. This offense was not infamous by the law of England at the time of the adoption of the fifth amendment; nor is it infamous when tested by the common law rule that a common law crime involving a charge of falsehood, to be infamous, must be calculated to injuriously affect the public administration of justice. *United States v. Yates*, §§ 3010-11.

§ 2999. The crime, defined by subdivision 6 of section 5132, Revised Statutes, punishing with imprisonment, with or without hard labor, for not more than three years, the wilful and fraudulent omission of property from the inventory of the effects of a bankrupt, is not an infamous crime. Although it involves the charge of falsehood, yet this falsehood is not calculated to injuriously affect the public administration of justice. This offense may, therefore, be prosecuted by information filed by the district attorney upon leave of the court. *United States v. Block*, §§ 3012-15.

[NOTES.— See §§ 3016-3027.]

UNITED STATES *v.* WYNN.

(District Court for Missouri: 3 McCrary, 266-277; 9 Federal Reporter, 886-895. 1882.)

Opinion by TREAT, D. J.

STATEMENT OF FACTS.— An information was filed against the defendant under the second clause of section 5469, R. S., which section is as follows: "Any person who shall steal the mails or shall steal or take from or out of any mail or postoffice, etc., any letter or packet; any person who shall take the mail, or any letter or packet therefrom, or from any postoffice, etc., with or without the consent of the person having custody thereof, and open, embezzle or destroy any such mail, letter or package which shall contain any note, bond, etc.; . . . any person who shall by fraud or deception obtain from any person having custody thereof any such mail, letter, etc., although *not* employed in the postal service, shall be punishable by imprisonment at hard labor for not less than one year and not more than five years."

Under said information the defendant was tried before a jury and found guilty. The court assigned as counsel for the defendant, Messrs. Bakewell and Stewart, who have assiduously attended to the case, and presented to the court, in the light of authorities and argument, their views of the law which should govern United States courts in this class of vexed and undetermined cases. With equal diligence the counsel for the United States have prosecuted the controversy.

§ 3000. *Infamous crimes, within the meaning of the fifth amendment of the constitution, are such as are so declared or made felonies by act of congress.*

The first question is, what, under the fifth amendment of the United States constitution, is an infamous crime? and the second, whether the offense charged is within that provision. Within a few years past there has been much discussion of the main question, and several decisions by the United States courts, each of which encounters and endeavors to solve, at least to a limited extent, the many and important difficulties involved. They are too numerous for detailed analysis or review. Many of them fully consider what at common law were infamous crimes, and proceed on the theory that if a like offense exists under United States statutes, it must be considered "infamous" under the federal statutes. Hence, the elaborate review in such cases of the common law and British statutes existing at the date of the United States constitution, and original amendments thereto. Counsel in this case have in the most praise-

worthy manner presented the whole line of English decisions and authority on this subject, which, if conclusive or persuasive, would have an essential bearing on the question. At the date of the United States constitution there were no federal offenses except, impliedly, treason. The fifth amendment refers to "capital offenses and other infamous crimes." Were those offenses which at that time were capital or infamous at common law to be considered as within the purview of that amendment, if thereafter congress chose to specify offenses against the United States, and did not denounce capital or infamous punishment on conviction thereof? Of the many offenses at common law, and by British statutes, which were capital, very few were even made federal offenses or punishable capitally. Hence, in this particular, it must be conceded that there was not embraced in the purview of the constitution any offenses denominated "capital" except those which might thereafter be so declared by congressional enactment. If this be so, why should a different rule obtain as to the so-called "infamous crimes" designated in the same amendment? The rule governing the two should be the same.

If regard is had to the then existing common law and British statutes, as fully explained in the cases cited, it may be considered as settled that the treason, felony and *crimen falsi* were infamous. To every student of legal history it is well known that many offenses now considered trivial, comparatively, were in England denominated felonies, and once made capital, while many other and graver crimes were designated misdemeanors, and followed by milder punishments. As at the date of the constitutional amendments it remained for congress to name offenses and prescribe punishments therefor, is it to be held that every offense by it defined must take either its classification or punishment *ex necessitate* from the English system, or solely from congressional provisions? Originally a felony was an offense which was followed by forfeiture, yet a century ago the English courts repudiated that test, and so have the American courts since. It is said that it is not the grade of the punishment, but the nature and quality of the offense, which must determine its classification. If so, the rule is very uncertain. Many offenses comparatively trivial were felonies, and punishable at common law with death and forfeiture, which at the present time are not felonies or so punishable either in England or the United States. It must be observed that the constitutional amendment under review does not use the word "felony." True, at common law, all felonies were infamous, but as the constitution did not adopt the penal code of the common law, and as consequently there are no common law crimes against the United States, how does it happen that whatever was in common law a felony comes to be infamous when an offense of a like nature is declared to be an offense — but not a felony or infamous — against the United States, punishable only as the latter had enacted?

Although forfeitures ceased to be the consequence of most felonies before the adoption of the United States constitution, yet the designation "felony" remained. Still, are we to hold that all felonies under the United States constitution and statutes are to be held infamous, notwithstanding their position before the law had been essentially changed? Section 5326, Revised Statutes, declares that "no conviction or judgment shall work corruption of blood or any forfeiture of estate." Again, under the head of *crimen falsi*, offenses were infamous which were followed with disqualification as witnesses or jurors. Many offenses which, under the English system, involved such consequences do not do so now under many American codes, and especially under the federal

laws. So far as observation goes there are but two offenses expressly denounced by federal statutes as infamous within the meaning of the common law definition, yet there are disqualifications for offices in a few others. Shall all offenses, then, involving moral turpitude, be held technically infamous? What shall be the test, the punishment, or the quality of the act? Most modern jurists agree that the nature of the punishment is not the criterion, and yet many of them attempt to draw a sharp distinction at the walls of the penitentiary. If the nature of the punishment does not affect the question, why is it that they make imprisonment in the penitentiary infamous and not imprisonment in the common jail? All familiar with federal statutes and practice know that persons convicted can, in many instances, be sentenced to imprisonment, with or without hard labor, either in a jail or penitentiary.

It is very difficult to reconcile the cases, or to reach a definite conclusion therefrom. In this circuit it has lately been held that the punishment does not give character to the offense, although the later decisions are not in accord with what theretofore had been held otherwise. If the extent or place of punishment does not affect the question, how is it that the walls of the penitentiary can make a dividing line between infamous and non-infamous crimes? It must be confessed that the rulings of this circuit for more than twenty years on this subject were overthrown by the *Maxwell* and other cases, and properly so. Hence, the test is not where the criminal may be imprisoned, nor what at common law would have been the designation of the offense, but what the federal statute prescribes. It is very difficult to understand logically what rule should be observed, in the light of many decisions. Shall the courts pronounce that every felony is infamous, merely because the United States statute denominates a specific offense a felony, when no such offense was known to the common law, and consequently could not be infamous when the constitution was adopted? On the other hand, if congress prescribes an offense and does not denominate it a felony, and yet the very nature of the offense is one of moral turpitude, but the punishment not infamous, can the court say it is infamous, to be pursued only through indictments?

It will be seen that great embarrassments exist, which have perplexed the courts, arising not from the constitutional provision alone, but from United States statutes. Only two offenses have denominated expressly against them disqualifications which are within the technical definition infamous, unless all felonies are to be so considered, and certain offenses under the election laws pertaining to disqualifications for office. It may be very difficult to reconcile cases with right reason on this subject, and such an effort will be foreborne. Without criticising such cases, and analyzing them, it may be wiser to state generally the conclusions reached, and to give the elemental thoughts on which such conclusions rest. As at the date of the constitution there were no offenses under the federal law, with the possible exceptions named, is not the character of each offense thereafter prescribed to be determined solely by the statute? Within recognized rules a felony is infamous, and in the absence of such a designation the offense is not a felony. Hence, if an offense against the United States is defined, and the same is not denominated a felony, and no infamous punishment is denounced, how can a court decide that offense to be without the constitutional provision? Was it the purpose of the constitution to make all offenses that congress might thereafter prescribe, to take their quality, not from congressional legislation, but from the common law? If so, was not the power of congress restricted as to offenses not known to the common law? So

far as their penal consequences might extend,—that is, if congress enacted that certain defined acts should be an offense against the United States, and attached thereto consequences which were infamous,—were they not to be so, although there was no common law rule on the subject? In other words, could not congress declare what offenses it enacted infamous or non-infamous, as it may deem wise?

§ 3001. *Reference to common law for definition of terms.*

This suggestion leads up to the main inquiry, whether congress was inhibited from making any offense a felony or infamous which the common law or British statutes did not recognize as such. The mere statement of the proposition shows its absurdity, for none of the common law or statutory offenses (British) were United States offenses. Whatever congress might enact thereafter would take its character, quality and punishment solely from the congressional enactment. Although courts would look for the definition of terms used, if they were common law terms, to the common law, yet they could not enlarge the punishment beyond what the federal statutes prescribe. Similar offenses may have been capital under the British law. Yet congress may have denounced therefor imprisonment merely for a limited term, or merely a fine. How, then, is the offense to be designated,—according to the federal statutes, which must alone govern, or according to the common law, which is no part of the federal system? Without pursuing further this abstract line of thought, which leads to a *reductio ad absurdum*, it may be well to state succinctly the views of this court. At the adoption of the United States constitution, and the amendments thereto, inasmuch as no federal offenses had been defined, it was prescribed that whenever congress should declare certain acts an offense and attach thereto capital punishments or infamy, the alleged offender should not be brought to trial except after indictment.

§ 3002. *Interposition of a grand jury necessary, when.*

The nature, functions and protective duties of a grand jury have been often defined and enforced by this court. But the question under consideration is, When is the interposition of such a jury essential? It may be stated that the following rules should prevail: (1) In the absence of a federal statute there is no offense cognizable by United States courts. (2) When congress has declared an offense, it is what congress has designated it, and not what any other system of jurisprudence or foreign statutes may prescribe. (3) If the congressional statute prescribes infamy the offense is infamous. (4) If congress does, without express provisions as to infamy, make the offense a felony, the offense must be prosecuted as infamous and by indictment. Under this head it must be observed that common law felonies, or offenses of like nature, are not within the purview of the constitution unless congress so enacts. The many offenses under the British law, with their barbarous consequences, were not, and in some instances (notably, treason) could not be, federal law. By recognized decisions and definitions all felonies were infamous, but as there were no felonies here until congress so enacted, whatever offenses congress denounced, not as felonies, but as misdemeanors, could not fall within the description of infamous unless, independent of the technical definition of "felony," they fell within the rule of infamous punishments, so expressly denounced; or possibly, from the quality or nature of the offense, as *crimen falsi*. As to the latter, this court holds that the federal statute must alone prevail. (5) If there are no felonies under the federal law except what the federal statutes so denominate, what other federal offenses are infamous? As has been already stated, there are only two

statutes which denounce infamous punishment; that is, disqualification within common law rules. Considering the nature of the United States government and its limitations of authority, what offenses and consequences thereof can obtain within its jurisdiction beyond what congress enacts? It cannot borrow authority from England or from any of the states within the Union. It may be that British statutes or law and state statutes measure certain offenses against their authority very differently from federal statutes; may denounce against them punishments of infamy or otherwise, while the federal statutes treat like offenses as trivial. United States courts are bound to follow United States statutes, and no other, in criminal cases.

§ 3003. *State laws do not control in respect to offenses against the United States.*

It has been urged with force that as United States courts are bound as to rules of evidence in civil cases to follow the state authority, that, therefore, if certain offenses under state laws are made infamous the United States courts should consider infamous cases of like quality as to turpitude under the federal law. But is not this a begging of the question? The diversity or incongruity of federal legislation in that respect need not be discussed, whereby what is a rule of evidence in one United States court may not be the rule in another, and whereby United States courts are not governed by a uniform law enacted by congress, but are made subject to local legislation, contrary to the spirit of federal jurisdiction and authority. It must suffice, however, that no state legislation can enlarge or restrict federal authority, nor can such legislation create or qualify a federal offense. Each state may, for purposes of its own, designate what shall be considered offenses against its authority, and characterize them as felonies or otherwise; but its legislation in such respects cannot override federal laws, or supply their supposed defects, in matters exclusively within federal cognizance; hence, United States courts cannot look to state legislation for assistance. If, then, congress passes a statute against frauds of various kinds, which, under the common law, would fall respectively under the designation of infamous or non-infamous, should a United States court fall back on the common law to ascertain the nature and quality of this newly-created offense, and attach consequences which congress has not done? These questions have generally been discussed as if whatever offense congress declared was to be considered, not as what congress enacted, but as what like offenses by analogy were considered at common law or by state statutes. At this point the logical difficulty occurs. If congress alone can say what shall be an offense under the United States laws and prescribe the punishment therefor, how can the courts go beyond such congressional enactments? What, then, independent of felonies, shall be considered in the United States courts infamous crimes, within the meaning of the fifth amendment of the constitution? The answer should be, such offenses and such only as congress has declared to be infamous. Whence does a United States court derive authority in criminal cases to go beyond the United States statutes? Hence cases not declared felonies or infamous can be prosecuted by information. It is true that congress in its wisdom has chosen to denominate many trivial offenses, involving no moral turpitude, felonies, and not so to denominate many of the gravest crimes; yet the courts are bound thereby. In these, as in many other matters, courts can only say: *Sic ita lex scripta est.*

§ 3004. *There are no federal offenses except such as congress prescribes.*

After a careful examination of the many authorities cited, English and

American, it seems that the true solution of the vexed question must be found in the fact that there are no federal offenses except such as congress prescribes, and that if congress declares an offense capital or infamous, the accused has a right to exact the intervention of a grand jury. This rule is to be taken with the qualification that all declared felonies are to be construed infamous. If congress does not choose to declare an offense a felony, or make it infamous, it cannot be so considered in a United States court. These views may not be in accord with those expressed by some courts, and especially by those who decide that the quality or character of the offense is or is not to be determined by the punishment. After felonies under the British law had been specifically defined as determinable solely by the consequent punishment, the English courts adopted another rule, which has been generally followed in this country, whereby the nature of the punishment was held not to determine the character of the offense. Still the struggle remains under federal statutes whether, in the absence of a designation of the offense as a felony or misdemeanor, the court should look to the prescribed punishment to ascertain the true classification. Many acts of congress prescribe hard labor, or imprisonment in the penitentiary, with or without hard labor for a defined term, or imprisonment solely, or fine and imprisonment, etc., in most instances leaving the place of the imprisonment in the discretion of the court. Is it, then, to be held as a legal proposition that imprisonment in the penitentiary, which is often at the discretion of the court, makes the offense infamous, whereas if, in its discretion, the imprisonment were ordered to be in the common jail it would be non-infamous? Again, if the imprisonment ordered is for more than a year, although hard labor is not denounced, yet the sentence may be to the penitentiary. Shall such shifting, discretionary and arbitrary rules settle the important constitutional question presented? That is, if the court chooses to make the place of imprisonment, on conviction, in the penitentiary, the offense is infamous; otherwise not. Suppose trial and conviction had on an information under any of the many statutes, where it is in the discretion of the court to sentence to the common jail or to the penitentiary, or to fine and imprisonment, or imprisonment alone, with or without hard labor, etc., and the court in its discretion sentences to the penitentiary, does the offense thereby become infamous; whereas, if the sentence had been to the jail or to payment of a fine it would have been non-infamous?

But all are of the opinion that it is not, as a general rule, the punishment which determines the nature of the offense, and if it were not so the absurd result would follow that in the cases above supposed the character of the offense would not depend on its intrinsic quality, but on the discretion of the judge who passes sentence. These extreme illustrations are presented in order to show the importance of having some well defined rules which all can understand. It has been deemed better not to pass through a careful analysis of the many cases cited, or to review the same, but to present the subject with its attendant difficulties.

§ 3005. *What offenses are infamous.*

The conclusions reached are that under the United States constitution and statutes there are no infamous crimes except those therein denounced as capital or felonies, or punished with disqualification as witnesses or jurors. If congress makes an offense infamous, it must be prosecuted through indictment; if it makes it non-infamous, it can be pursued through information. This necessarily follows from the fact that under the United States constitution there are

no criminal offenses other than what congress prescribes, and unless it declares directly or inferentially that an offense is infamous it must be pronounced otherwise. There is no other safe or consistent rule. A reference, therefore, to the statute, cited at the beginning of this opinion, makes it clear that the offense charged is not infamous within the rules herein stated. The fact that imprisonment "at hard labor" is denounced does not make the offense infamous within the purview of the constitution, and consequently the case was rightly tried on information. The motion in arrest is overruled.

UNITED STATES v. MAXWELL.

(Circuit Court for Missouri: 3 Dillon, 275-281. 1875.)

Information for violation of the internal revenue laws.

Opinion by DILLON, J.

STATEMENT OF FACTS.—The offense charged in the information is a misdemeanor, and not a "capital or otherwise infamous crime." The defendant was originally arrested by virtue of a warrant issued by a commissioner of the United States upon a complaint duly made to him under oath, showing probable cause. There is, therefore, no ground to claim that the guaranties of personal liberty secured by the fourth amendment to the constitution have been violated, which provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." The information was afterwards filed by leave of court, and the defendant, after pleading guilty, moved in arrest of judgment. This motion must be sustained if there is no authority of law for the prosecution of such misdemeanors in the federal courts by criminal information.

§ 3006. *An infamous crime is one that subjects the offender to infamous punishment.*

The fifth amendment to the federal constitution provides that "no person shall be held to answer for a *capital or otherwise infamous crime* unless upon presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or other public danger." The offense charged against the defendant is not a "capital or infamous crime." The words "infamous crime" have a fixed and settled meaning. In a legal sense they are descriptive of an offense that subjects a person to infamous punishment or prevents his being a witness. The fact that an offense may be, or must be, punished by imprisonment in the penitentiary does not necessarily make it, in law, infamous. 1 Bish. Cr. L., secs. 70, 644; *Rex v. Hickman*, 1 Moody, 34; *Commonwealth v. Shaver*, 3 Watts & Serg., 338; *Russ. Crimes*, 126; 1 Greenl. Ev., secs. 372, 373; *People v. Whipple*, 9 Cow., 707; *United States v. Shepard*, 1 Abb., 431, 439 (§§ 3195-99, *infra*). The constitutional provisions, therefore, as to the mode of prosecuting capital and other infamous offenses, have no application to the misdemeanor set forth in the information.

§ 3007. *Offenses not capital or infamous may be prosecuted on information.*

But the question remains, whether other than capital and infamous offenses may be prosecuted in any other mode than upon presentment or indictment of a grand jury. In other words, must all federal offenses of whatever character or grade be prosecuted upon an accusation made by a grand jury? The constitutional provision above quoted does not say that all offenses must be prose-

cuted with the sanction of a grand jury, but only that certain classes of offenses must be. The fair implication is that offenses other than those falling within the classes specially described may be prosecuted otherwise than by the intervention of a grand jury. And certainly as respects offenses not capital and not infamous, there is no restriction upon congress as to the mode of procedure; and as to such offenses it is entirely competent for congress to provide that they shall be prosecuted upon indictment or information, or in either mode. But there is no act of congress prescribing in terms that such offenses shall be proceeded against upon indictment or by information, or otherwise. Of course they may be prosecuted by indictment. This is admitted; and it is clear from the fifth constitutional amendment and from various provisions of acts of congress in relation to grand juries, etc., that it is contemplated that crimes of all grades may be prosecuted upon the presentment or indictment of a grand jury. But is it contemplated that all offenses although not infamous must be thus prosecuted? There is no act of congress to that effect; and no specific declaration of its will for or against prosecutions by criminal information.

§ 3008. *Procedure by information discussed.*

Criminal prosecution for misdemeanors was a familiar mode of procedure in England, "as ancient," says Blackstone (4 Com., 309), "as the common law itself;" and was the only existing mode of prosecution, it seems, except by indictment or presentment of a grand jury. *Id.*, 308. It was a mode in daily and constant use in England at the time of the American Revolution, as well as in the American colonies. This was well known when the fifth amendment of the constitution was adopted, which provided only for the previous action of a grand jury in capital or otherwise infamous offenses. If it had been intended wholly to prohibit prosecution by information, language expressive of such intention would have been used. Congress has never enacted a code of criminal procedure, and the states have no power to prescribe either modes of proceeding or rules of evidence in prosecutions for federal offenses. In a general way the federal courts must be governed in these respects by the common law, with the modifications pointed out by the supreme court. *United States v. Reid*, 12 How., 361 (§§ 2694-99, *supra*). Congress, nevertheless, created federal offenses, and clothed the federal courts with jurisdiction over such offenses, and no legal reason exists, in the absence of express legislation, why such must be prosecuted in only one of the two well-known common law methods.

Owing to causes not necessary here to notice (4 Bl. Com., 309, 310), the proceeding by information was unpopular in England, and doubtless also in the colonies, and it has in many of the states, from a very early day, been either restricted or prohibited. In the law lectures of Judge Wilson, one of the justices of the supreme court of the United States, which were delivered in 1790, he recognizes an information in the name of the state as one mode of prosecuting crimes and offenses, and after referring to the two kinds (one strictly public, and the other at the instance of a private person or informer) says: "Restraints have, in England, been imposed upon the last species; but the first — those at the king's own suit, filed by his attorney-general — are still unrestrained. 4 Bl. Com., 307. By the constitution of Pennsylvania, both kinds are effectually restricted. By that constitution, however, informations are still suffered to live, but they are bound and gagged. They are confined to official misdemeanors; and even against those they cannot be filed but by leave of the court. By that constitution no person shall, for any indictable

offense, be proceeded against, criminally, or by information, unless by leave of the court, for oppression and misdemeanor in office." 3 Wilson's Works, 144, 145. See, also, 4 Wend. Bl. Com., 309, note, as to bill of rights and decisions in New York; Whart. Cr. L. (7th ed.), sec. 213. Thus, by constitutional provision and positive legislation in the states, informations, as a mode of criminal prosecutions, were either very much restricted or abolished, and the result was that, in the state courts, the prevailing method of prosecution was by indictment, and naturally the same practice obtained in the federal courts.

But the constitutional provision (fifth amendment) leaves all offenses open to prosecution by information, except those which are capital or infamous, and there is no enactment of congress preventing a resort to this mode of procedure. On the contrary, there are provisions in several acts of congress which imply that informations may be filed for criminal offenses. 1 Stats. at Large, p. 98, secs. 7, 32; 2 Stats. at Large, p. 290, sec. 3; 3 Stats. at Large, p. 305, sec. 179; 14 Stats. at Large, p. 145, sec. 179. And it has been several times expressly adjudged that offenses not capital or otherwise infamous may be prosecuted in the federal courts by information. *United States v. Waller*, 1 Saw., 701 (Field and Sawyer, JJ.); *United States v. Shepard*, 1 Abb., 431 (§§ 3195-99, *infra*) (Withey, J.); *United States v. Ebert*, 1 Cent. L. J., 205 (Krekel, J.). And such seems to have been the opinion of Mr. Justice Story. *United States v. Mann*, 1 Gall., 3; 1 id., 552, 554. And see *Walsh v. United States*, 3 Woodb. & M., 341; *Bish. Cr. Pr.*, secs. 604, 611; *contra*, *United States v. Joe*, 4 Ch. Leg. N., 105. In *The United States v. Isham*, 17 Wall., 496. In the *United States v. Buzzo*, 18 Wall., 125, the proceeding by criminal information does not seem to have been questioned in either court. See, also, *Territory of Nebraska v. Lockwood*, 3 Wall., 236; *Stockwell v. United States*, 13 Wall., 542.

§ 3009. *When process by information may be used.*

We are of the opinion, therefore, that offenses not capital or infamous may, in the discretion of the court, be prosecuted by information. We cannot recognize the right of the district attorney to proceed on his own motion, and shall require probable cause of guilt to appear by the oath of some credible person before we will allow an information to be filed and a warrant of arrest to issue. But with these safeguards there is no more reason to fear an oppressive use of information than there is reason to fear an abuse of the powers of a grand jury. Where the accusation is a grave one, or where the charge seems to be doubtful, the court will refuse leave to file an information and compel the district attorney to lay it before a grand jury. But it is well known that the internal revenue laws have created a large number of minor offenses, many of them involving no moral turpitude, and that the cost of proceeding by a grand jury and the delay are burdensome and inconvenient both to the government and the defendant. In this class of cases, most of which are not defended, great and unnecessary expense will be saved by proceeding by information, and we not only think the practice legal, but one which, in cases of this kind, should, with the restrictions above mentioned, be adopted and encouraged rather than condemned. The courts in this country have never been made the instruments of power in oppressing the citizen, and it can, perhaps, further be safely affirmed that the government has yet to attempt to make use of the machinery of the law for that purpose; and if it should, it seems quite probable that it would be as easy to secure an indictment from a grand jury, as the consent of the court to the filing of an information. This line of observation is, however, scarcely called

for, since the court is only concerned on this motion with the lawfulness of a prosecution by information, and is not obliged to vindicate the propriety or policy of this mode of procedure. The motion in arrest of judgment is overruled.

KREKEL, J., concurs.

UNITED STATES v. YATES

(District Court, Eastern District of New York; 6 Federal Reporter, 861-867. 1881.)

Opinion by BENEDICT, D. J.

STATEMENT OF FACTS.—Andrew Yates was charged by an information with having passed counterfeit trade dollars with intent to defraud, in violation of the statute of the United States in such case made. R. S., § 5457, as amended by act of January 16, 1877 (19 St. at Large, 223). Upon arraignment he pleaded not guilty. Having been tried and convicted upon such information and plea, he now moves in arrest of judgment upon the ground that a prosecution upon an information filed by the district attorney, instead of an indictment of a grand jury, for the crime charged against him, is in violation of the constitution of the United States. The language of the constitution relied on is found in the fifth amendment, and is as follows: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

§ 3010. *The crime of passing counterfeit trade dollars is not an "infamous crime."*

The question for determination, therefore, is whether the crime of passing counterfeit trade dollars is an infamous crime within the meaning of the fifth amendment of the constitution. The act of passing counterfeit money, with intent to defraud, was one of common occurrence in England prior to and at the time of the adoption of our constitution, and the character of the act, as fixed by the statutes of England in force at the time of the adoption of the fifth amendment, will furnish a good test by which to determine whether the offense was intended to be covered by the words "infamous crime" in the fifth amendment. By the laws of England from an early period a clear distinction between the act of coining and the act of passing counterfeit coin had been maintained. The former was, by the statutes of Elizabeth (1 Hale, P. C., 224), placed in the highest class of crimes, and punished with death, upon the ground that the royal majesty of the crown was affected by such act in a great prerogative of government. 1 Russ. on Crimes, 54. The act of passing counterfeit coin was nothing more than a cheat. Prior to the statute 15 Geo. II., c. 28, there does not appear to have been any statute of England whereby the mere act of passing counterfeit coin, with intent to defraud, was made a crime. It was punishable as a cheat at common law, but not otherwise. 1 Russ. on Crimes, 75.

The statute (15 Geo. II., c. 28) made it a statutory offense to utter or tender in payment counterfeit coin in gold or silver, and this statute, after reciting that "whereas the uttering of false money, knowing it to be false, is a crime frequently committed all over the kingdom, and the offenders therein are not deterred by reason that it is only a misdemeanor and the punishment often but small," provides that the offender, for the first offense, shall suffer six months' imprisonment and give sureties for good behavior during six months; that upon

conviction a second time for a like offense the offender shall suffer two years' imprisonment and give sureties for good behavior during two years; and that upon a third conviction for a like offense the offender shall be deemed a felon. The provisions of this statute, taken in connection with the prior condition of the law upon this subject in England, are sufficient to show that, at the time of the adoption of the fifth amendment, the act of passing counterfeit coin was not, by the laws of England, included among infamous crimes. Judging from the law of England, as it was understood to be at the time of the adoption of the fifth amendment, the conclusion would, therefore, be that the act of passing counterfeit coin was not intended to be included among infamous crimes, within the meaning of the fifth amendment. The same conclusion is reached by applying the principles of the common law to the act here charged against the defendant. The rule of the common law, by which to determine whether an act was infamous or not, is given in *United States v. Block*, 4 Saw., 214 (§§ 3012-15, *infra*), where it is said that at common law a crime involving a charge of falsehood, must, to be infamous, not only involve a falsehood of such a nature and purpose as makes it probable that the party committing it is devoid of truth and insensible to the obligation of an oath, but the falsehood must be calculated to injuriously affect the public administration of justice. Tried by this test, the act of passing counterfeit coin with intent to defraud is, manifestly, not infamous.

The rule of the common law, as above stated, seems to be recognized in the statutes of the United States, inasmuch as section 5392 contains a specific provision that a conviction for perjury shall render the offender incapable of giving testimony in any court of the United States; and, so far as I have discovered, a similar effect has not been given by statute to any other crime. But I do not see how the question under consideration must not be considered as disposed of by the decision of the supreme court of the United States in the case of *Fox v. State of Ohio*, 5 How., 410 (Constr., §§ 496-500), where the power of a state to punish the act of passing a counterfeit coin of the United States with intent to defraud was called in question and upheld upon the ground that it was a mere cheat. It will not be pretended, I think, that any act, such as the act of passing counterfeit coin is described to be by the supreme court in the case of *Fox v. State of Ohio*, was, by the common law, deemed to be an infamous crime. The effect of the decision of the supreme court in *Fox v. State of Ohio* is in nowise modified by the subsequent decision of the same court in *United States v. Marigold*, 9 How., 560, where the power of the United States to punish the act of passing counterfeit coin of the United States was upheld upon the ground that the court traced "both the offense and the authority to punish it to the power given by the constitution to coin money, and to the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation;" for in *United States v. Marigold* the court is careful to re-affirm, in express terms, all the doctrines declared in *Fox v. State of Ohio*. So that, according to the laws of the United States, as expounded by the supreme court of the United States, the act of passing counterfeit coin with intent to defraud is, in its nature, nothing more than a cheat. Authority in the United States to punish this form of cheating results from the obligation cast upon the United States by the grant of power to coin money, but the character of the act is not changed thereby. It is still a cheat and nothing more.

It is pushing the argument too far to say that the supreme court, in uphold-

ing the authority of the United States to punish the passing of counterfeit coin upon the ground that the effect of such an act was to interfere with the government in the discharge of its obligations under the constitution, has placed the act of passing counterfeit coin in the same category with coining, and that, because coining was infamous at common law, passing counterfeit coin must now be held infamous. This mode of reasoning would lead to the conclusion that all crimes punishable by the United States are infamous, and must be prosecuted upon the indictment of a grand jury; for, except in a single instance (Const., art. 1, sec. 8), all the power to create offenses possessed by the United States is a resulting power derived from the obligations created by the constitution.

The act of passing an unstamped check is plainly enough an interference with the government in the discharge of its obligation to levy and collect taxes, and probably nothing else. But a prosecution of such an act by information has passed under the consideration of the supreme court without objection (*United States v. Isham*, 17 Wall., 496), and many offenses of a character to touch the prerogatives of the government have been prosecuted by information, both in the circuit and district courts of the United States. *United States v. Maxwell*, and cases cited, 3 Dill., 275 (§§ 3006-3009, *supra*). Before dismissing the subject it is proper to add that it is not seen that the question under discussion is affected by the circumstance that the statute creating the offense prescribes imprisonment at hard labor, and does not declare the offense to be infamous or a felony. The omission to declare the crime a felony furnishes, no doubt, a reason for considering the crime to be a misdemeanor, but the fact that the offense is a misdemeanor is not conclusive of the question whether it be an infamous crime or not; nor can the crime be held infamous from the fact that it is punishable by hard labor.

§ 3011. *Rules by which to determine whether a crime is infamous.*

By the statutes of many states any crime punishable by hard labor is a felony, but no such test is furnished by the statutes of the United States. Indeed, a provision declaring that "a felony, under any law of the United States, is a crime punishable with death, or by imprisonment at hard labor," and that "every other crime is a misdemeanor," submitted by the revisers of the statutes in their draft, was rejected. See 2 Draft Rev. St., 2561, title "Crimes."

In early times the character of the crime was determined by the punishment inflicted, but in modern times the act itself, its nature, purpose and effect, are looked at for the purpose of determining whether it be infamous or not. *The People v. Whipple*, 9 Cow., 708; 2 Starkie on Ev., part 4, p. 715. And while under our constitution the legality of an information may be affected by the nature of the punishment to this extent, that by virtue of the fifth amendment an information is not legal in any case where the punishment is death,—and such was the punishment prescribed for the act of passing counterfeit money by the act of 1790, repealed by the act of March 3, 1825,—in all other cases the legality of a prosecution by information, not prohibited by positive statute, must, as I conceive, depend upon the judicial question whether the nature, purpose and effect of the act made criminal is such as to bring it within the meaning of the term "infamous crime," as that term was understood at common law, and cannot be determined by reference to any declaration on the subject contained in the statute, or by the nature of the punishment which the statute prescribes. Any other rule would place it in the power of the legislature to

nullify the provision in the constitution by declaring that no offense against the United States shall be an infamous crime.

But if the rule be otherwise, and it be competent for the legislature to designate what offenses against the United States are infamous crimes, or to make a crime infamous by declaring it to be a felony, the result here would be the same, because the statute is silent on the subject; and, in the absence of some positive provision, the presumption is against an intention to make an offense an infamous crime. *United States v. Cross*, 1 MacArth., 149. For these reasons I am of the opinion that the prosecution of the accused for the crime of passing counterfeit trade dollars by an information instead of by an indictment is legal, and that judgment may properly be pronounced upon the verdict rendered. In order to prevent the delay attendant upon a removal of the case to the circuit court by writ of error, under the statute of March 3, 1879 (20 St. at Large, 354), Judge Blatchford consented to listen to the argument made upon this motion, and I am authorized to say that he concurs in this opinion.

UNITED STATES v. BLOCK.

(District Court for Oregon: 4 Sawyer, 211-216. 1877.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—The information sought to be filed charges the defendant with “wilfully and fraudulently omitting from the inventory of the effects of Abraham I. Block and M. S. Block, partners” and bankrupts, on July 14, 1876, the sum of \$2,500 in money, belonging to the estate of said bankrupts, contrary to subdivision 6 of section 5132 of the Revised Statutes. In pursuance of a rule granted at the time of making the application, the defendant, by his counsel, showed cause against the motion; that the crime charged in the information was “infamous,” and therefore within the prohibition contained in the fifth amendment to the national constitution.

§ 3012. *What is an infamous crime at common law.*

The term infamous — without fame or good report — was applied at common law to certain crimes, upon the conviction of which a person became incompetent to testify as a witness. This was so, upon the theory that a person would not commit a crime of such heinous character, unless he was so depraved as to be altogether insensible to the obligation of an oath, and therefore was unworthy of credit. 1 Greenl. Ev., sec. 372. These crimes are said to be treason, felony, and the *crimen falsi*. Id., sec. 373; 1 Phil. Ev., 28; *Barker v. People*, 20 Johns., 460. As to treason and felony, the authorities are agreed, but as to what or whether all species of the *crimen falsi* are to be considered infamous there is some apparent disagreement among them. The term is borrowed from the civil law, where, as it implies, it included every species of fraud and deceit or wrong involving falsehood. But the better opinion seems to be that the common law has not used the term in this connection in so extensive a sense; and that, therefore, a crime is not infamous, within the meaning of the prohibition contained in said fifth amendment, unless it not only involves the charge of falsehood, but may also injuriously affect the public administration of justice, by the introduction therein of falsehood and fraud. 1 Greenl. Ev., sec. 373; 1 Phil. Ev., 28. The following have been determined to be such crimes: “forgery, perjury, subornation of perjury, suppression of testimony by bribery, or conspiracy to procure the absence of a witness, or other conspiracy

to accuse one of a crime and barratry." 1 Greenl. Ev., 373. And upon the principle, I suppose, that "a receiver is as bad as a thief," it was held in *Commonwealth v. Rogers*, 7 Metc., 501, that a person convicted of receiving stolen goods, knowing them to have been stolen, was thereby rendered infamous. But in *Utley v. Merrick*, 11 Metc., 302, it was held that obtaining goods by false pretenses was not an infamous crime; and in *United States v. Shepard*, 1 Abb., 436 (§§ 3195-99, *infra*), the same rule was applied to the crime of smuggling goods into the United States, as defined by section 4 of the act of July 18, 1866 (14 Stat., 179). In *United States v. Waller*, 1 Saw., 701, before Mr. Justice Field and Sawyer, circuit judge, the district attorney was allowed to file an information charging the defendant with introducing distilled spirits into Alaska, contrary to the statute. Indeed, the opinion in this case may be cited as authority for the proceeding by information in the cases of "misdemeanors committed against all laws of the United States." But I do not think it ought to be so construed; and that the expression quoted ought to be taken in connection with the case before the court. For it is certain that perjury, conspiracies, and other infamous crimes, were only misdemeanors at common law (4 Black., 5, n. 5), and the fifth amendment prohibits any proceeding other than by indictment in all cases of "infamous" crimes, whether they are misdemeanors or not.

§ 3013. *The character of the punishment does not determine whether the crime is infamous.*

The modern code definition of felony and misdemeanor, which makes the distinction between them rest upon the character of the punishment imposed for their commission, has not yet been incorporated into the laws of the United States, and if it had it is not perceived how it could affect the question. The word "infamous," as used in the fifth amendment, must be taken in the sense in which it was used and understood at the common law, from which it was taken. That is the sense in which it was used and understood by those who made and adopted the constitution and the amendments to it. *Bains v. The Schooner*, 1 Bald., 558. As has been shown, at common law this term was only applicable to certain crimes which from their nature implied a total want of truth in the person committing them, without reference to the fact of whether they were otherwise distinguished as felonies or misdemeanors. Neither was it the punishment, but the nature of the act constituting the crime, which made it infamous: *Ex delicto non ex supplicio emergit infamia*. 1 Greenl. Ev., sec. 372, n. 1; 1 Phil. Ev., 30; *People v. Whipple*, 9 Cow., 707; *People v. Herrick*, 13 Johns., 84; *United States v. Brokhus*, 3 Wash., 99. The crime charged in the information is created by statute and was unknown to the common law. The punishment is "imprisonment, with or without hard labor, for not more than three years." Sec. 5132, R. S. The section defining it does not declare it a felony or misdemeanor, but elsewhere in the same title (*Bankruptcy*, subd. 10, sec. 5110, R. S.) it is referred to as a misdemeanor.

§ 3014. *The offense, under Revised Statutes, section 5132, of omitting property from an inventory of a bankrupt's effects is not an infamous crime.*

The law having required the defendant to make an "accurate statement" of the estate of the bankrupts (secs. 5016, 5030, R. S.), and the charge being that he has wilfully and fraudulently omitted a material portion of the same from the inventory, there is ground for saying that the crime involves the charge of falsehood. But as was said in *Utley v. Merrick*, *supra*, any falsehood does not make a party infamous, nor is a crime infamous because its commission involves

a falsehood of any kind or degree. On the contrary, the nature and purpose of the falsehood must be such as makes it probable that the party committing it is void of truth and insensible to the obligation of an oath. And even this is not enough; it must also appear that the falsehood is calculated to injuriously affect the public administration of justice, as perjury or the suppression of testimony.

Tried by this test, I do not think that this crime can be considered infamous, or within the category of the *crimen falsi* at common law. It has also been suggested that the proceeding by information, not having been specially authorized by congress, will not lie in any case in the national courts. Until the supreme court decides otherwise, the case of *United States v. Waller*, *supra*, must be considered sufficient authority in this court for the prosecution of crimes not "capital or otherwise infamous" by information. The case of *United States v. Cultus Joe*, Int. Rev. Rec., 57, is the only one I know to the contrary, while the case of *United States v. Shepard*, *supra*, is unqualifiedly in support of the authority to entertain the proceeding. There can be no doubt but that at common law from the most ancient time all misdemeanors, unless it was misprision of treason, might be prosecuted by information filed by the attorney-general, or the master of the crown office. 3 Black., 308; 4 Ba. Abr., 402.

§ 3015. *In the absence of constitutional and statutory provisions, the procedure in criminal cases in United States courts is regulated by common law principles.*

The ruling in *United States v. Joe*, *supra*, is based upon the theory that the common law as to procedure or remedy is not in force in the United States. But this seems contrary to the authorities and the practice. In *Kneass v. Schuylkill Bank*, 4 Wash., 107, it was held that where an act of congress gives a right without providing a specific remedy, the latter "may be drawn from the abundant stores of the common law." And although there are no common law crimes in the United States, yet where congress declares an act a crime, a person charged with the commission of the same may be prosecuted therefor according to the course of the common law, unless the constitution or congress has otherwise provided. In discussing this subject, Conkling, in his treatise, says: "The national courts are unquestionably to look to the common law, in the absence of statutable provisions, for rules to guide them in the exercise of their functions in criminal as well as civil cases." Conk. Treat. (3d ed.), 167. And again, at p. 613, he says: "While no resort can be had to the common law as a source of criminal jurisdiction, it nevertheless furnishes the proper, and, as the state laws are here inoperative, the only, guide in the absence of constitutional or statutory regulations, as to the principles and rules of procedure in the exercise of this branch of jurisdiction." And such is substantially the ruling of the supreme court in *United States v. Reid*, 12 How., 365 (§§ 2694-99, *supra*). A casual remark in Story's Com., vol. 2, sec. 1786, to the effect that the proceeding by information is rarely used in America, and had not, in the case of mere misdemeanors, been formally put into operation by any positive authority of congress, ought not to be considered as bearing materially upon the question. Besides, the very prohibition contained in said fifth amendment, by a strong and almost necessary implication, asserts that the proceeding by information, in all cases not "capital or otherwise infamous," was well known and lawful. Again, congress by the enactment of section 32 of the act of April 30, 1790 (sec. 1044, R. S.), and section 3 of the act of March 26, 1804 (sec. 1046, R. S.), has recognized the right to proceed in the national courts in a certain class of crimes by information. Taken together, these sections provide that

no person shall be prosecuted for any "offense" or "crime" not capital, "unless the indictment is found, or the *information* instituted," within a certain time after the commission of such offense or crime. By section 8 of the act of May 31, 1870 (sec. 1022, R. S.), congress formally recognized the right to prosecute all crimes against the elective franchise and the civil right of citizens that are not infamous by information. There is no good reason why this proceeding, when confined to *mala prohibita*, should be regarded at this day with disfavor. Within the past quarter of a century the proceeding has been substantially revived in many of the states as a substitute for the more cumbersome, costly and dilatory one by a grand jury. Without it, a defendant would often be compelled to remain in prison awaiting the coming of a grand jury for a period of time longer than that imposed as a punishment for the crime with which he may be charged.

The proceeding is a cheap and convenient one, and when allowed only upon leave of the court, and the information is made upon oath and the official responsibility of the district attorney, it is not any more likely to be abused or become oppressive than accusations found by a grand jury. Let the information be filed.

§ 3016. When an information will lie — Infamous crimes.— The institution of a proceeding against a criminal by criminal information filed by the district attorney is unknown in the federal courts, except in one case specially provided by law of congress, and is improper in cases of selling liquors to Indians. *United States v. Cultus Joe*,* 15 Int. Rev. Rec., 57. See §§ 2994, 2996.

§ 3017. Offenses under section 5508, Revised Statutes, must be presented by a grand jury, and cannot be tried upon information. *United States v. Butler*,* 4 Hughes, 512.

§ 3018. The constitution of the United States, to which the territorial legislatures must conform, does not inhibit prosecution by information when the offense falls below the degree of capital or infamous. The keeping of a gambling-house is not infamous, and an act of a territorial legislature authorizing the prosecution of the offense of keeping a gambling-house, by information filed by the district attorney, is valid. *Chase v. The People*,* 2 Colo. T'y, 509.

§ 3019. A conspiracy to make counterfeit coin may be prosecuted by information. The crime is not infamous. *United States v. Burgess*,* 3 McC., 278; S. C., 9 Fed. R., 896.

§ 3020. No conspiracy at common law was infamous, except such as pertained to the subversion of justice. A conspiracy to cause a felony to be committed would not be a felony or infamous, unless so declared by statute. *Ibid.*

§ 3021. To make a penalty infamous, it must pronounce against the offender a degradation from his civil rights. In the absence of such a forfeiture, the crime will not be deemed legally infamous unless it is so expressly pronounced. *United States v. Cross*,* 1 MacArth., 149.

§ 3022. The infamous character of an offense is not to be determined by the popular sense of the word *infamy*, but a crime, to be infamous, must, in some form, be so declared by law. *Ibid.*

§ 3023. Petit larceny was not an infamous crime at the time of the passage of the act of January 17, 1870, creating the police court of the District of Columbia, nor of the act of February 23, 1867, for the punishment of certain crimes in the District of Columbia. *Ibid.*

§ 3024. Under the act of congress of July 13, 1866, providing that "all fines, penalties and forfeitures which may be imposed or incurred shall be, and may be, sued for and recovered, when not otherwise provided, in the name of the United States, in any proper form of action, or by any appropriate form of proceeding before any district or circuit court," offenses arising under the internal revenue laws may be prosecuted by information filed by the district attorney. These offenses being misdemeanors only, this practice is not contrary to the fifth amendment, declaring that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury." *United States v. Ebert*,* 1 Cent. L. J., 205.

§ 3025. The district courts of Washington Territory, although courts of general jurisdiction in one sense, yet in the exercise of their jurisdiction, and the settlement of their practice as circuit and district courts of the United States, are obviously subject to like limitations with the circuit and district courts themselves. If the circuit and district courts have author-

ity to proceed in criminal cases by information, then that authority must spring from the constitution and statutes of the United States, either expressly or by necessary implication. Such a power is nowhere expressly granted. The fifth amendment, declaring that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury," the only provision on the subject, does not warrant any other implication than that congress is free to provide, by any mode it sees fit, for the prosecution of crimes not capital or infamous. The acts of congress not having authorized such a proceeding either expressly or by implication, except for recovery of penalties in revenue cases, it cannot be exercised by the courts of the United States, nor by the courts of Washington Territory. *United States v. Cultus Joe*,* 4 Ch. Leg. N., 105.

§ 3026. *Felonies*.—Tested by the common law, the word *felony*, when used in an act of congress, has no very exact and determinate meaning, and can apply to no cases in this country except treason, where limited forfeiture of estate is allowed. In most of the states the term *felony*, by force of state legislation, has become to mean any offense the punishment of which is imprisonment in the penitentiary. But the federal courts cannot look to state laws, in the criminal jurisprudence of the United States, for the characteristic elements which constitute an offense; nor to the common law; nor even to the character of the punishment. There is no doubt, however, that offenses are felonies when so declared to be by congress, and the defendant in such cases is entitled to ten challenges under section 819, Revised Statutes. *United States v. Coppersmith*, 2 Flip., 546 (§§ 1920-24).

§ 3027. A felony at common law was a crime which was punished capitally, and an infamous crime was one upon conviction of which the defendant was incompetent as a witness. Under the laws of the United States a crime is not a felony or infamous because punishable by imprisonment in the penitentiary, but its character is to be determined by the rules of the common law. *United States v. Shepard*, 1 Abb., 431 (§§ 3193-99).

XXX. PRINCIPAL AND ACCESSORY.

SUMMARY — *Agreement of district attorney not to prosecute accomplice*, § 3028.

§ 3028. The district attorney has no authority to contract with an accomplice of an accused on trial, that if he will testify fully and fairly in such prosecution against his associate in guilt he shall not be prosecuted for the same offense. If the witness performs his part of such an agreement, he cannot plead its performance in bar of any indictment against him, nor avail himself of it upon his trial. Testimony of this character given by an accomplice gives him a mere equitable title to the mercy of the executive, which rests on usage and the good behavior of the accomplice. And rights so acquired can only come before the court by way of an application to put off the trial in order to give the prisoner time to apply to the executive for the pardon to which he is equitably entitled. *Whisky Cases*, §§ 3029-30.

[NOTES.—See §§ 3031-3035.]

WHISKY CASES. (a)

(9 Otto, 594-606. 1878.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Accomplices in guilt, not previously convicted of an infamous crime, when separately tried are competent witnesses for or against each other; and the universal usage is that such a party, if called and examined by the public prosecutor on the trial of his associates in guilt, will not be prosecuted for the same offense, provided it appears that he acted in good faith and that he testified fully and fairly. Where the case is not within any statute, the general rule is that if an accomplice, when examined as a witness by the public prosecutor, discloses fully and fairly the guilt of himself and his associates, he will not be prosecuted for the offense disclosed; but it is equally clear that

(a) These were civil cases—debt, to recover a double internal revenue tax, and informations to forfeit certain property. This head seemed the most appropriate, however, under which to publish the opinion, which is devoted to a discussion of the rights of an accomplice who has testified under an agreement with the district attorney that no further proceedings should be commenced against him.

he cannot by law plead such facts in bar of any indictment against him, nor avail himself of it upon his trial, for it is merely an equitable title to the mercy of the executive, subject to the conditions before stated, and can only come before the court by way of application to put off the trial in order to give the prisoner time to apply to the executive for that purpose. *Rex v. Rudd*, 1 Cowp., 331. Sufficient appears to show that the following are the material proceedings in the several cases: 1. That the first two were actions of debt commenced in the circuit court to recover the double internal revenue tax imposed, as fully set forth in the respective declarations. 2. That the other six cases are informations filed in the district court to forfeit the properties therein described for acts done in violation of the internal revenue laws.

Service was made in the first two cases, and the defendants appeared and pleaded the general issue and the special plea set forth in the transcript. Issue was joined upon the first plea, and the United States demurred to the special plea. Hearing was had, and the court overruled the demurrer and gave judgment for the defendants. Like defenses in the form of answers or pleas were filed in the other six cases commenced in the district court, to which the United States demurred; but the district court overruled the demurrers, and finally rendered judgment in each case for the defendants. Prompt steps were taken by the district attorney to remove the cases into the circuit court, where the respective judgments rendered by the district court were affirmed. Suffice it to say in this connection, without entering into detail, that the United States sued out a writ of error in each case and removed the same into this court. Both parties agreed that the questions presented for decision are the same in each case, in which the court here fully concurs.

Two errors are assigned as causes for reversing the judgment, which present very clearly the matters in controversy as discussed at the bar. 1. That the plea or answer set up as defense is bad because it is too general and does not set forth the supposed agreement in traversable form. When filed, the first assignment of error also objected to the plea or answer that it did not designate the officer who made the alleged agreement, which was plainly a valid objection to it; but that was obviated at the argument, it being conceded by the United States that the plea or answer should be understood as alleging that the supposed agreement was made by the district attorney. 2. That the plea or answer is bad because the officer representing the government in these prosecutions had no authority to make the agreement pleaded, and that the court cannot enforce it, as it is void.

As amended, it requires no argument to show that the plea or answer cannot be understood as alleging that the president was a party to any such agreement, as the distinct allegation is that it was made by the district attorney; nor could any such implication have arisen even if the pleading had not been amended, as it is settled law that suits of the kind to recover municipal forfeitures must be prosecuted in the subordinate courts by the district attorney, and in this court, when brought here by appeal or writ of error, by the attorney-general. *Confiscation Cases*, 7 Wall., 454. Suppose the plea to be amended as stipulated at the argument, the first question is, whether as amended it sets up a good defense to the several actions. Taken in that view, it alleges in substance and effect that the district attorney promised the defendants that if they would testify in behalf of the United States frankly and truthfully when required, in reference to a conspiracy among certain government officials in the internal revenue service, and other parties, then known to exist, whereby the honest

manufacture of distilled spirits and the collection of the tax thereon had been rendered practically impossible, and would plead guilty to one count in an indictment then pending against them in said district court, and would withdraw their pleas in certain condemnation cases then pending against their property in said district court, for the purpose *only* of insuring their good faith in so testifying on behalf of the United States, then the United States would recall any and all assessments under the internal revenue law made against them, and that no more assessments under said law should be made against them; that no more proceedings against them should be commenced on account of violations of the internal revenue laws then passed, and that no penalties or forfeitures should in any manner be enforced or recovered against them or their property; that all suits for penalties and for forfeitures then pending against them and their property should be dismissed, and that full and complete indemnity should be granted to them as the said claimants.

Complete performance on their part is alleged by the claimants, and they allege that the pending suits are for the condemnation and confiscation of their property, which was seized by the United States on the ground of the alleged violation of the internal revenue law, prior to entering into the said agreement. Assessments made against the claimants or their property are to be recalled, and they and their property are to be free of internal revenue taxation. Proceedings pending against them for violations of the internal revenue laws are to be dismissed and no more are to be instituted, and the claimants are promised full and complete indemnity, civil and criminal, if they will consent to testify. Considering the scope and comprehensive character of the supposed agreement, it is not strange that the district attorney deemed it proper to demur to the plea. He took two objections to it; but the court will examine the second one first, as, if that is sustained, the other will become immaterial.

§ 3029. *A district attorney has no authority to contract with an accomplice that if he will testify against others he shall not be himself prosecuted nor subjected to penalties.*

Waiving for the present the question whether the district attorney may contract with an accomplice of an accused person on trial, that if he will testify in the case his taxes shall be abated, or that he and his property shall be exempt from internal revenue taxation, the court will consider in the first place whether the district attorney, as a public prosecutor, may properly enter into an agreement with such an accomplice, that if he will testify fully and fairly in such a prosecution against his associate in guilt he shall not be prosecuted for the same offense; and if so, whether such an agreement, if the witness performs on his part, will avail the witness as a defense to the criminal charge in case of a subsequent prosecution. Considered in its full scope, the agreement is that in consideration of the defendants testifying against their co-conspirators who were indicted for defrauding the revenue, they, the defendants, should have a full and complete discharge, not only from all criminal liability, but from all penalties and forfeitures they had incurred, and from liability for their internal revenue taxes which they had fraudulently refused to pay, giving them full and complete indemnity, civil and criminal, for all their fraudulent and illegal acts in respect to the public revenue.

Courts of justice everywhere agree that the established usage is that an accomplice duly admitted as a witness in a criminal prosecution against his associates in guilt, if he testifies fully and fairly, will not be prosecuted for the same offense, and some of the decided cases and standard text-writers give

very satisfactory explanations of the origin and scope of the usage in its ordinary application in actual practice. Beyond doubt, some of the elements of the usage had their origin in the ancient and obsolete practice called *approvement*, which may be briefly explained as follows: When a person indicted of treason or felony was arraigned, he might confess the charge before plea pleaded, and appeal, or accuse another as his accomplice of the same crime, in order to obtain his pardon. Such *approvement* was only allowed in capital offenses, and was equivalent to indictment, as the appellee was equally required to answer to the charge; and if proved guilty, the judgment of the law was against him, and the *approver*, so called, was entitled to his pardon *ex debito justitiæ*. On the other hand, if the appellee was acquitted, the judgment was that the *approver* should be condemned. 4 Bl. Com., 330. Speaking upon that subject, Lord Mansfield said, more than a century ago, that there were three ways in the law and practice of that country in which an accomplice could be entitled to a pardon: *First*, in the case of *approvement*, which, as he stated, then still remained a part of the common law, though he admitted it had grown into disuse by long discontinuance. *Secondly*, by discovering two or more offenders, as required in the two acts of parliament to which he referred. *Thirdly*, persons embraced in some royal proclamation, as authorized by an act of parliament, to which he added, that in all these cases the court will bail the prisoner in order to give him an opportunity to apply for a pardon.

Approvers, as well as those who disclosed two or more accomplices in guilt, and those who came within the promise of a royal proclamation, were entitled to a pardon; and the same high authority states that besides those ancient statutory regulations there was another practice in respect to accomplices who were admitted as witnesses in criminal prosecutions against their associates, which he explains as follows: Where the accomplice has made a full and fair confession of the whole truth and is admitted as a witness for the crown, the practice is, if he act fairly and openly and discover the whole truth, though he is not entitled *of right* to a pardon, yet the usage, the lenity and the practice of the court is to stop the prosecution against the accomplice, the understanding being that he has an equitable title to a recommendation for the king's mercy. Subsequent remarks of the court in that opinion showed that the ancient statutes referred to were wholly inapplicable to the case, and that there remained, even at that date, only the equitable practice which gives a title to recommendation to the mercy of the crown. Explanations then follow which prove that the practice referred to was adopted in substitution for the ancient doctrine of *approvement*, modified and modeled so as to be received with greater favor. As modified it gives, as the court said in that case, a kind of hope to the accomplice that, if he behaves fairly and discloses the whole truth, he may, by a recommendation to mercy, save himself from punishment and secure a pardon, which shows to a demonstration that the protection, if any, to be given to the accomplice rests on the described usage and his own good behavior; for, if he acts in bad faith, or fails to testify fully and fairly, he may still be prosecuted as if he had never been admitted as a witness. *Rex v. Rudd*, 1 Cowp., 331; *S. C.*, 1 Leach, 115.

Great inconvenience arose from the practice of *approvement*, in consequence of which a mode of proceeding was adopted in analogy to that law, by which an accomplice may be entitled to a recommendation to mercy, but not to a pardon as of legal right, nor can he plead it in bar or avail himself of it on his trial. 2 Hawk. P. C., n. 3, p. 532; 3 Russ. Crimes (9th Am. ed.), 596. In

the present practice, says Mr. Starkie, where accomplices make a full and fair confession of the whole truth, and are in consequence admitted to give evidence for the crown, if they afterwards give their testimony fairly and openly, although they are not of right entitled to a pardon, the usage, lenity and practice of the court is to stay the prosecution against them, and they have an equitable title to a recommendation to the king's mercy. 2 Stark. Ev. (4th Am. ed.), 15.

§ 3030. *A person admitted to testify against his accomplices cannot plead that fact in bar of a prosecution. He has only an equitable title to a pardon.*

Participes criminis in such a case, when called and examined as witnesses for the prosecution, says Roscoe, have an equitable title to a recommendation for the royal mercy; but they cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defense on their trial, though it may be made the ground of a motion for putting off the trial in order to give the prisoner time to present an application for the executive clemency. Roscoe, Cr. Ev. (9th Am. ed.), 597.

Authorities of the highest character almost without number support that proposition, nor is it necessary to look beyond the decisions of this court to establish the correctness of the rule. *Ex parte Wells*, 18 How., 307 (§§ 3252-56, *infra*). Special reference is made in that case to the three ancient modes of practice which authorized accomplices, when admitted as witnesses in criminal prosecutions, to claim a pardon as a matter of right; and the court, having explained the course of such proceedings, remarked that, except in those cases, accomplices, though admitted to testify for the prosecution, have no absolute claim or legal right to executive clemency.

Much consideration appears to have been given to the question in that case, and the court held that the only claim the accomplice has in such a case is an equitable one for pardon, and that only upon the condition that he makes a full and fair disclosure of the guilt of himself and that of his associates; that he cannot plead it in bar of an indictment against him for the offense, nor use it in any way except to support a motion to put off the trial in order to give him time to apply for a pardon. Three quarters of a century before that, ten of the twelve judges of England decided in the same way, holding that the accomplice in such a case cannot set up such a claim in bar to an indictment against him, nor avail himself of it upon his trial; that such a claim for mercy depends upon the conditions before described, and that it can only come before the court by way of application to put off the trial in order to give the party time to apply for a pardon. *Rex v. Rudd*, 1 Leach, 125; 1 Chitty, Cr. L. (ed. 1847), 82; *Mass. Cr. L.*, 175.

Attempt was made sixty years later in the same court to convince the judges then presiding that some of the remarks of the chief justice in *Rex v. Rudd*, before cited, justified the conclusion that the accomplice in such a case was, by law, entitled to be exempted from punishment; but Lord Denman replied that the organ of the court on that occasion was not speaking of legal rights in the strict sense, nor of such rights as would constitute a defense to an indictment or an answer to the question why sentence should not be pronounced, saying, in substance and effect, that the right mentioned was only an equitable right, and that the court would postpone the trial or any action in the case to the prejudice of the prisoner, in order to give him an opportunity to apply to the crown for mercy. *Rex v. Garside*, 2 Ad. & Ell., 275; *Rex v. Lee*, Russ. & R., 361; *Rex v. Hunton*, *id.*, 454. Other text-writers of the highest repute besides those

previously mentioned affirm the rule that accomplices, though admitted as witnesses for the prosecution, are not of right entitled to a pardon — that they have only an equitable right to a recommendation to the executive clemency; and they all hold that prisoners, under such circumstances, cannot plead such right in bar of an indictment against them, nor avail themselves of it as a defense on their trial.

None of those propositions can be successfully controverted; but it is equally clear that the party, if he testifies fully and fairly, may make it the ground of a motion to put off the trial in order that he may apply to the executive for the protection which immemorial usage concedes that he is entitled to at the hands of the executive. 3 Russ. Crimes (9th Am. ed.), 597. Certain ancient statutory regulations, as already remarked, gave unconditional promise to accomplices of pardon and complete exemption from punishment, and in such cases it was always held that the accomplice, if he was called and examined for the prosecution, was entitled as of right to a pardon, provided he acted in good faith, and testified fully and fairly to the whole truth. Instances of the kind are adverted to by Mr. Phillipps in his valuable treatise on Evidence; but he, like the preceding text-writer, states that accomplices, when admitted as witnesses, under the more modern usage and practice of the courts, have only an equitable title to be recommended to mercy, on a strict and ample performance, to the satisfaction of the presiding judge, of the conditions on which they were admitted to testify; that such an equitable title cannot be pleaded in bar nor in any manner be set up as a defense to an indictment charging them with the same offense, though it may be made the ground of a motion for putting off their trial in order to allow time for an application to the pardoning power. 1 Phil. Ev. (ed. 1868), 86.

Offenders of the kind are not admitted to testify as of course, and sufficient authority exists for saying that in the practice of the English court it is usual that a motion to the court is made for the purpose, and that the court, in view of all the circumstances, will admit or disallow the evidence as will best promote the ends of public justice. *Id.*, 87; 3 Russ. Crimes (9th Am. ed.), 598. Good reasons exist to suppose that the same course is pursued in the courts of some of the states, where the English practice seems to have been adopted without much modification. *People v. Whipple*, 9 Cow., 707. Such offenders everywhere are competent witnesses if they see fit voluntarily to appear and testify; but the course of proceeding in the courts of many of the states is quite different from that just described, the rule being that the court will not advise the attorney-general how he shall conduct a criminal prosecution. Consequently it is regarded as the province of the public prosecutor and not of the court to determine whether or not an accomplice, who is willing to criminate himself and his associates in guilt, shall be called and examined for the state.

Of all others, the prosecutor is best qualified to determine that question, as he alone is supposed to know what other evidence can be adduced to prove the criminal charge. Applications of the kind are not always to be granted, and in order to acquire the information necessary to determine the question, the public prosecutor will grant the accomplice an interview, with the understanding that any communications he may make to the prosecutor will be strictly confidential. Interviews for the purpose mentioned are for mutual explanation, and do not absolutely commit either party; but if the accomplice is subsequently called and examined, he is equally entitled to a recommendation for executive clemency. Promise of pardon is never given in such an interview,

nor any inducement held out beyond what the before-mentioned usage and practice of the courts allow. Prosecutors in such a case should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfils those conditions he is equitably entitled to a pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation.

Modifications of the practice doubtless exist in jurisdictions where the power of pardon does not exist prior to conviction; but every embarrassment of that sort may be removed by the prosecutor, as in the absence of any legislative prohibition he may *nol. pros.* the indictment if pending, or advise the prisoner to plead guilty, he, the prisoner, reserving the right to retract his plea and plead over to the merits if his application for pardon shall be unsuccessful. 1 Bish. Cr. Proc. (2d ed.), sec. 1076, and note. Where the power of pardon exists before conviction as well as after, no such difficulties can arise, as the prisoner, if an attempt is made to put him to trial in spite of his equitable right to pardon, may move that the trial be postponed, and may support his motion by his own affidavit, when the court may properly insist to be informed of all the circumstances. Power under such circumstances is vested in the court in a proper case to put off the trial as long as may be necessary, in order that the case of the prisoner may be presented to the executive for decision.

Centuries have elapsed since the judicial usage referred to was substituted for the ancient practice of *approvement*, and experience shows that throughout that whole period it has proved, both here and in the country where it had its origin, to be a proper and satisfactory protection to the accomplice in all cases where he acts in good faith and testifies fairly and fully to the whole truth. Cases undoubtedly have arisen where the accomplice, having refused to comply with the conditions annexed to his equitable right, has been subsequently tried and convicted, it being first determined that he has forfeited his equitable title to protection by his bad faith and false representations. *Commonwealth v. Knapp*, 10 Pick., 477. Such offenders, if they make a full disclosure of all matters within their knowledge in favor of the prosecution, will not be subjected to punishment; but if they refuse to testify, or testify falsely, they are to be tried, and may be convicted upon their own confession. Nothing of weight by the way of judicial authority can be invoked in opposition to the views here expressed, as is evident from the brief filed by the defendants, which exhibits proof of research and diligence. Decided cases may be cited which contain unguarded expressions, of which the following are striking examples: *People v. Whipple*, *supra*; *United States v. Lee*, 4 McL., 103.

Neither of those cases, however, supports the proposition for which they are cited. Enough appears in the first case to show that it was objected on behalf of the accomplice that the usage gave him no certain assurance of a pardon, inasmuch as the power of pardon was vested in the governor, and the authority of the court extended no further than the recommendation for mercy; to which the court responded that the legal presumption was that the public faith will be preserved inviolate, and that the equitable claim of the party will be ratified and allowed. Public policy and the great ends of justice, it was said in the second case, require that the arrangement between the public prosecutor and the accomplice should be carried out; and the court proceeded to remark that, if the district attorney failed to enter a *nolle prosequi* to the indictment,

"the court will continue the cause until an application can be made for a pardon," which of itself is a complete recognition of the usage and practice established in the place of the ancient proceeding of *approvement*. More evil than good flowed from that regulation, and in consequence the practice now acknowledged was substituted in its place, under which the accomplice acquires only an equitable right to the clemency of the executive, which, as Lord Mansfield said, rests on usage and the good behavior of the accomplice, who in a proper case will be bailed by the court in order that he may apply for the pardon to which he is equitably entitled. Should it be objected that the application may not be successful, the answer of the court must be in substance that given by Lord Denman on a similar occasion, that we are not to presume that the equitable title to mercy which the humblest and most criminal accomplice may thus acquire by testifying to the truth in a federal court will not be sacredly accorded to him by the president, in whom the pardoning power is vested by the federal constitution.

Having come to the conclusion that the district attorney had no authority to make the agreement alleged in the plea in bar, it follows that the circuit court erred in the two cases instituted there, in overruling the demurrer to it, and that the judgment must be reversed, and the causes remanded for further proceedings in conformity with the opinion of the court. Tested by these considerations it is clear that the circuit court also erred in affirming the judgment of the district court in all the other cases, and that the judgment in each of those cases must be reversed, and the causes remanded with directions to reverse the judgment of the district court, and for further proceedings in conformity with the opinion of the court; and it is so ordered.

§ 3031. Principal and accessory — In general.—Persons indicted for participating in and advising the loaning of public money by an officer contrary to law are principals and not accessories. *United States v. Hartwell*, 3 Cliff., 226.

§ 3032. If a person be present, consenting, aiding, procuring, advising or assisting the commission of a crime, he is a principal and may be indicted as such. A crime may consist of many acts, which must all be committed in order to complete the offense, but each person present consenting to the commission of the offense, and doing any one act which is either an ingredient of the crime, or immediately connected with or leading to its commission, is as much a principal as if he had, with his own hand, committed the whole offense. *United States v. Wilson*,* *Bald.*, 78.

§ 3033. A person present aiding and abetting an assault is guilty as principal. *United States v. Ricketts*,* 1 Cr. C. C., 164; *United States v. McFarland*,* 1 Cr. C. C., 140.

§ 3034. One who is a mere spectator in a contest where a mob of rioters are resisting officers of the law in the execution of their duty, and who refuses assistance, countenance or aid to either side, may be liable to punishment for misdemeanor for his refusal to interfere, but such conduct will not necessarily make him liable as principal in the riot or murder committed. *United States v. Hanway*, 2 Wall. Jr., 139 (§§ 1195-1201).

§ 3035. If one present at a riot came to aid, abet, countenance or encourage the rioters, he is guilty of every act committed by any individual engaged in the riot, whether it amounts to treason or felony. *Ibid.*

§ 3036. Where a person with an unlawful purpose or intent designs the commission of a criminal act, and to carry out that purpose or effect the unlawful object another is employed to do the act, that act becomes the act of the principal, and he, as well as the agent, is criminally accountable. *United States v. Nunnemacher*, 7 Biss., 111 (§§ 723-732).

§ 3037. Mere suspicion or bare knowledge that an illegal act is being done by others, without any participation in or connection with it, is insufficient to render a person criminally liable, but such facts may be taken into consideration by the jury in connection with other circumstances to aid in determining whether he was a participant in the guilty acts shown. *Ibid.*

§ 3038. Upon the trial of an indictment for burning the treasury buildings, the court, at the motion of the defendant's counsel, and without objection from the other side, instructed

the jury that if the traverser was not personally present at the time of applying the fire to the treasury building, or not sufficiently near, at the time, to be aiding and abetting in applying the fire, although he was concerned in the design of burning the building, he was but an accessory before the fact, and entitled to be acquitted under the indictment. *United States v. White*,* 5 Cr. C. C., 33.

§ 3039. — **misdemeanors.**— Misdemeanors do not admit of accessories either before or after the fact, but the general rule is that whatsoever will make a party an accessory before the fact in felony will make him a principal in a misdemeanor if he is properly charged as such in the indictment. *United States v. Hartwell*, 3 Cliff., 227; *United States v. Gooding*, 13 Wheat., 460; *United States v. Harries*,* 2 Bond, 311; *United States v. White*,* 5 Cr. C. C., 73.

§ 3040. In cases of misdemeanors, all those who are concerned in aiding and abetting, as well as perpetrating, the act are principals. Under such circumstances, there is no room for questions of actual or constructive presence or absence; for, whether present or absent, all are principals. In such cases those aiding and abetting may be charged with aiding and abetting, but they are punished as principals. *United States v. Gooding*, 12 Wheat., 460.

§ 3041. Those guilty in the first degree are those who were actually present. Those guilty in the second degree are those so connected with the offense that they are constructively present. *United States v. Harries*,* 2 Bond, 311.

§ 3042. The third section of the penitentiary act for the District of Columbia, declaring "that every person duly convicted of the crime of maliciously, wilfully and fraudulently burning any dwelling-house, or any other house, barn or stable adjoining thereto, . . . or of wilfully and maliciously burning any of the public buildings in the cities, towns or counties of the District of Columbia, belonging to the United States, or the said cities, towns or counties, . . . or as being accessory thereto, shall be sentenced," etc., does not make any accessories in the misdemeanors described in the act, and the accessories in the misdemeanors described must be indicted as principals. *United States v. White*,* 5 Cr. C. C., 73.

§ 3043. — **trial of accessory.**— Where a person is charged as an accessory, he may be tried and convicted if the principal cannot be found. If the principal is acquitted on a count in the indictment involving the charge against the accessory, the latter must be discharged. *United States v. Crane*,* 4 McL., 317.

§ 3044. The conviction and sentence of a person in a circuit court for robbing the mail is most conclusive evidence in another circuit court against his accessory, that the crime of which the principal was convicted was committed by him. *United States v. Wood*,* 2 Wheeler, 325.

§ 3045. Where a principal cannot be punished for an act under any law, it seems that one merely aiding or abetting the act cannot be punished. *United States v. Libby*, 1 Woodb. & M., 231.

§ 3046. It seems that the plea of not guilty pleaded by an accessory puts in issue the charge against the principal as well as that against himself, and whether tried at the same time with the principal or subsequently, he may controvert the guilt of the principal as fully as the principal himself may do, even when the latter is separately indicted and tried by a separate jury. *United States v. Hartwell*, 3 Cliff., 238.

§ 3047. It seems that where principal and accessory are tried together the confessions of the former are admissible to prove his own guilt, and are evidence of that fact as against the latter. *Ibid.*

§ 3048. — **murder.**— The act of congress punishing murder does not embrace an accessory before the fact; and as the courts have no common law jurisdiction, an indictment charging the accused as an accessory before the fact cannot be sustained. *United States v. Ramsay*,* Hemp., 481.

§ 3049. When a murder is committed, all who are present, aiding, abetting and assailing, are equally guilty with him who gave the fatal stroke. An abettor of murder, in order to be a principal, must be present at the transaction. If he is absent he may be an accessory, but in treason all are principals, and one may be guilty of aiding and abetting though not present. *United States v. Hanway*, 2 Wall. Jr., 189 (§§ 1195-1201).

§ 3050. — **seamen.**— A seaman who aids and abets in confining the master of the ship is considered in law as a principal offender. If one seaman seizes and confines the master, and a second seizes the mate with a view to favor the attack upon the master, the second is equally guilty of confining the master. But otherwise if they are distinct affrays, arising from distinct causes. *United States v. Henry*,* 4 Wash., 428.

§ 3051. — **inciting another.**— Language addressed to persons who immediately afterwards commit a misdemeanor, actually intended by the speaker to incite those addressed to commit it, and adapted thus to incite them, is such a counseling or advising to the crime as the law contemplates, and the person so inciting others may be indicted as principal. Charge to Grand Jury, 2 Curt., 637.

§ 3052. — *testimony of accomplice.*—The testimony of accomplices is to be heard with suspicion, and if their testimony should be improbable or contradicted by circumstances or by other testimony, the jury may discredit it. But if all the circumstances of the case corroborate the testimony of an accomplice and are in fact merely connected by that testimony, the facts supplied by the accomplice are not to be disregarded. *United States v. Chapels*,* 2 Wheeler, 205.

§ 3053. Where an accomplice testifies for the prosecution and makes a full disclosure, he is entitled to a discharge; and it is not material that the person against whom he testified was acquitted. If the district attorney will not enter a *nolle prosequi*, the court will continue the case until a pardon can be applied for. *United States v. Lee*,* 4 McL., 103.

§ 3054. Though accomplices in a crime are competent witnesses, and though their testimony is to be considered by the jury, yet it is always to be received with extreme caution, and weighed and scrutinized with great care, and if unsupported should not be relied upon by the jury unless it produces in their minds the fullest and most positive conviction of its truth. *United States v. Babcock*,* 3 Dill., 590, 619.

§ 3055. It seems that where a criminal prosecution against a *particeps criminis* is *prima facie* barred by the statute of limitations, he may be compelled to testify in behalf of the government in a civil suit against one implicated with him, but after so testifying he cannot be prosecuted. *United States v. Smith*,* 4 Day (Conn.), 123.

XXXI. PUNISHMENT.

SUMMARY — *Executing death penalty by shooting.* §§ 3056, 3057; *power of the territories.* § 3058. — *Place of imprisonment.* § 3059. — *Hard labor a part of the punishment.* § 3060. — *Imprisonment outside of state in which conviction is had.* § 3061. — *No permission from state to use penitentiary.* § 3062. — *Jail removed by the state.* § 3063.

§ 3056. Punishment by shooting, as a mode of executing the death penalty for the crime of murder in the first degree, is not a cruel or an unusual punishment within the meaning of the eighth amendment. *Wilkerson v. Utah*, §§ 3064-67. See §§ 3084, 3096.

§ 3057. Under a law of a territory providing that every person guilty of murder in the first degree shall suffer death, taken in connection with a law making it the duty of the court authorized to pass sentence to determine and impose the punishment prescribed, and in connection with the fact that there is no other specific regulation as to the mode of executing such a sentence, the court has authority to sentence one convicted of murder in the first degree to be shot until he is dead. *Ibid.*

§ 3058. It was not the intention of congress that the act (R. S., sec. 5325) providing that the manner of inflicting the punishment of death shall be by hanging should supersede the power of the territories to legislate upon the subject. *Ibid.*

§ 3059. In all cases where a person is sentenced to confinement for longer than one year he may be imprisoned in a state penitentiary. *Ex parte Karstendick*, §§ 3068-71. See § 3073.

§ 3060. In all cases where the statute makes hard labor a part of the punishment for an offense it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment alone a federal court may, in its discretion, order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the place of confinement. *Ibid.* See § 3098.

§ 3061. The courts of the United States may order an offender imprisoned outside the state in which he is convicted if there is no suitable place for such confinement within the state, and its finding that there is no suitable place within the state is a finding on a question of fact, and cannot be reviewed by a court on *habeas corpus*. *Ibid.*

§ 3062. Though a person is confined by sentence of a federal court in a penitentiary of a state which has not given the federal government permission to use it for the confinement of its criminals, yet if the state permits a criminal to be confined there without objection, it is equivalent to such express permission, and the criminal cannot take advantage of the lack of it. *Ibid.*

§ 3063. A defendant was sentenced to be confined in a certain jail. Afterwards the jail was, by act of the state legislature, removed to another place and the prisoner was removed with it. *Held*, that he was properly imprisoned at the latter place, and that he had no right to be discharged therefrom on the ground that he was not confined in the place to which he was sentenced. *In re Hartwell*, § 3072.

[NOTES.— See §§ 3073-3102.]

WILKERSON v. UTAH.

(9 Otto, 130-137. 1878.)

ERROR to the Supreme Court of the Territory of Utah.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Duly organized territories are invested with legislative power, which extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. R. S., sec. 1851. Congress organized the territory of Utah on the 9th of September, 1850, and provided that the legislative power and authority of the territory shall be vested in the governor and legislative assembly. 9 Stat., 454.

Sufficient appears to show that the prisoner named in the record was legally charged with the wilful, malicious and premeditated murder of William Baxter, with malice aforethought, by indictment of the grand jury in due form of law, as fully set forth in the transcript; and that he, upon his arraignment, pleaded that he was not guilty of the alleged offense. Pursuant to the order of the court, a jury for the trial of the prisoner was duly impaneled and sworn; and it appears that the jury, after a full and fair trial, found, by their verdict, that the prisoner was guilty of murder in the first degree. Regular proceedings followed, and the record also shows that the presiding justice in open court sentenced the prisoner as follows: That "you be taken from hence to some place in this territory, where you shall be safely kept until Friday, the 14th day of December next; that between the hours of 10 o'clock in the forenoon and 3 o'clock in the afternoon of the last-named day you be taken from your place of confinement to some place within this district, and that you there be publicly shot until you are dead."

Proceedings in the court of original jurisdiction being ended, the prisoner sued out a writ of error and removed the cause into the supreme court of the territory, where the judgment of the subordinate court was affirmed. Final judgment having been rendered in the supreme court of the territory, the prisoner sued out the present writ of error, the act of congress providing that such a writ from this court to the supreme court of the territory will lie in criminal cases where the accused is sentenced to capital punishment or is convicted of bigamy or polygamy. 18 Stat., 254. Appended to the proceedings is the assignment of error imputed to the court below, which is repeated in the same words in the brief of his counsel filed since the case was removed into this court. No exception was taken to the proceedings in either court prior to the sentence, the assignment of error being that the court below erred in affirming the judgment of the court of original jurisdiction and in adjudging and sentencing the prisoner to be shot to death.

Murder, as defined by the compiled laws of the territory, is the unlawful killing of a human being with malice aforethought, and the provision is that such malice may be express or implied. Comp. Laws Utah, 1876, 585. Express malice is when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature, and it may be implied when there is no considerable provocation, or when the circumstances attending the killing show an abandoned or malignant heart. Criminal homicide, when perpetrated by a person lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any one of the offenses therein enumerated, and evidencing a depraved mind, regardless of human life, is murder in the first degree. Id., 586. Pro-

vision is also made that every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and that every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years. Comp. Laws Utah, 1876, 586.

Duly convicted of murder in the first degree as the prisoner was by the verdict of the jury, it is conceded that the existing law of the territory provides that he "shall suffer death;" nor is it denied that the antecedent law of the territory which was in force from March 6, 1852, to March 4, 1876, provided that "when any person shall be convicted of any crime the punishment of which is death, . . . he shall suffer death by being shot, hung or beheaded, as the court may direct," or as the convicted person may choose. Sess. Laws Utah, 1852, p. 61; Comp. Laws Utah, 1876, 564. When the Revised Penal Code went into operation, it is doubtless true that it repealed that provision, as section 400 provides that "all acts and parts of acts" heretofore passed "inconsistent with the provisions of this act be and the same are hereby repealed." Comp. Laws Utah, 651.

Assume that section 124 of the prior law is repealed by the Revised Penal Code, and it follows that the existing law of the territory provides that every person guilty of murder in the first degree shall suffer death, without any other statutory regulation as to the mode of executing the sentence than what is found in the following enactment of the Revised Penal Code. Section 10 provides that "the several sections of this code, which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence to determine and impose the punishment prescribed." Comp. Laws Utah, 1876, 567. Construed as that provision must be in connection with the enactment that every person guilty of murder in the first degree shall suffer death, and in view of the fact that the laws of the territory contain no other specific regulation as to the mode of executing such a sentence, the court here is of the opinion that the assignment of error shows no legal ground for reversing the judgment of the court below. Authority to pass such a sentence is certainly not possessed by the circuit courts of the United States, as the act of congress provides that the manner of inflicting the punishment of death shall be by hanging. R. S., sec. 5325.

§ 3064. *Powers of territorial legislatures.*

Punishments of the kind are always directed by the circuit courts to be inflicted in that manner, but organized territories are invested with legislative power which extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. By virtue of that power the legislative branch of the territory may define offenses and prescribe the punishment of the offenders, subject to the prohibition of the constitution that cruel and unusual punishments shall not be inflicted. Story, Const. (3d ed.), sec. 1903. Good reasons exist for supposing that congress never intended that the provision referred to, that the punishment of death shall be by hanging, should supersede the power of the territories to legislate upon the subject, as the congressional provision is a part of the first crimes act ever passed by the national legislature. 1 Stat., 114. Different statutory regulations existed in the territory for nearly a quarter of a century, and the usages of the army to the present day are that sentences of the kind may in certain cases be executed by shooting, and in others by hanging. Offenses of various kinds are defined

in the rules and articles of war where the offender, if duly convicted, may be sentenced to the death penalty. In some of those cases the provision is that the accused, if convicted, shall suffer death, and in others the punishment to be awarded depends upon the finding of the court-martial; but in none of those cases is the mode of putting to death prescribed in the articles of war or the military regulations. Article 96 provides that no person shall be sentenced to suffer death except by the concurrence of two-thirds of the members of a general court-martial, and in the cases specified in the rules and articles enacted by congress. R. S., p. 238.

§ 3065. *Modes of capital punishment prescribed by military law.*

Repeated instances occur where the death penalty is prescribed in those articles; but the invariable enactment is that the person guilty of the offense shall suffer death, without any specification as to the mode in which the sentence shall be executed, and the regulations of the army are as silent in that respect as the rules and articles of war. Congress having made no regulations in that regard, the custom of war, says a learned writer upon the subject, has, in the absence of statutory law, determined that capital punishment be inflicted by shooting or hanging; and the same author adds to the effect that mutiny, meaning mutiny not resulting in loss of life, desertion, or other military crime, if a capital offense, is commonly punished by shooting; that a spy is always hanged, and that mutiny, if accompanied by loss of life, is punished in the same manner,—that is, by hanging. Benet, Courts-Martial (5th ed.), 163.

Military laws, says another learned author, do not say how a criminal offending against such laws shall be put to death, but leave it entirely to the custom of war; and his statement is that shooting or hanging is the method determined by such custom. DeHart, Courts-Martial, 196. Like the preceding author, he also proceeds to state that a spy is generally hanged, and that mutiny unaccompanied with loss of life is punished by the same means; and he also concurs with Benet, that desertion, disobedience of orders, or other capital crimes are usually punished by shooting, adding that the mode in all cases, that is, either shooting or hanging, may be declared in the sentence. Corresponding rules prevail in other countries, of which the following authorities will afford sufficient proof: Simmons, Courts-Martial (5th ed.), sec. 645; Griffith, Military Law, 86. Capital punishment, says the author first named, may be by either shooting or hanging. For mutiny, desertion or other military crime it is commonly by shooting; for murder not combined with mutiny, for treason, and piracy accompanied with wounding or attempt to murder, by hanging, as the sentence in England must accord with the law of the country in regard to the punishment of offenders. Exactly the same views are expressed by the other writer, which need not be reproduced.

§ 3066. *Capital punishment by shooting is not a cruel or unusual punishment, within the terms of the constitution.*

Cruel and unusual punishments are forbidden by the constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment. Soldiers convicted of desertion or other capital military offenses are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fullness by the writers upon the subject of courts-martial. Simmons, secs. 759, 760; DeHart, pp. 247, 248. Where the conviction is in the civil tribunals, the rule of the common law was that the

sentence or judgment must be pronounced or rendered by the court in which the prisoner was tried or finally condemned, and the rule was universal that it must be such as is annexed to the crime by law. Of these, says Blackstone, some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead. 4 Bl. Com., 377.

Such is the general statement of that commentator, but he admits that in very atrocious crimes other circumstances of terror, pain or disgrace were sometimes superadded. Cases mentioned by the author are, where the prisoner was drawn or dragged to the place of execution, in treason; or where he was emboweled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female. History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect. Examples of such legislation in the early history of the parent country are given by the annotator of the last edition of Archbold's Treatise. Archb. Cr. Pr. and Pl. (8th ed.), 584. Many instances, says Chitty, have arisen in which the ignominious or more painful parts of the punishment of high treason have been remitted, until the result appears to be that the king, though he cannot vary the sentence so as to aggravate the punishment, may mitigate or remit a part of its severity. 1 Chitt. Cr. L., 787; 1 Hale, P. C., 370.

Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the constitution. Cooley, Const. Lim. (4th ed.), 408; Whart. Cr. L. (7th ed.), sec. 3405. Concede all that, and still it by no means follows that the sentence of the court in this case falls within that category, or that the supreme court of the territory erred in affirming the judgment of the court of original jurisdiction. Antecedent to the enactment of the code which went into operation March 4, 1876, the statute of the territory passed March 6, 1852, provided that when any person was convicted of any capital offense he shall suffer death by being shot, hanged or beheaded, as the court may direct, subject to the qualification therein expressed, to the effect that the person condemned might have his option as to the manner of his execution, the meaning of which qualification, as construed, was that the option was limited to the modes prescribed in the statute, and that if it was not exercised the direction must be given by the court passing the sentence.

Nothing of the kind is contained in the existing code, and the legislature in dropping the provision as to the option failed to enact any specific regulation as to the mode of executing the death penalty. Instead of that, the explicit enactment is that every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court. Beyond all question, the first clause of the provision is applicable in this case, as the jury gave no such recommendation as that recited in the second clause, the record showing that their verdict was unconditional and absolute, from which it follows that the sentence that the prisoner shall suffer death is legally correct. Comp. Laws Utah, 1876, p. 586.

Had the statute prescribed the mode of executing the sentence, it would have been the duty of the court to follow it, unless the punishment to be inflicted was cruel and unusual, within the meaning of the eighth amendment to the constitution, which is not pretended by the counsel of the prisoner. Statutory directions being given that the prisoner when duly convicted shall suffer death, without any statutory regulation specifically pointing out the mode of executing the command of the law, it must be that the duty is devolved upon the court authorized to pass the sentence to determine the mode of execution and to impose the sentence prescribed. *Id.*, p. 567. Persons guilty of murder in the first degree "shall suffer death" are the words of the territorial statute; and when that provision is construed in connection with section 10 of the code previously referred to, it is clear that it is made obligatory upon the court to prescribe the mode of executing the sentence of death which the code imposes where the conviction is for murder in the first degree, subject, of course, to the constitutional prohibition, that cruel and unusual punishment shall not be inflicted.

§ 3067. *Modes of punishment at common law.*

Other modes besides hanging were sometimes resorted to at common law, nor did the common law in terms require the court in passing the sentence either to prescribe the mode of execution or to fix the time or place for carrying it into effect, as is frequently if not always done in the federal circuit courts. At common law, neither the mode of executing the prisoner nor the time or place of execution was necessarily embodied in the sentence. Directions in regard to the former were usually given by the judge in the calendar of capital cases prepared by the clerk at the close of the term; as, for example, in the case of murder, the direction was "let him be hanged by the neck," which calendar was signed by the judge and clerk, and constituted in many cases the only authority of the officer as to the mode of execution. 4 Bl. Com., 404; Bishop, Cr. Proc. (2d ed.), secs. 1146-1148; Bishop, Cr. L. (6th ed.), sec. 935. Reference is made to the cases of *Hartung v. The People*, 22 N. Y., 95; *The People v. Hartung*, 23 How. Pr. (N. Y.), 314; S. C., 26 id., 154; and 28 id., 400, as supporting the theory of the prisoner that the court possessed no authority to prescribe the mode of execution; but the court here is entirely of a different opinion, for the reasons already given.

Judgment affirmed.

EX PARTE KARSTENDICK.

(8 Otto, 396-405. 1876.)

PETITION for *Habeas Corpus*.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—Karstendick, the petitioner, was indicted for a conspiracy, and convicted May 1, 1876, in the circuit court of the United States for the district of Louisiana, under section 5440 of the Revised Statutes. The punishment for his offense, prescribed by the statute, is a penalty of not less than \$1,000 nor more than \$10,000, and imprisonment not more than two years. The sentence, as passed by the court, so far as it is material to the present inquiry, is as follows: "And, it having been in due form determined and ascertained that there is no penitentiary within the district of Louisiana, suitable for the confinement of persons convicted of crime in the courts of the United States, in said district of Louisiana, and the attorney-general of the United

States having, in due form, and by and with competent authority, designated the penitentiary at Moundsville, in West Virginia, as the place of confinement, subsistence and employment of all persons convicted, or who may hereafter be convicted, by the courts of the United States, of crime against the United States of America, in said district of Louisiana, and such designation having been in due form notified to the court and entered upon the record thereof, . . . it is considered, by reason of the verdict herein, . . . that the said Otto H. Karstendick be confined in the penitentiary of the state of West Virginia, at Moundsville in said state, for and during the full period of sixteen calendar months from and after this day, and that he do also further pay a fine of \$2,000," etc.

In execution of this sentence, Karstendick is now imprisoned in the penitentiary at Moundsville, and he seeks through this application to obtain a discharge, alleging for cause that the order of the court for his imprisonment in a penitentiary, and without the state of Louisiana, is not authorized by law, and consequently void.

§ 3068. *The laws and regulations under which persons convicted of crimes against the United States are imprisoned in the penitentiaries and other prisons of the states.*

Section 5440 of the Revised Statutes is a reproduction of section 30 of an act of congress, passed March 2, 1867, "to amend existing laws relating to internal revenue, and for other purposes." 14 Stat., 484. At that time another act, passed March 3, 1865, "regulating proceedings in criminal cases, and for other purposes," was in force, which provided, in section 3, that "in every case where any person convicted of any offense against the United States shall be sentenced to imprisonment for a period longer than one year, it shall be lawful for the court, by which the sentence is passed, to order the same to be executed in any state prison or penitentiary within the district or state where such court is held, the use of which prison or penitentiary is allowed by the legislature of such state for such purposes." 13 Stat. 500. This provision is also reproduced in section 5541 of the Revised Statutes, save only that the words "state jail" are substituted for the words "state prison," where they occur in the original act.

As early as 1834 congress enacted that, whenever any criminal convicted of any offense against the United States shall be imprisoned in pursuance of such conviction, or of the sentence thereupon, in the prison or penitentiary of any state or territory, such criminal shall, in all respects, be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such prison or penitentiary is situated, and, while so confined in such prison, shall also be exclusively under the control of the officers having charge of the same, under the laws of such state or territory. 4 Stat., 739. This provision is re-enacted in section 5539 of the Revised Statutes, the word "jail," however, being substituted in the revision for "prison," where it occurs in the original. All these several statutes, being *in pari materia*, were, when in force before the revision, to be construed together. The same is true of the corresponding revised sections, and, under this rule, the same effect must be given to section 5440 that it would have if it read as follows: "All the parties to such a conspiracy shall be liable to a penalty of not less than \$1,000 and not more than \$10,000, and to imprisonment not more than two years." Sec. 5440. If the sentence of imprisonment shall be for a longer term than one year, the court passing the same may order it to be executed in any state jail or penitentiary within the district or state where said court is held (sec.

5541), and the criminal so imprisoned shall, in all respects, be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such jail or penitentiary is situated, and shall, while so confined therein, be exclusively under the control of the officers having charge of the same under the laws of the state. Sec. 5539.

§ 3069. *The rule as to imprisonment with or without hard labor.*

This language is explicit, and, taken by itself, is certainly sufficient to authorize imprisonment in a penitentiary, at the discretion of the court, in all cases where the sentence is for a longer term than one year. But the counsel for the petitioner, in their argument, refer to other sections of the statute, which in terms provide for punishment by imprisonment at hard labor, and they seek to confine the power of imprisonment in a penitentiary to such cases; because, as they claim, imprisonment in a penitentiary necessarily implies imprisonment at hard labor; and where the punishment provided for by the statute is imprisonment alone, a sentence to confinement at a place where hard labor is imposed as a consequence of the imprisonment is in excess of the power conferred. We have not been able to arrive at this conclusion. In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases. Thus, a wider range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever-varying circumstances of the cases which come before them. If the offense is flagrant, the penitentiary, with its discipline, may be called into requisition; but if slight, a corresponding punishment may be inflicted within the general range of the law.

This view of the case is strengthened by a further examination of the legislation upon this subject. As early as 1825, in an "Act more effectually to provide for the punishment of crimes against the United States, and for other purposes" (4 Stat., 118), it was enacted (sec. 15) that "in every case where any criminal convicted of any offense against the United States shall be sentenced to imprisonment and confinement at hard labor, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any state prison or penitentiary within the district or state where such court is holden, the use of which prison or penitentiary may be allowed or granted by the legislature of such state for such purposes." With this statute in force, the act of 1865, which has already been referred to, was passed, giving the same power in nearly the same words, where the punishment was by imprisonment for a longer term than one year, without any special requirement as to hard labor.

These two acts are separately re-enacted in the Revised Statutes. The act of 1825 is reproduced in section 5542, and that of 1865 in section 5541, the language of the two original acts being substantially retained in the revision. With this legislation in full force, it is impossible to believe that it was the intention of congress to confine imprisonment in penitentiaries exclusively to cases in which hard labor is in express terms made by statute a part of the punishment. Without extending the argument further upon this branch of the case, we are clearly of the opinion that the order of the court directing the imprisonment in a penitentiary is not void. It still remains to consider whether that part of the sentence which directed that the imprisonment should be in the penitentiary at Moundsville can be sustained.

§ 3070. *Power of congress to provide for confinement of convicts. Those convicted in one state may be imprisoned in another.*

It is conceded that congress has the power to provide that persons convicted of crimes against the United States in one state may be imprisoned in another. Congress can cause a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there; or it may arrange with a single state for the use of its prisons, and require the courts of the United States to execute their sentences of imprisonment in them. All this is left to the discretion of the legislative department of the government, and is beyond the control of the courts. Acting under this power, congress, while recognizing as a rule the propriety of sentencing those convicted of crime against the United States to imprisonment in the jails or prisons of the state where their conviction was had, did, in 1864, to meet contingencies that might arise, enact that "all persons who have been, or may hereafter be, convicted of crime by any court of the United States, not military, the punishment whereof shall be imprisonment in a district or territory where at the time of such conviction there may be no penitentiary or other prison suitable for the confinement of convicts of the United States, or available therefor, shall be confined, during the term for which they may have been or may be sentenced, in some suitable prison, in a convenient state or territory to be designated by the secretary of the interior." 13 Stat., 74. In 1872 the power of designating was transferred to the attorney-general. This provision is also re-enacted in section 5546 of the Revised Statutes, the word "jail" being substituted for "other prison," and "suitable jail or penitentiary" for "suitable prison," in the original act. This section is to be construed in connection with the other sections which have been referred to. In fact, it may be treated as a proviso to sections 5541 and 5542.

The counsel for the petitioner do not dispute the validity of this legislation; but they claim that in this case the conditions precedent to the execution of the sentence in a prison outside of the state have not been complied with, and consequently that the case is not brought within the power of the court to make such an order. It is first insisted, that, as the state of Louisiana permits the use of its jails and penitentiaries for the punishment of criminals convicted in the courts of the United States, the sentences of imprisonment by those courts cannot be executed elsewhere. It is not enough that the jails and penitentiaries of the state may be used; they must also be suitable. Whether suitable or not is a question of fact. In this case, the court passing the sentence has determined this question, and found that in the state of Louisiana there was no penitentiary suitable for the confinement of persons convicted of crime against the United States. This finding is conclusive until reversed, and it cannot be reviewed in this form of proceeding. To justify a discharge, under any writ to be issued upon this application, it must appear upon the face of the record that the order of commitment was void.

The court also decided, that, under the circumstances of this case, the punishment should be by imprisonment in a penitentiary. This made it necessary to ascertain whether any penitentiary outside the state had been designated by the attorney-general of the United States for use when that in the state was found to be unsuitable. As to this, the record shows that, on the 1st day of April, 1876, the attorney-general addressed the following communication to the United States attorney at Louisiana: "Under the authority granted by section

5546 of the Revised Statutes of the United States, I designate the penitentiary at Moundsville, in West Virginia, as the place for the confinement, subsistence and employment of all persons convicted, by the courts of the United States for the district of Louisiana, of crime against the United States, and sentenced by said courts to imprisonment longer than one year, on and after this instant. You will bring this designation to the notice of the courts, and have this order entered, if possible, on the records."

This action of the attorney-general was brought to the attention of the circuit court, and the desired entry made. This, as it seems to us, is clearly a designation under the statute, and we are unable to agree with the counsel for the petitioner in the opinion that it applies only to persons under conviction and sentence at the time the order was issued. It is true the language is, "all persons convicted . . . and sentenced;" and that certainly includes persons already convicted, but it does not necessarily exclude persons thereafter to be convicted. The statute makes it the duty of the attorney-general to designate other places of confinement, whenever the jails or penitentiaries of a state are unsuitable or unavailable. That it was his intention to act in reference to future convictions as well as to past is evident from the form of his communication, which is not addressed to, or, so far as appears, intended for, the marshal of the district, but to the attorney of the United States, for the purpose of being brought by him to the attention of the courts. An order from the attorney-general to the marshal was all that was necessary to effect a removal after sentence passed. No action of the courts was required. A notification to the courts was, therefore, only necessary for the purpose of influencing their conduct in the future. A sentence in this case for imprisonment in a state penitentiary would not have been void, but it might not have prevented the attorney-general, acting under the statute, from directing a removal of the convict to some penitentiary outside of the state. Until such removal, the imprisonment in Louisiana would have been good. But if the court finds that the state penitentiary is unsuitable in fact, and the attorney-general has designated another for use on that account, we can see no reason why the court may not sentence the person convicted to imprisonment at the place designated. Suppose there had been no penitentiary at all in the state, and under the law the attorney-general had made his designation, would it for a moment be doubted that a sentence to imprisonment at the designated place would be good? But if a penitentiary is unsuitable within the meaning of the statute, how is the case different in principle from what it would be if there were none? The order of the attorney-general is equivalent to a finding by him that the penitentiary of the state was unsuitable or unavailable for the confinement of criminals convicted under the laws of the United States; and when this action of the attorney-general is supplemented by a finding of the same fact by the court, it seems to us to be as much within the power of the court to order the imprisonment at Moundsville, as it would have been if there had been no penitentiary at all in Louisiana. It certainly could not have been contemplated that the courts must in all cases sentence to confinement in the state where the conviction was had, without regard to the fact whether it could be executed there or not, and that the sole power of directing the sentence to be executed in another state was vested in the attorney-general. That is neither within the letter nor the spirit of the statute. The sole power of designation is in the attorney-general; but when he has designated, if the facts which authorize the change of place exist, it is as much within the power of the court to order

its sentence to be executed at the designated place, as to determine which of two prisons in a state, equally suitable and equally available for the punishment to be inflicted, shall be employed for that purpose. The policy of the law is to avoid circuity of action, and to permit the courts to do directly, as far as possible, all that they may do indirectly.

Neither is it an objection to the order, as made, that the designation of the attorney-general is of a penitentiary alone. If the sentence of the court had been imprisonment in a jail, and the jails of the state of Louisiana had been found unavailable or unsuitable, a designation of some jail outside of the state might have been necessary before the court could have ordered a confinement outside of the state. But here the sentence is for imprisonment in a penitentiary; and as to that, as has been seen, there was a sufficient designation.

§ 3071. *The fact that a state has not consented to the use of its penitentiary by the United States does not render a commitment to such penitentiary void.*

It is further insisted, on behalf of the petitioner, that the legislature of the state of West Virginia has not given its consent to the use of the penitentiary of the state by the United States for the punishment of their criminals, and that for this reason the order for his confinement there is void. The petitioner is actually confined in the penitentiary, and neither the state nor its officers object. Congress has authorized imprisonment, as a punishment for crimes against the United States, in the state prisons. So far as the United States can do so, they have made the penitentiary at Moundsville a penitentiary of the United States, and the state officers having charge of it their agents to enforce the sentences of imprisonment passed by their courts. The question is not now whether the state shall submit to this use of its property by the United States, nor whether these state officers shall be compelled to act as the custodians of those confined there under the authority of the United States, but whether this petitioner can object if they do not. We think he cannot. So long as the state permits him to remain in its prison as the prisoner of the United States, and does not object to his detention by its officers, he is rightfully detained in custody under a sentence lawfully passed.

Neither do we think the objection tenable, that there can be no imprisonment in a penitentiary outside of Louisiana, if there are within that state jails that are both suitable and available. It is for the court to determine whether the imprisonment shall be in a jail or a penitentiary. If in a penitentiary, then a penitentiary must be found inside of the state suitable and available, in order that the sentence to be pronounced may be executed there. If there is none, resort may be had to those of another state. Imprisonment need not necessarily be ordered in a jail because the penitentiary of the state is unsuitable.

As the whole record is before us, and the case has been fully argued upon the merits, the writ is denied.

IN RE HARTWELL.

(Circuit Court for Massachusetts: 1 Lowell, 536-539. 1871.)

STATEMENT OF FACTS.—Hartwell was convicted of crime and sentenced to pay a fine and to be imprisoned in a jail at Lenox for five years. The *mittimus* was in terms pursuant to the sentence. Afterwards the jail at Lenox was removed to Pittsfield, and the prisoner was carried thither. The petition was for a writ of *habeas corpus* and for a discharge.

Opinion by LOWELL, J.

The able and learned argument for the petitioner, in which all the statutes

bearing upon the subject, and such decisions as seem applicable, have been carefully collected, is that the further execution of the sentence has become impossible, by the lawful discontinuance of the jail in which the petitioner was directed to be confined; that neither the sentence nor the execution thereof can now be varied, because the power of the court over the case was gone when the *mittimus* was served, or, at latest, when the term ended at which the sentence was passed; and the authority of the marshal was exhausted when he delivered the relator to the state officer; and, as a consequence of these premises, that he must now be discharged. I am inclined to think that neither the court nor the marshal has any further control over this sentence. When the petitioner was committed to the keeper of the jail the marshal had fully executed his warrant, and thenceforward the respondent alone became responsible for the safe-keeping of the prisoner. *Randolph v. Donaldson*, 9 Cranch, 76. And the court cannot now, perhaps, reform or change the sentence. *Commonwealth v. Weymouth*, 2 Allen, 144.

§ 3072. *A prisoner sentenced to confinement in the jail of Berkshire county at Lenox can be lawfully imprisoned in the jail of that county at Pittsfield.*

The sentence is in the form long used in the circuit court. In the district court it has been usual to name the jail simply, without adding the county; as, "the jail at Dedham, in said district." I do not, however, see any difference in their legal meaning. The sentence is to imprisonment in a certain jail, whether the county be named or not. Now, the argument is, that a sentence to one jail cannot be executed in another. The commitment, indeed, as was well argued by the district attorney, is to the keeper of the jail. *Rex v. Fell*, 1 Ld. Raym., 424. The mere fact, however, that the keeper of that jail happens to be keeper of other jails, would not of itself give him the right to keep the prisoner in any of his jails, at his discretion. The decision of this case must depend on the sentence rather than on the commitment, and the sentence was to the jail at Lenox. Has, then, the further execution of the sentence become impossible by the act of the legislature of Massachusetts? I think not. The law of the state necessarily controls all matters pertaining to the care, custody and safe-keeping of the prisoners. When the statutes of Massachusetts authorize the removal of prisoners in case of disease, contagion or fire, as in Gen. Stats., ch. 26, § 25, and ch. 178, §§ 48, 49, or to remove prisoners from one jail to another within the same county, as in ch. 178, § 2, it would seem that the sentence of the federal court must be construed as including that power and authority, and that it would not need an act of congress to ratify a removal of a prisoner of the United States when the occasion should arise. The state, indeed, cannot regulate the term of imprisonment, directly or indirectly, as by laws for discharging poor convicts detained for fines only, or shortening terms for good behavior, and the like; but, so far as the keeping is concerned, the laws of the state are to govern. It is somewhat doubtful whether a general act of congress could confer authority on a state or its officers to remove prisoners in certain contingencies. If not, there must be a special act of congress in each case, or an authority to some federal officer to act in concurrence with the authorities of the state. I suppose the sheriff, as keeper of the jail, has power, at common law, to remove prisoners to another jail, in case of fire, contagion or other necessity. See, as to persons committed for trial, *Bac. Abr.*, Gaol and Gaoler (C).

Another of the incidental powers conferred on the keeper of the jail, and implied in the sentence, is, that, if the jail is lawfully removed, he shall remove

the prisoners with it. The sentence need not recite that the keeper is to hold the prisoner at the jail in Lenox unless and until there shall be some lawful occasion or necessity to remove him therefrom. All this is implied. I do not consider a sentence to the jail in Lenox to be different in legal intentment from one to the jail of the county of Berkshire, situated at Lenox. If there had been two jails in that county, a designation of one in particular would have been necessary, or at least convenient, but the legal effect would have been the same. It was not intended to point out a particular building, but a particular jail, and the argument would be equally strong for the petitioner if a new jail had been built at Lenox. The jail has been removed by the only authority that could remove it, and under statutes already passed when this sentence was pronounced. All the prisoners were lawfully removed with the jail, though the statute of Massachusetts says nothing about them. 1 Whart. R., 439, 445.

The prisoner must be remanded for three reasons: 1. The jail to which he was sentenced is the same in which he is now confined, though the building is different; 2. If not, and that jail has been destroyed, the keeper of the jail has a right to confine his prisoner in a substituted jail; 3. The state has a right to regulate the custody of prisoners within the state, including their removal from one jail to another, when necessary, and of this necessity the state, acting by its legislature, is the sole judge. The first point is entirely clear to my mind, and sufficient for the decision of the case.

Prisoner remanded.

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§ 3073. Place of confinement.—Where for over thirty years federal prisoners have been confined on sentence in the penitentiaries of a state, it is immaterial whether such use has been sanctioned by the legislature by express enactment, so far as a federal prisoner confined therein is concerned. *Ex parte Geary*, * 2 Biss., 485. See § 3059.

§ 3074. Under the third section of the act of March 3, 1863, a federal court has no right to order that a person sentenced to imprisonment for a year or less be confined in any particular state prison or penitentiary. And an order that a person sentenced for a year be imprisoned at Blackwell's Island is proper. *In re De Puy*, * 3 Ben., 307.

§ 3075. A person, on conviction, was ordered to be confined for a year on Blackwell's Island. *Held*, that he was properly delivered to the keeper of the Blackwell's Island penitentiary, whether by virtue of the order of court, or by rule of court providing that in cases of which his was one the person convicted should be confined in one of the prisons within the city and county of New York. *Ibid*.

§ 3076. When a person is sentenced by a federal court to confinement in a state penitentiary, he is subject to the same discipline and treatment as prisoners of the state. So where a person is sentenced to the state prison of Illinois, he is subject to hard labor the same as state prisoners. *Ex parte Geary*, * 2 Biss., 485; *In re De Puy*, * 3 Ben., 323.

§ 3077. When a federal court sentences a party to imprisonment it can be executed in any place where, by the authority or permission of the state, the prisoner can be received and detained, and unless the law prescribes in what particular place the punishment of an offense shall be executed, the court has power to order that it be in a county jail or in a state penitentiary, or that part of it be executed in one and part in the other. *Ex parte Geary*, * 2 Biss., 485.

§ 3078. Section 15 of the act of March 3, 1825 (4 Stat. at L., 118), and the third section of the act of March 3, 1865 (13 Stat. at L., 500), relating to the place of imprisonment of persons convicted of offenses against the United States, are declaratory merely, and the courts had authority to act in the matter independently thereof. *Ibid*.

§ 3079. If a state refuses to admit to the custody of its penitentiary a person convicted in such state of an offense against the United States, the judge of the district in which the party is convicted is authorized by the act of March 3, 1821, to hire a convenient place to serve as a jail, and to make necessary provision for the safe-keeping of such prisoner, or he may, under the act of March 3, 1829, confine the prisoner in the penitentiary of the District of Columbia. *Confinement of Convicts*, * 7 Op. Att'y Gen'l, 615.

§ 3080. Perjury.—Upon a conviction of perjury the court inflicted the punishment of fine, imprisonment, and to stand one hour in the pillory. *United States v. Snow*, 1 Cr. C. C., 123.

§ 3081. Contempt.—When a contempt consists of a violation of the order of a court, and is a contempt not committed in its presence, and the statute does not prescribe the form of the order of commitment, the defendant may be imprisoned until he be discharged by the court, or until the further order of the court. *In re Allen*, 13 Blatch., 275.

§ 3082. Riot.—Imprisonment is not a necessary part of the punishment for a riot at common law. *United States v. McFarlane*,* 1 Cr. C. C., 163.

§ 3083. Common law offense.—Where a statute merely alters the punishment of a common law offense, the statutory punishment may be inflicted, although the indictment does not conclude *contra formam statuti*. *United States v. Norris*,* 1 Cr. C. C., 411.

§ 3084. Cruel and excessive.—A fine of \$50 and imprisonment at hard labor in the house of correction for three months, for the offense of maintaining and keeping, without a license, a tenement for the illegal sale and illegal keeping of intoxicating liquors, is not cruel, or excessive, or unusual. *Pervear v. The Commonwealth*, 5 Wall., 475. See § 3056.

§ 3085. Changed by statute.—If a new statute provides a milder punishment than was before imposed for the same offense, it repeals so much of the old law as concerns the punishment. *People v. Sponsler*,* 1 Dak. T'y, 289.

§ 3086. Second offense while under sentence.—Where a person is convicted of a second offense while under sentence in the penitentiary for the first, his sentence of imprisonment may be made to commence from the expiration of the term for which he already stands committed. *United States v. Farrell*,* 5 Cr. C. C., 311.

§ 3087. Going aboard a vessel about to arrive.—Section 62 of the shipping act of June 7, 1872, as to going on board of a vessel about to arrive, creates a criminal offense against the United States, punishable by means of an indictment and conviction, and, upon such conviction, by the effect of sections 62 and 64 taken together, a penalty not exceeding \$200 is imposed by the court, and the offender may be imprisoned until payment thereof, not exceeding six months. *United States v. Anderson*,* 10 Blatch., 226.

§ 3088. Procuring exemption of drafted person.—The act of February 24, 1864, section 21, punishing any person who, by fraud procures the exemption of a drafted person, declares that he shall, on conviction, "be punished by imprisonment for the period for which the party was drafted." This statute contemplates a definite period of penal imprisonment, and does not leave the court any discretion in regard to its duration. Section 11 of the act of March 8, 1863, the law then governing the time of service of drafted men, provides that all persons duly enrolled "shall be subject, for two years after the first day of July succeeding the enrollment, to be called into the military service of the United States, and to continue in service during the present rebellion, not, however, exceeding the term of three years." On a conviction for this offense, it was held by the court that the imprisonment could not be fixed at three years, because the rebellion might not last so long; and that it could not be imposed to last during the existence of the rebellion, as that would be an uncertain term of imprisonment, and, as the statute left the court without discretion in the matter, the indictment must be quashed. *United States v. McCarty*,* 1 Woolw., 93.

§ 3089. Commutation.—Where the law of the state in which a prisoner is imprisoned provides a system of commutation for state prisoners, the act of March 3, 1875, does not apply; and this, although the applicant is confined in a jail, and the state law provides no commutation for persons so imprisoned. *United States v. Schroeder*,* 14 Blatch., 344.

§ 3090. But the applicant, in such case, is entitled to the benefit of section 5543 of the Revised Statutes, although the jail in which he is confined is a county or city jail, and not supported by the state at large. *Ibid*.

§ 3091. Guilty under several counts.—Section 3169 of the Revised Statutes provides that every officer or agent appointed and acting under the authority of any revenue laws of the United States, who having knowledge or information of the violation of any revenue law by any person, or of fraud by any person against the United States, and failing to report in writing such knowledge or information to his next superior officer, and to the commissioner of internal revenue, shall be dismissed from office, and shall be held to be guilty of a misdemeanor, and shall be fined, etc., and imprisoned, etc. The defendant, a collector, pleaded guilty to five counts in one indictment under the above section, each charging him with having knowledge or information of frauds committed by a separate and distinct person, and of failing to report. The court held (wishing the ruling not to be considered as concluding the question, as it was made without argument of counsel and inquiry by the court) that, notwithstanding section 1024, Revised Statutes, declaring that "when there are several charges against any person for the same act or transaction connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts," there should be but one judgment entered, and sentenced the prisoner to the maximum punishment for a single offense, leaving the question whether there could be more than

one judgment, and whether one judgment could exceed the maximum punishment for a single offense, open for further consideration. *United States v. Maguire*,* 3 Cent. L. J., 273.

§ 3092. Section 5467 of the Revised Statutes, having intended to make the act of taking a sack from the mail, and abstracting its contents, two separate and distinct offenses, although done by the same person and at the same time, the court will take this fact into consideration in fixing the punishment of one convicted of both offenses, and will impose the punishment incurred by each. *United States v. Harmison*,* 3 Saw., 556.

§ 3093. An indictment charged in the first count that the defendant broke into a certain postoffice to commit larceny; in the second, that he stole a letter therefrom containing \$750; in the third, that he broke into another postoffice to commit larceny; and in the fourth, that he stole therefrom letters containing \$157. The defendant pleaded guilty generally, and was sentenced to imprisonment for two years on each count, one term commencing at the expiration of another. At the end of two years he applied for a discharge on *habeas corpus*, on the ground that the court could not pass cumulative sentences. *Hehl*, that having failed to object to the joinder of offenses in the indictment, and as the indictment set forth two offenses at least, the sentence was at least good for four years. *In re Peters*,* 4 Dill., 169.

§ 3094. **Assault—Standing of parties.**—In fixing the punishment upon a conviction for assault and battery, the court may consider the station in life of the parties. *United States v. Houston*,* 4 Cr. C. C., 261.

§ 3095. **Mitigating circumstances.**—Where the court has a discretion as to the extent of punishment to be inflicted on a party, it may hear evidence of any circumstances which may properly be taken into view, either in mitigation or aggravation of such punishment. *United States v. Harmison*,* 3 Saw., 556.

§ 3096. **Capital punishment.**—The eighth section of the act of 1790, providing that if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, such offender shall be deemed a pirate and a felon and shall suffer death, does not include those offenses, when committed in the Indian country attached to the state of Missouri. Nor is such Indian country within the exclusive jurisdiction of the United States. Robbery, therefore, when committed in such Indian country is not punishable with death, but as larceny only. Charge to Grand Jury,* 1 West. L. J., 245. See § 3056.

§ 3097. **Offenses in places ceded to United States.**—The act of March 3, 1825, which provides "that if any offense shall be committed in any of the places aforesaid (referring to places ceded to the United States), the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon conviction in any court of the United States having cognizance thereof, be liable to, and receive, the same punishment as the laws of the state in which such fort, dock-yard, . . . or other place ceded as aforesaid is situated provide for the like offense, when committed within the body of any county of such state," must be restricted to such places as were ceded to the United States at or before that time. *United States v. Barney*,* 5 Blatch., 294.

§ 3098. **At hard labor—Modified.**—A person having been sentenced to imprisonment at hard labor in a case in which the statute simply provided that the offense should be punished by imprisonment, the supreme court, on writ of error, ordered the sentence set aside and a new sentence pronounced in conformity to the statute. *Reynolds v. United States*, 8 Otto, 145 (§§ 854-865). See § 3060.

§ 3099. **Province of jury.**—It is error to refuse to allow the jury to fix the punishment, under the act of December, 1871, of Wyoming Territory, providing that when the punishment of any crime is discretionary as to amount or extent, the jury may determine the same. This act is not contrary to the organic act—vesting the judicial power in the courts. *Hamilton v. Wyoming Territory*,* 1 Wyom. Tt., 131.

§ 3100. Where an act provides that an offense shall be punished by imprisonment and amercement at the discretion of the jury, imprisonment is a necessary part of the punishment, and the jury are to determine both the fine and the imprisonment. *United States v. Aubrey*,* 1 Cr. C. C., 185.

§ 3101. **In District of Columbia.**—Authority is not given to the corporation of Washington, by any of its charters or the amendments thereof, directly to punish a free person corporally, for violation of its by-laws. They can only impose fines, penalties and forfeitures for the breach of their ordinances, to be recovered as debts. *Ex parte Reed*,* 4 Cr. C. C., 582.

§ 3102. On a conviction for bigamy in Washington county, D. C., burning in the hand may be dispensed with. *United States v. Jennegen*,* 4 Cr. C. C., 118.

XXXII. INSANITY.

SUMMARY — *What persons not liable for their acts, §§ 3103, 3110, 3118. — Burden of proof, §§ 3104, 3117, 3121. — Reasonable doubt, § 3105. — Act must be shown to proceed from diseased condition of mind, § 3106. — Not inferred from insanity of ancestors, 3107. — Not inferred from the commission of a criminal act, nor from the nature of the act, § 3108. — Insane delusion, § 3109. — Peculiarities and delusions prior to the criminal act, § 3110. — Belief that the act was a political necessity, § 3111. — Belief in inspiration, § 3112. — Moral indifference or insensibility to the distinctions between right and wrong, § 3113. — Testimony of experts; question for the jury, §§ 3114, 3119. — Fact of insanity before or after the act, § 3115. — No malice implied from acts of insane person, § 3116. — Insanity not presumed, § 3117. — It is not every kind or degree of insanity that will excuse crime, § 3118. — Delirium tremens, § 3120. — Not presumed that insanity arose from any particular cause, § 3121. — Caused by habitual drunkenness, § 3122. — When the fact of intoxication may be considered, § 3123.*

§ 3103. If one's mental faculties are so diseased that he does not know what he is doing when he kills another, or does not know that it is wrong, his act is not murder. *Guiteau's Case, §§ 3124-44. See § 3158.*

§ 3104. Although the prisoner is presumed to be innocent until proved guilty, yet the government is not bound to prove that the prisoner was sane when he did the act. The defendant must prove himself to have been insane if he relies on that defense. *Ibid.* See § 36.)

§ 3105. If the jury entertain a reasonable doubt as to the killing or as to the responsible condition of the prisoner's mind when he did the act, the prisoner is entitled to its benefit. *Ibid.*

§ 3106. Whenever partial insanity is relied on as a defense it must appear that the crime charged was the product of the delusion or other morbid condition, and connected with it as effect with cause, and not the result of sane reasoning or natural motives which the party may be capable of, notwithstanding his disorder. *Ibid.*

§ 3107. It is not allowed to infer insanity in the accused from the mere fact of its existence in his ancestors. *Ibid.*

§ 3108. The jury is not warranted in inferring that a man is insane from the mere fact of his committing a crime or from the enormity of the crime, or from the mere apparent absence of an adequate motive for it, for the law assumes that there was a bad motive — that it was prompted by malice — if nothing else appears. *Ibid.*

§ 3109. An insane delusion is an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or at least impossible under the circumstances of the individual. It is never the result of reasoning or reflection, nor can it be dispelled by them. In this respect it differs from an opinion. *Ibid.*

§ 3110. The only materiality of evidence of a prisoner's peculiarities and delusions during his life previous to the commission of his crime is the probability it may afford of his liability to such disorder of the mind, and the corroboration it may yield to other evidence which may tend directly to show such disorder at the time of the commission of the crime. *Ibid.*

§ 3111. It is no excuse for a homicide that the prisoner had reasoned himself into the conviction that the killing was a political necessity, or necessary to the predominance of one of the political parties. Such is not an insane delusion. *Ibid.*

§ 3112. A man may be insanely convinced that he is inspired by the Almighty to do an act, to a degree that will destroy his responsibility for the act. But he cannot escape responsibility by baptizing his own spontaneous conceptions and reflections and deliberate resolves with the name of inspiration. And so in *Guiteau's Case* the jury were instructed that the question for them to determine was whether the idea of killing the president first presented itself to the defendant in the shape of a command or inspiration from the Deity in the manner in which insane delusions of that kind arise; or whether it was a conception of his own, followed out to a resolution to act, and if he thought at all about inspiration, it was simply a speculation or theory, or a theoretical conclusion of his own mind, drawn from the expediency or necessity of the act, that his previously conceived ideas were inspired. *Ibid.*

§ 3113. Moral indifference or insensibility to the distinctions between right and wrong, resulting from a blunted conscience, a torpid moral sense or depravity of heart, is to be distinguished from mental incapacity to understand these distinctions, and is no excuse for crime. *Ibid.*

§ 3114. It is for the jury to determine the weight to be given to the testimony of an expert with regard to the sanity or insanity of the prisoner, and the court will not instruct the jury

that the facts stated in the hypothetical question must be true to entitle the answer of the expert to any weight. *Ibid.*

§ 3115. An instruction that the fact of the insanity or sanity of the prisoner before or after the date of the crime is not in issue except as collateral to the main fact of sanity or insanity at the date of the crime, and the only evidence as to such main fact is in the testimony of the prisoner himself, his words and acts, and the testimony of experts in answer to hypothetical questions, was refused because it involved a question of fact for the jury. *Ibid.*

§ 3116. Where one is so insane that the law holds him irresponsible, it deems him incapable of malice, and no malice will be implied from his acts however atrocious. *United States v. McGlue*, §§ 3145-54. See § 3158.

§ 3117. The accused must be presumed to be sane till his insanity is proved. To excuse him, he must be proved to be insane when he did the act. *Ibid.* See § 3160.

§ 3118. It is not every kind or degree of insanity that will excuse crime. If the accused understands the nature and consequences of his act, if he knows that it is wrong, and that if he does it he will deserve punishment, he is responsible. If he is under such delusion as not to understand the nature of his act, or if he has not sufficient memory and reason and judgment to know that he is doing wrong, or not sufficient conscience to discern that his act is deserving of punishment, he is not responsible. *Ibid.* See § 3158.

§ 3119. Experts are not allowed to give their opinions on the facts of the case when disputed. They must give their opinions on supposed cases. Such opinions are not binding on the jury against their judgment. *Ibid.*

§ 3120. If a person suffering under *delirium tremens* is so far insane as to render him irresponsible, the law does not punish him for any crime he may commit. But if a person commits a crime under the immediate influence of liquor, and while intoxicated, the law does punish him, however mad he may have been. *Ibid.*

§ 3121. While it is upon the prisoner to prove his insanity, yet the law does not presume that the insanity arose from any particular cause. And if the prosecutor asserts that the prisoner's insanity arose from a certain cause, and that he is, therefore, responsible for his act, it is upon the government to prove the assertion. *Ibid.* See § 3160.

§ 3122. Insanity, whose remote cause is habitual drunkenness, is an excuse for a homicide committed by the party, while so insane, but not at the time intoxicated or under the influence of liquor. *United States v. Drew*, § 3155. See §§ 3161, 3164.

§ 3123. Where a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, it is proper for the jury to inquire into the condition of the defendant as drunk or sober when he committed the act; not upon the ground that drunkenness renders a criminal act less criminal, but as bearing upon the question whether the defendant's mind was capable of that deliberation or premeditation which determines the degree of the crime. *Hopt v. People*, §§ 3156, 3157.

[NOTES.—See §§ 3158-3167.]

GUITEAU'S CASE.

(Supreme Court of the District of Columbia: 10 Federal Reporter, 161-189. 1832.)

STATEMENT OF FACTS.—Guiteau was indicted for the murder of James A. Garfield, president of the United States. The defense of insanity was interposed.

Charge by Cox, J.

Gentlemen of the Petit Jury: The constitution of the United States provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." These provisions are deemed the indispensable safeguards of life and liberty. They are intended for the protection of the innocent from injustice and oppression. It is only by their faithful observance that guilt or innocence can be fairly ascertained.

§ 3124. *Presumption of innocence.*

Every accused person is presumed innocent until the accusation be proved, and until such proof no court dare to prejudge his cause or withhold from him

the protection of this fundamental law. With what difficulty and trial of patience this law has been administered in the present case, you have been daily witnesses. After all, however, it is our consolation that not one of these sacred guaranties has been violated in the person of the accused. If he be guilty, no man deserves their protection less than he does. If he be innocent, no man needs their protection more, and no man's case more clearly proves their beneficence and justice. At length the long chapter of proof is ended; the task of the advocate is done; and the duty now rests with you of determining, with such aid as I can afford you, the issue between public justice and the prisoner at the bar. No one can feel more keenly than I do the grave responsibility of my duty; and I feel that I can only discharge it by a close adherence to the law as it has been laid down by its highest authorized expounders.

Before proceeding, I wish to interject here a remark upon an episode in the trial pending the last argument. The prisoner has taken repeated occasions to proclaim that public opinion, as evidenced by the press and by his correspondence, is in his favor. As you well know, these declarations could not have been prevented except by resorting to the process of gagging him. Any suggestion that you could be influenced by this lawless babble of the prisoner would have seemed to me simply absurd, and I should have felt that I had almost insulted your intelligence if I had warned you not to regard it. The counsel for the prosecution have been rebuked for allowing these declarations to go to you without contradiction, and in the course of the final argument they felt it necessary to interpose a contradiction to these declarations of the prisoner, and the latter's counsel excepted to the form in which the contradiction was made. For the sole purpose of purging this record of any apparently objectionable matter, I would simply say, here, that nothing that has been said in reference to public sentiment or newspaper opinion, on either side, is to be regarded by you, although I really feel that such an admonition from me is totally unnecessary.

§ 3125. *Definition of murder.*

This indictment charges the defendant with having murdered James A. Garfield. It becomes my duty, in the first place, to explain to you the nature of the crime charged. With us, murder is committed where a person of sound memory and discretion unlawfully kills a reasonable creature in being, and in the peace of the United States, with malice aforethought. It must, of course, be proved, first, that the death was caused by the act of the accused. It must be further shown that it was caused with malice aforethought; but this does not mean that the government must prove any special ill-will, hatred, or grudge, on the part of the prisoner, towards the deceased. Whenever a homicide is shown to have been committed without lawful authority and with deliberate intent, it is sufficiently proved to have been done with malice aforethought. And this evidence is not answered and malice is not disproved, by showing that the accused had no personal ill-will against the deceased, but killed him from some other motive, as for purpose of robbery, or by mistaking him for another, or, as alleged in this case, to produce a public benefit. If it could be shown that the killing occurred in the heat of passion and on sudden quarrel, and under provocation from the deceased, then it would appear that there was no premeditated intent, and consequently no malice aforethought; and this would reduce the crime to manslaughter. But it is hardly necessary to say that there is nothing of that kind in the present case. You will probably see that either the defendant is guilty of murder or he is innocent. But,

in order to constitute the crime of murder, the assassin must have a responsibly sane mind. The technical term, "sound memory and discretion," in the old common law definition of murder means this. An irresponsibly insane man can no more commit murder than a sane man can do so without killing. His condition of mind cannot be separated from the act. If he is laboring under disease of his mental faculties — if that is a proper expression — to such an extent that he does not know what he is doing, or does not know that it is wrong, then he is wanting in that sound memory and discretion which make a part of the definition of murder. In the next place, I instruct you that every defendant is presumed innocent until the accusation against him is established by proof.

§ 3126. *Presumption of sanity.*

In the next place, notwithstanding this presumption of innocence, it is equally true that a defendant is presumed to be sane and have been so at the time when the crime charged against him was committed; that is to say, the government is not bound, as a part of its proofs, to show, affirmatively, that the defendant was sane. As insanity is the exception, and most men are sane, the law presumes the latter condition of everybody until some reason is shown to believe the contrary. The burden is therefore on the defendant, who sets up insanity as an excuse for crime, to bring forward his proofs, in the first instance, to show that that presumption is a mistake as far as it relates to him. The crime, then, involves three elements, viz.: The killing, malice, and a responsible mind in the murderer.

§ 3127. *What is a reasonable doubt.*

But after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned,—*i. e.*, that the defendant is innocent till he is proved guilty, and that he is and was sane, until evidence to the contrary appears,—and considering the whole evidence in the case, still entertain what is called a reasonable doubt, on any ground (either as to the killing, or the responsible condition of mind), whether he is guilty of the crime of murder, as it has been explained and defined, then the rule is that the defendant is entitled to the benefit of that doubt and to an acquittal. But here it becomes important to explain to you, in the best way that I can, what is a reasonable doubt. I can hardly venture to give you an exact definition of the terms, for I do not know of any successful attempt to do so. As to questions relating to human affairs, a knowledge of which is derived from testimony, it is impossible to have the same kind of certainty which is created by scientific demonstration. The only certainty you can have is a moral certainty, which depends upon the confidence you have in the integrity of witnesses, and their capacity to know the truth. If, for example, facts not improbable are attested by numerous witnesses who are credible, consistent and uncontradicted, and who had every opportunity of knowing the truth, a reasonable or moral certainty would be inspired by their testimony. In such case, a doubt would be unreasonable, or imaginary, or speculative, which the books say it ought not to be. And it is not a doubt whether the party may not *possibly* be innocent in the face of strong proof of his guilt, but a sincere doubt whether he has been proved guilty, that is called reasonable.

And even where the testimony is contradictory, so much more credit may be due to one side than the other, that the same result will be produced. On the other hand, the opposing proofs may be so nearly balanced that the jury may justly doubt on which side lies the truth, and in such case the accused

party is entitled to the benefit of the doubt. As certainty advances, doubt recedes. If one is reasonably certain, he cannot at the same time be reasonably doubtful, *i. e.*, have a reasonable doubt, of a fact. All that a jury can be expected to do is to be reasonably or morally certain of the fact which they declare by their verdict. As Chief Justice Shaw says, in *Com. v. Webster*, 5 Cush., 320: "For it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

With regard to the evidence in this case, very little comment is required from the court, except upon one question, the others being hardly matters of dispute. That the defendant fired at and shot the deceased president is abundantly proved, if you believe the testimony. That the wound caused the death has been testified to by the surgeons most competent to speak on that subject, and they are uncontradicted. That the homicide was committed with malice aforethought, if the defendant was capable of criminal intent and malice, can hardly be gainsaid if you will bear in mind what I have already said. It is not necessary to prove that any special and express hatred or malice was entertained by the accused towards the deceased. It is sufficient to prove that the act was done with deliberate intent, as distinct from an act done under the sudden impulse of passion, and in the heat of blood, and without previous malice.

Evidence has been exhibited to you tending to show that the defendant, in his own handwriting, admitted that he had conceived the idea of removing the president, as he calls it, some six weeks before the shooting, and had deliberated upon it, and come to a determination to do it, and that about two weeks before he accomplished it, he stationed himself for the purpose, but some relents delayed the attempt. His preparation for it by the purchase of the pistol has been detailed to you. All these facts, if believed by you, come up to the full measure of proof required to establish what the law denominates *malice aforethought*. And thus, I apprehend, that you will have little difficulty in reaching a conclusion as to all the elements that make up the crime charged in the indictment, unless it be the one of "sound memory and discretion," as it is called, which is only a technical expression for a sound mind. We now approach the difficult question in this case.

§ 8128. *Defense of insanity.*

I have said that a man who is insane, in a sense that makes him irresponsible, cannot commit a crime. The defense of insanity has been so abused as to be brought into great discredit. It has been the last resort in cases of unquestionable guilt, and has been the excuse to juries for acquittal, when their own and the public sympathy have been with the accused, and especially when the provocation to homicide has excused it according to public sentiment, but not according to law. For these reasons, it is viewed with suspicion and disfavor, whenever public sentiment is hostile to the accused. Nevertheless, if insanity be established to the degree that has been already, in part, and will hereafter further be explained, it is a perfect defense to an indictment for murder, and must be allowed full weight.

§ 8129. *Total insanity.*

Now, it is first to be observed that we are not troubled in this case with any question about what may be called *total* insanity, such as raving mania, or ab-

solite imbecility, in which all exercise of reason is wanting, and there is no recognition of persons or things, or their relations. But there is a debatable border-line between the sane and the insane, and there is often great difficulty in determining on which side of it a party is to be placed. There are cases in which a man's mental faculties generally seem to be in full vigor, but on some one subject he seems to be deranged. He is possessed, perhaps, with a belief which every one recognizes as absurd, which he has not reasoned himself into, and cannot be reasoned out of, which we call an *insane delusion*, or he has, in addition, some morbid propensity, seemingly in harsh discord with the rest of his intellectual and moral nature.

§ 3130. *Partial insanity does not necessarily render the party irresponsible.*

These are cases of what, for want of a better term, is called partial insanity. Sometimes its existence, and at other times its limits, are doubtful and undefinable. And it is in these cases that the difficulty arises of determining whether the patient has passed the line of moral or legal accountability for his actions. You must bear in mind that a man does not become irresponsible by the mere fact of being partially insane. Such a man does not take leave of his passions by becoming insane, and may retain as much control over them as in health. He may commit offenses, too, with which his infirmity has nothing to do. He may be sane as to his crime, understand its nature, and be governed by the same motives in regard to it as other people; while on some other subject, having no relation to it whatever, he may be subject to some delusion. In a reported case, a defendant was convicted of cheating by false pretenses, but was not saved from punishment by his insane delusion that he was the lawful son of a well known prince. The first thing, therefore, to be impressed upon you is, that wherever this partial insanity is relied on as a defense, it must appear that the crime charged was the product of the delusion, or other morbid condition, and connected with it as effect with cause, and not the result of sane reasoning or natural motives, which the party may be capable of, notwithstanding his circumscribed disorder. The importance of this will be appreciated by you further on. But, assuming that the infirmity of mind has had a direct influence in the production of crime, the difficulty is to fix the degree and character of the disorder which, in such case, will create irresponsibility in law. The outgivings of the judicial mind on this subject have not always been entirely satisfactory or in harmony with the conclusions of medical science. Courts have, in former times, undertaken to lay down a law of insanity without reference to and in ignorance of the medical aspects of the subject, when it could only be properly dealt with through a concurrent and harmonious treatment by the two sciences of law and medicine. They have, therefore, adopted and again discarded one theory after another in the effort to find some common ground where a due regard for the security of society and humanity for the afflicted may meet. It will be my effort to give you the results most commonly accepted by the courts.

§ 3131. *Evidence of insanity. Letters.*

It may be well to say a word as to the evidence by which courts and juries are guided in this difficult and delicate inquiry. That subtle essence which we call "mind" defies, of course, ocular inspection. It can only be known by its outward manifestations, and they are found in the language and conduct of the man. By these his thoughts and emotions are read, and according as they conform to the practice of people of sound mind, who form the large majority of mankind, or contrast harshly with it, we form our judgment as to his sound-

ness of mind. For this reason evidence is admissible to show conduct and language at different times and on different occasions, which indicate to the general mind some morbid condition of the intellectual powers; and the more extended the view of the person's life the safer is the judgment formed of him. Everything relating to his physical and mental history is relevant, because any conclusion as to his sanity must often rest upon a large number of facts. As a part of the language and conduct, letters spontaneously written afford one of the best indications of mental condition.

§ 3132. *Insanity in the family.*

Evidence as to insanity in the parents and immediate relatives is also pertinent. It is never allowed to infer insanity in the accused from the mere fact of its existence in the ancestors. But when testimony is given directly tending to prove insane conduct on the part of the accused, this kind of proof is admissible as corroborative of the other. And therefore it is that the defense have been allowed to introduce evidence to you covering the whole life of the accused, and reaching to his family antecedents. In a case so full of detail as this, I shall deem it my duty to you to assist you in weighing the evidence by calling your attention to particular parts of it. But I wish you distinctly to understand that it is your province, and not mine, to decide upon the facts; and if I, at any time, seem to express or intimate an opinion on them, which I do not design to do, it will not be binding on you, but you must draw your own conclusions from the evidence. The instructions that have been given you import, in substance, that the true test of criminal responsibility, where the defense of insanity is interposed, is whether the accused had sufficient use of his reason to understand the nature of the act with which he is charged, and to understand that it was wrong for him to commit it; that if this was the fact he is criminally responsible for it, whatever peculiarities may be shown about him in other respects; whereas, if his reason was so defective, in consequence of mental disorder, generally supposed to be caused by brain disease, that he could not understand what he was doing, or that what he was doing was wrong, he ought to be treated as an irresponsible person.

§ 3133. *General observations on the question of insanity.*

Now, as the law assumes every one at the outset to be sane and responsible, the question is, what is there in this case to show the contrary as to this defendant? A jury is not warranted in inferring that a man is insane from the mere fact of his committing a crime, or from the enormity of the crime, or from the mere apparent absence of adequate motive for it, for the law assumes that there is a bad motive—that it is prompted by malice—if nothing else appears. Perhaps the easiest way for you to examine into this subject is, *first*, to satisfy yourselves about the condition of the prisoner's mind for a considerable period of time before any conception of the assassination entered it, and at the present time, and then to consider what evidence exists as to a different condition at the time of the act charged. I shall not spend any time on the first question, because to examine it at all would require a review of evidence relating to over twenty years of the defendant's life, and this has been so exhaustively discussed by counsel that anything I could say would be a wearisome repetition. Suffice it to say, that, on one side, this evidence is supposed to show a chronic condition of insanity for many years before the assassination; and, on the other, to show an exceptionally quick intellect and decided power of discrimination. You must draw your conclusions from the evidence. Was his ordinary, permanent, chronic condition of mind such, in consequence of disease, that he was

unable to understand the nature of his actions, or to distinguish between right and wrong in his conduct? Was he subject to insane delusions that destroyed his power of so distinguishing? And did this continue down to and embrace the act for which he is tried? If so, he was simply an irresponsible lunatic.

Or, on the other hand, had he the ordinary intelligence of sane people, so that he could distinguish between right and wrong, as to his own actions? If another person had committed the assassination, would he have appreciated the wickedness of it? If he had had no special access of insanity impelling him to it, as he claims was the case, would he have understood the character of such an act and its wrongfulness if another person had suggested it to him? If you can answer these questions in your own minds it may aid you towards a conclusion as to the normal or ordinary condition of the prisoner's mind before he thought of this act; and if you are satisfied that his chronic or permanent condition was that of sanity, at least so far that he knew the character of his own actions, and whether they were right or wrong, and was not under any permanent insane delusions which destroyed his power of discriminating between right and wrong as to them, then the only inquiry remaining is whether there was any special insanity connected with this crime; and what I shall further say will be on the assumption that you find his general condition to have been that of sanity to the extent I have mentioned. On this assumption it will be seen that the reliance of the defense is on the existence of an insane delusion in the prisoner's mind which so perverted his reason as to incapacitate him from perceiving the difference between right and wrong as to this particular act.

§ 3134. *The MacNaghten case. Dicta of the English judges as to the evidences of insanity.*

As a part of the history of judicial sentiment on this subject, and by way of illustrating the relation between insane delusions and responsibility, I will refer to a celebrated case in English history already freely commented on in argument. Nearly forty years ago one MacNaghten was tried in England for killing a Mr. Drummond, private secretary of Sir Robert Peel, mistaking him for the premier himself. He was acquitted on the ground of insanity, and his acquittal caused so much excitement that the house of lords addressed certain questions to the judges of the superior courts of England in regard to the law of insanity in certain cases, and their answers have been since regarded as settling the law on this subject in England, and, with some qualification, have been approved in the courts of this country. One of the questions was: "If a person, under an insane delusion as to the existing facts, commits an offense in consequence thereof, is he thereby excused?" To which it was answered, that, "In case he labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts with regard to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting his life, and he kills that man, as he supposes, *in self-defense*, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him *in revenge* for such supposed injury, he would be liable to punishment." This, you will understand, was because it was excusable to kill in self-defense, but not to kill in revenge for an injury.

§ 3135. *Monomania. Case cited.*

This has been in part recognized as law in this country. Thus Chief Justice

Shaw, of Massachusetts, in the case of *Com. v. Rogers*, 7 Metc., 500, says: "Monomania may operate as an excuse for a criminal act" when the "delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as when the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defense. A common instance is, where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature."

The cases I have referred to furnish an introduction to the subject of insane delusions, which plays an important part in this case, and demands careful consideration. We find it treated, to a limited extent, in judicial decisions, but learn more about it from works on medical jurisprudence and expert testimony. Sane people are said sometimes to have delusions, proceeding from temporary disorder and deception of the senses, and they entertain extreme opinions which are founded upon insufficient evidence, or result from ignorance, or they are speculations on matters beyond the scope of human knowledge; but they are always susceptible of being corrected and removed by evidence and argument.

§ 3136. *What is an insane delusion.*

But the *insane delusion*, according to all testimony, seems to be an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or at least impossible under the circumstances of the individual. A man, with no reason for it, believes that another is attempting his life, or that he himself is the owner of untold wealth, or that he has invented something which will revolutionize the world, or that he is president of the United States, or that he is God or Christ, or that he is dead, or that he is immortal, or that he has a glass arm, or that he is pursued by enemies, or that he is inspired by God to do something. In most cases, as I understand it, the fact believed is something affecting the senses. It may also concern the relations of the party with others. But generally the delusion centers around himself, his cares, sufferings, rights and wrongs. It comes and goes independently of the exercise of will and reason, like the phantasms of dreams. It is, in fact, the waking dream of the insane, in which facts present themselves to the mind as real, just as objects do to the distempered vision in *delirium tremens*. The important thing is that an insane delusion is never the result of reasoning and reflection. It is not generated by them, and it cannot be dispelled by them. A man may reason himself, and be reasoned by others, into absurd opinions, and may be persuaded into impracticable schemes and vicious resolutions, but he cannot be reasoned or persuaded into insanity or insane delusions. Whenever convictions are founded on evidence, on comparison of facts and opinions and arguments, they are not insane delusions. The insane delusion does not relate to mere sentiments or theories or abstract questions in law, politics or religion. All these are the subjects of *opinions*, which are beliefs founded on reasoning and reflection. These opinions are often absurd in the extreme. Men believe in animal magnetism, spiritualism and other like matters, to a degree that seems unreason itself, to most other people. And there is no absurdity in relation to religious, political and social questions that has not its sincere supporters. These opinions result from naturally weak or ill-trained reasoning powers, hasty conclusions from insufficient *data*, ignorance of men

and things, credulous dispositions, fraudulent imposture, and often from perverted moral sentiments. But still, they are *opinions*, founded upon some kind of evidence, and liable to be changed by better external evidence or sounder reasoning. But they are not insane delusions.

Let me illustrate further: A man talks to you so strongly about his intercourse with departed spirits that you suspect insanity. You find, however, that he has witnessed singular manifestations, that his senses have been addressed by sights and sounds, which he has investigated, reflected on, and been unable to account for, except as supernatural. You see, at once, that there is no insanity here; that his reason has drawn a conclusion from evidence. The same man, on further investigation of the phenomena that staggered him, discovers that it is all an imposture and surrenders his belief. Another man, whom you know to be an affectionate father, insists that the Almighty has appeared to him and commanded him to sacrifice his child. No reasoning has convinced him of his duty to do it, but the command is as real to him as my voice is now to you. No reasoning or remonstrance can shake his conviction or deter him from his purpose. This is an insane delusion, the coinage of a diseased brain, as seems to be generally supposed, which defies reason and ridicule, which palsies the reason, blindfolds the conscience, and throws into disorder all the springs of human action.

Before asking you to apply these considerations to the facts of this case, let me premise one or two things. The question for you to determine is, What was the condition of the prisoner's mind at the time when this tragedy was enacted? If he was sufficiently sane *then* to be responsible, it matters not what may have been his condition before or after. Still, evidence is properly admitted as to his previous and subsequent conditions, because it throws light, prospectively and retrospectively, upon his condition at the time. Inasmuch as these disorders are of gradual growth and indefinite continuance, if he is shown insane shortly before or after the commission of the crime, it is natural to *conjecture*, at least, that he was so at the time. But all the evidence must center around the time when the deed was done.

You have heard a good deal of evidence respecting the peculiarities of the prisoner through a long period of time before this occurrence, and it is claimed that he was, during all that time, subject to delusions calculated to disturb his reason and throw it from its balance. I only desire to say here that the only materiality of that evidence is in the probability it may afford of the defendant's liability to such disorder of the mind, and the corroboration it may yield to other evidence which may tend directly to show such disorder at the time of the commission of the crime. A few words may assist you in applying to the evidence what I have thus stated. You are to determine whether, at the time when the homicide was committed, the defendant was laboring under any insane delusion prompting and impelling him to the deed.

§ 3137. *Documentary evidence on the question of insanity.*

Very naturally you look, first, for any explanation of the act which may have been made by the defendant himself at the time or immediately before and after. You have had laid before you, especially, several papers, which were in his possession, and which purport to assign the motives for his deed. In the address to the American people of June 16th, which seems most fully to set forth his views, he says: "I conceived the idea of removing the president four weeks ago. Not a soul knew of my purpose. *I conceived the idea myself* and kept it to myself. I read the newspapers *carefully*, for and against the admin-

istration, and *gradually the conviction dawned on me that the president's removal was a political necessity*, because he proved a traitor to the men that made him, and thereby imperiled the life of the republic."

Again: "Ingratitude is the basest of crimes. That the president, under the manipulation of his secretary of state, has been guilty of the basest ingratitude to the stalwarts, admits of no denial. The expressed purpose of the president has been to crush General Grant and Senator Conkling, and thereby open the way for his renomination in 1884. In the president's madness he has wrecked the once grand old republican party, *and for this he dies.*" . . .

Again: "This is not murder. It is a political necessity. It will make my friend Arthur president, and save the republic," etc.

The other papers are of similar tenor, as I think you will find. There is evidence that, when arrested, the prisoner refused to talk, but said that the papers would explain all. On the night of the assassination, according to the witness James J. Brooks, the prisoner said to him that he had thought over it and prayed over it for weeks, and the more he thought and prayed over it the more satisfied he was that he had to do this thing. *He had made up his mind that he had done it as a matter of duty;* . . . he made up his mind that they (the president and Mr. Blaine) were conspiring against the liberties of the people, and that the president must die. "This is all that the evidence shows as to the prisoner's utterances about the time of the shooting.

In addition to this you have the very important testimony of the witness Joseph S. Reynolds as to the prisoner's statements, oral and written, made about a fortnight after the shooting. If you credit this testimony you find him reiterating the statements contained in the other papers, but, perhaps, with more emphasis and clearness. He is represented as saying *that the situation at Albany suggested the removal of the president*, and as the factional fight became more bitter, he became more decided. He knew that Arthur would become president, and that would help Conkling, etc. *If he had not seen that the president was doing a great wrong to the stalwarts, he would not have assassinated him.*

In the address to the American people, then written, he says: "*I now wish to state distinctly why I attempted to remove the president.* I had read the newspapers *for and against* the administration, very carefully, for two months, before I conceived the idea of removing him. *Gradually, as the result of reading the newspapers,* the idea settled on me that if the president was removed it would unite the two factions of the republican party, and thereby save the government from going into the hands of the ex-rebels and their northern allies. *It was my own conception, and, whether right or wrong, I take the entire responsibility.*" A second paper, dated July 19th, addressed to the public, reiterates this and concludes, "Whether he lives or dies, I have got the inspiration worked out of me."

We have now before us everything emanating from the prisoner about the time of the shooting and within a little over a fortnight afterwards. We have nothing further from him until over three months afterwards. Let us pause here to consider the import of all this. You are to consider, first, whether this evidence fairly represents the true feelings and ideas which governed the prisoner at the time of the shooting. If it does, it represents a state of things which I have not seen characterized in any judicial utterance or authoritative work as an insane delusion. You are to consider whether it is so described in the evidence, or does not, on the contrary, show a deliberate process of reason-

ing and reflection, upon argument and evidence for and against, resulting in an *opinion* that the president had betrayed his party, and that if he were out of the way it would be a benefit to his party, and save the country from the predominance of their political opponents. So far there was nothing insane in the *conclusion*. It was, doubtless, shared by a great many others. But the difference was that the prisoner, according to his revelations, went a step further, and reached the *conviction* that to put the president out of the way by assassination was a political necessity.

When men reason the law requires them to reason correctly, as far as their practical duties are concerned. When they have the *capacity* to distinguish between right and wrong, they are bound to do it. Opinions, properly so called,—*i. e.*, beliefs resulting from reasoning, reflection, or examination of evidence,—afford no protection against the penal consequences of crime. A man may believe a course of action to be right, and the law, which forbids it, to be wrong. Nevertheless, he must obey the law, notwithstanding his convictions. And nothing can save him from the consequences of its violation, except the fact that he is so crazed by disease as to be unable to comprehend the necessity of obedience to it.

§ 3138. *Conviction of right and religious duty will not excuse violation of law.*

The Mormon prophets profess to be inspired, and to believe in the duty of plural marriages, although it was forbidden by a law of the United States. One of the sect violated the law, and was indicted for it. The judge who tried him instructed the jury: "That if the defendant, under the influence of a religious belief that it was right,—under an inspiration, if you please, that it was right,—deliberately married a second time, having a first wife living, the want of consciousness of evil intent, the want of understanding that he was committing a crime, did not excuse him."

And the supreme court of the United States, to which the case went, under the title of *Reynolds v. United States*, 98 U. S., 145 (§§ 854-865, *supra*), in approving this ruling, said: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So, here, as a law of the organization of society, under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed, can a man excuse his practice to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

And so, in like manner, I say, a man may reason himself into a conviction of the expediency and patriotic character of political assassination, but to allow him to find shelter from punishment behind that belief, as an insane delusion, would be simply monstrous. Between one and two centuries ago there arose a school of moralists who were accused of maintaining the doctrine that whenever an end to be attained is right, any means necessary to attain it would be justifiable. They were accused of practicing such a process of reasoning as

would justify every sin in the decalogue when occasion required it. They incurred the odium of nearly all Christendom in consequence. But the mode of reasoning attributed to them would seem to be impliedly, if not expressly, reproduced in the papers written by the defendant and shown in evidence: "It would be a right and patriotic thing to unite the republican party and save the republic. Whatever means may be necessary for that object would be justifiable. The death of the president by violence is the only, and therefore the necessary, means of accomplishing it, and therefore it is justifiable. Being justifiable as a political necessity, it is not murder." Such seems to be the substance of the ideas which he puts forth to the world as his justification in these papers. If this is the whole of his position, it presents one of those vagaries of opinion for which the law has no toleration, and which furnishes no excuse whatever for crime.

§ 3139. *The insane delusion of immediate inspiration.*

This, however, is not all that the defendant now claims. There is, undoubtedly, a form of *insane delusion*, consisting of a belief by a person that he is inspired by the Almighty to do something,—to kill another, for example,—and this delusion may be so strong as to impel him to the commission of a crime. The defendant, in this case, claims that he labored under such a delusion and impulse, or pressure, as he calls it, at the time of the assassination.

§ 3140. — *declarations of accused.*

The prisoner's unsworn declarations, since the assassination, on this subject, in his own favor; are, of course, not evidence, and are not to be considered by you. A man's language, when sincere, may be evidence of the condition of his mind when it is uttered, but it is not evidence in his favor of the facts declared by him, or as to his previous acts or condition. He can never manufacture evidence in this way in his own exoneration. It is true that the law allows a prisoner to *testify* in his own behalf, and thereby makes his sworn testimony on the witness stand legal evidence, to be received and considered by you, but it leaves the weight of that evidence to be determined by you also. I need hardly say to you that no verdict could safely be rendered upon the evidence of the accused party only, under such circumstances. If it were recognized by such a verdict, that a man on trial for his life could secure an acquittal by simply testifying, himself, that he had committed the crime charged under a delusion, an inspiration, an irresistible impulse, this would be to proclaim a universal amnesty to criminals in the past, and an unbounded license for the future, and the courts of justice might as well be closed. It must be perfectly apparent to you that the existence of such a delusion can be best tested by the language and conduct of the party immediately before and at the time of the act. And while the accused party cannot make evidence *for* himself by his subsequent declarations, on the other hand, he may make evidence *against* himself, and, when those declarations amount to admissions against himself, they are evidence to be considered by a jury.

§ 3141. *Sane and insane beliefs on the doctrine of inspiration.*

Let me here say a word about the characteristics of this form of delusion. It is easy to understand that the conceit of being inspired to do an act may be either a sane belief or an insane delusion. A great many Christians believe, not only that events generally are providentially ordered, but that they themselves receive special providential guidance and illumination in reference to both their inward thoughts and outward actions, and, in an undefined sense, are inspired to pursue a certain course of action; but this is a mere sane belief,

whether well or ill founded. On the other hand, if you were satisfied that a man sincerely, though insanely, believed that, like Saul of Tarsus, on his way to Damascus, he had been smitten to the earth, had seen a great light shining around him, had heard a voice from heaven, warning and commanding him, and that thenceforth, in reversal of his whole previous moral bent and mental convictions, he had acted upon this supposed revelation, you would have before you a case of imaginary inspiration amounting to an insane delusion.

The question for you to consider is, whether the case of the defendant presents anything analogous to this. The theory of the government is that the defendant committed the homicide in the full possession of his faculties, and from perfectly sane motives; that he did the act from revenge, or perhaps from a morbid desire for notoriety; that he calculated deliberately upon being protected by those who were politically benefited by the death of the president, and upon some ulterior benefit to himself; that he made no pretense to *inspiration* at the time of the assassination, nor until he discovered that his expectations of help from the so-called stalwart wing of the republican party were delusive, and that these men were denouncing his deed, and that then, for the first time, when he saw the necessity of making out some defense, he broached this theory of inspiration and irresistible pressure, forcing him to the commission of the act. If this be true, you would have nothing to indicate the real motives of the act except what I have already considered. Whether it is true or not, you must determine from all the evidence. It is true that the term "inspiration" does not appear in the papers first written by the defendant, nor in those delivered to Gen. Reynolds, except at the close of the one dated July 19th, in which he says that the *inspiration* is worked out of him; though what that means is not clear. It is true, also, that this was after, according to Gen. Reynolds, he had been informed how he was being denounced by the stalwart republicans.

In one of the first papers I have referred to, the president's removal was called an act of God, as were his nomination and election; but whether this meant anything more than that it was an act of God, in the sense in which all great events are said to be ordered by Providence, is not clear. Dr. Noble Young testifies that a few days after defendant's entrance into the prison—a time not definitely fixed—he told him he was inspired to do the act, but qualified it by saying that if the president should die he would be confirmed in his belief that it was an inspiration; but if not, perhaps not. The emphatic manner in which, in both the papers delivered to Gen. Reynolds, the defendant declared that the assassination was his *own conception* and execution, and *whether right or wrong* he took the entire responsibility, his detailed description of the manner in which the idea occurred to him, and how it was strengthened by his reading, etc., and his omission to state anything about a direct inspiration from the Deity at that time, are all circumstances to be considered by you on the question whether he then held that idea. On the other hand, you have the prisoner's testimony in which he *now* asserts that he conceived himself to be under an inspiration at the time. He also advanced this claim in his interviews with the expert witnesses shortly before the trial.

§ 3142. *Sketch of the evidence on the insanity theory of the defense.*

It becomes necessary, then, to examine the case on the assumption that the prisoner's testimony may be true, and to ascertain from his declaration and testimony what kind of inspiration it is which he thus asserts. According to the testimony of Dr. Strong, he inquired of the defendant if he claimed to

have had any direct revelation from heaven, and the answer was that he *did not believe in any such nonsense*. According to Dr. McDonald, who interviewed the prisoner on the 13th of November, he did not then, in terms, speak of his idea of removing the president as an inspiration, but as a conception of his own, and said that, after conceiving the idea, he tried to put it aside; that it was repulsive to him at first; that he waited a week or two, thinking over it and waiting for the Almighty to interfere. He had conceived the idea himself, but he wished the Almighty to have the opportunity of interfering to prevent its execution; and at the end of two weeks, no interference coming from the Almighty, he formed the deliberate purpose of executing the act, etc. According to the testimony of Dr. Gray, the prisoner said that he had received no instructions, heard no voice of God, saw no vision in the night, or at any time; that the idea came into his own mind first, and after thinking over it and reading the papers, when he arrived at the conclusion to do the act, he *believed then* it was a right act, and was justified by the political situation. When asked how he could apply this as an instruction from the Deity, he said it was a *pressure* of the Deity; *that this duty of doing it, as he claimed, had pressed him to it.*

Again, he said *he had not connected the Deity with the inception and development of the act; that it was his own*. He did not get the inspiration until the time came for it, and that the inspiration came when he had reached the conclusion and determination to do the act. Perhaps the most remarkable of the prisoner's statements to Dr. Gray was that at the very time when he was planning the assassination, he was also devising a theory of insanity which should be his defense, which theory was to be that he believed the act of killing was an inspired act. Perhaps equally remarkable was the prisoner's theory propounded in this conversation, viz., that he was not *medically* insane, but *legally* so, *i. e., irresponsible*, because the act was done *without malice*.

Finally, on this subject, you have the defendant's own testimony. He does not profess to have had any visions or direct revelation or distorted conception of facts. But he says that while pondering over the political situation the idea suddenly occurred to him that if the president were out of the way the dissensions of his party would be healed; that he read the papers with an eye on the possibility of the president's removal, and the idea kept pressing on him; that he was horrified; kept throwing it off; did not want to give it attention; tried to shake it off; but it kept growing upon him, so that at the end of two weeks his mind was thoroughly fixed as to the necessity for the president's removal and the divinity of the inspiration. He never had the slightest doubt of the divinity of the inspiration from the 1st of June. He kept praying about it, and that if it was not the Lord's will that he should remove the president there would be some way by which His providence would intercept the act. He kept reading the newspapers, and his inspiration was *being confirmed every day, and since the 1st day of June he has never had a doubt about the divinity of the act*.

In the cross-examination he said: If the political necessity had not existed the president would not have been removed — there would have been no necessity for the inspiration. About the 1st of June he made up his mind as to the inspiration of the act, and the necessity for it; from the 16th of June to the 2d of July he prayed that, *if he was wrong*, the Deity would stop him by His providence; in May it was an embryo inspiration — a mere impression that possibly it might have to be done; he was doubting whether it was the Deity

that was inspiring him, and was praying that the Deity would not let him make a mistake about it; and that at last it was the Deity, and not he, who killed the president. Again, the confirmation that it was the Deity, and not the devil, who inspired the idea of removing the president, came to him in the fact that the newspapers were all denouncing the president. He saw that the political situation required the removal of the president, and that is the way he knew that his intended act was inspired by the Deity; but for the political situation, he would have thought that it came from the devil. This is the substance of all that appears in the case on the subject of inspiration.

It is proper to call your attention to some variations in the prisoner's statements at different times. In two of the papers of July he says it *was his own conception*, and he took the *entire responsibility*. In the conversations reported by Dr. Gray, in November, he did not connect the Deity with the inception of the act. The conception was his own, and the inspiration came after he made up his mind; but he does not explain what he meant by the inspiration, unless it was that it was a pressure upon him, or, as he expresses it, the duty of doing it was pressing upon him.

In his testimony *he disclaims all responsibility*, while he still speaks of the idea of removing the president as an impression which arose in his own mind first. He says that in his reflections about it he debated with himself whether it came from the Deity or the devil; prayed that God would prevent it if it was not His will; and finally made up his mind, from a consideration of the political situation, that it was inspired by Him. On all this the question for you is, whether, on the one hand, the idea of killing the president first presented itself to the defendant in the shape of a command or inspiration of the Deity, in the manner in which insane delusions of that kind arise, of which you have heard much in the testimony; or, on the other hand, it was a conception of his own, followed out to a resolution to act; and if he thought at all about inspiration, it was simply a speculation or theory, or theoretical conclusion of his own mind, drawn from the expediency or necessity of the act, that his previously-conceived ideas were inspired. If the latter is a correct representation of his state of mind it would show nothing more than one of the same vagaries of reasoning that I have already characterized as furnishing no excuse for crime. Unquestionably a man may be insanely convinced that he is inspired by the Almighty to do an act, to a degree that will destroy his responsibility for the act. But, on the other hand, he cannot escape responsibility by baptizing his own spontaneous conceptions and reflections and deliberate resolves with the name of *inspiration*.

On the direct question whether the prisoner knew that he was doing wrong at the time of the killing, the only direct testimony is his own, to the contrary effect. One or two circumstances may be suggested as throwing some light on the question. The declaration that, *right or wrong*, he took the responsibility, made shortly afterwards, may afford some indication whether the question of wrong had suggested itself. And his testimony that he was horrified when the idea of assassination first occurred to him, and he tried to put it away, is still more pertinent. His statement, testified to by Dr. Gray, that he was thinking of the defense of inspiration while the *assassination* was being planned, tends to show a knowledge of the *legal* consequences of the killing. His present statement, that no punishment would be too quick or severe for him if he killed the president otherwise than as agent of the Deity, shows a present knowledge of the wrongfulness of the act in itself; but this declaration is of

value on this question of knowledge, only in case you should believe that he had the same appreciation of the act at the time of its commission and disbelieve his story about the inspiration.

I have said nearly all that I need say on the subject of insane delusion. The answer of the English judges, that I have referred to, has not been deemed entirely satisfactory, and the courts have settled down upon the question of knowledge of right and wrong as to the particular act, or rather the capacity to know it, as the test of responsibility; and the question of insane delusion is only important as it throws light upon the question of knowledge of, or capacity to know, the right and wrong. If a man is under an insane delusion that another is attempting his life, and kills him in self-defense, he does not know that he is committing an unnecessary homicide. If a man insanely believes that he has a command from the Almighty to kill, it is difficult to understand how such a man *can* know that it is wrong for him to do it. A man may have some other insane delusion which would be quite consistent with a knowledge that such an act is wrong—such as, that he had received an injury—and he might kill in revenge for it knowing that it would be wrong.

And I have dwelt upon the question of insane delusion, simply because evidence relating to that is evidence touching the defendant's power, or want of power, from mental disease, to distinguish between right and wrong, as to the act done by him, which is the broad question for you to determine, and because that is the kind of evidence on this question which is relied on by the defense. It has been argued with great force, on the part of the defendant, that there are a great many things in his conduct which could never be expected of a sane man, and which are only explainable on the theory of insanity. The very extravagance of his expectations in connection with this deed—that he would be protected by the men he was to benefit, would be applauded by the whole country when his motives were made known—has been dwelt upon as the strongest evidence of unsoundness. Whether this and other strange things in his career are really indicative of partial insanity, or can be accounted for by ignorance of men, exaggerated egotism, or perverted moral sense, might be a question of difficulty. And difficulties of this kind you might find very perplexing, if you were compelled to determine the question of insanity generally, without any rule for your guidance. But the only safe rule for you is to direct your reflections to the one question which is the test of criminal responsibility, and which has been so often repeated to you, viz., whether, whatever may have been the prisoner's singularities and eccentricities, he possessed the mental capacity, at the time the act was committed, to know that it was wrong, or was deprived of that capacity by mental disease.

§ 3143. *Distinction between mental and moral obliquity.*

In all this matter there is one important distinction that you must not lose sight of, and you are to decide how far it is applicable to this case. It is the distinction between mental and moral obliquity; between a mental incapacity to understand the distinctions between right and wrong, and a moral indifference and insensibility to those distinctions. The latter results from a blunted conscience, a torpid moral sense or depravity of heart; and sometimes we are not inapt to mistake it for evidence of something wrong in the mental constitution. We have probably all known men of more than the average of mental endowments, whose whole lives have been marked by a kind of moral obliquity and apparent absence of the moral sense. We have known others who have first yielded to temptation with pangs of remorse, but each transgression

became easier, until dishonesty became a confirmed habit, and at length all sensitiveness of conscience disappeared. When we see men of seeming intelligence and of better antecedents reduced to this condition, we are prone to wonder whether the balance-wheels of the intellect are not thrown out of gear. But indifference to what is right is not ignorance of it, and depravity is not insanity, and we must be careful not to mistake moral perversion for mental disease.

Whether it is true or not that insanity is a disease of the physical organ, the brain, it is clearly in one sense a disease, when it attacks a man in his maturity. It involves a departure from his normal and natural condition. And this is the reason why an inquiry into the man's previous condition is so pertinent, because it tends to show whether what is called an act of insanity is the natural outgrowth of his disposition or is utterly at war with it, and therefore indicates an unnatural change. A man who is represented as having been always an affectionate parent and husband suddenly kills wife and child. This is something so unnatural for such a man that a suspicion of his insanity arises at once. On further inquiry we learn that instead of being as represented, the man was always passionate, violent, and brutal in his family. We then see that the act was the probable result of his bad passions, and not of a disordered mind. Hence, the importance of viewing the moral as well as intellectual side of the man, in the effort to solve the question of sanity. That evidence on this subject is proper was held by the supreme judicial court of New Hampshire in *State v. Jones*, 50 N. H. Judge Ladd said: "The history of the defendant and evidence of his conduct at various times during a period of many years before the act for which he was tried, tending to show his temper, disposition and character, were admitted against his objection. It was for the jury to say whether the act was the product of insanity, or the naturally malignant and vicious heart. The condition of the man's mind, whether healthy or diseased, was the very matter in issue. This must be determined in some way or other from external manifestations as exhibited in his conduct. To know whether an act is the product of a diseased mind it is important to ascertain, if possible, how the same mind acts in a state of health. The condition of sanity or insanity shown to exist at one time is presumed to continue. For these reasons and others, which I have not thought it necessary to enlarge upon, it would seem that evidence tending to show defendant's mental and moral character and condition for many years before the act was properly received."

It was upon the principle enunciated in this case that evidence was received in the present case tending to show the moral character of the accused, and offered for the purpose of showing that eccentricities relied on as proof of unsound mind were accounted for by want of moral principle. From the materials that have been presented to you two pictures have been drawn by counsel. The one represents the youth of more than the average of mental endowments, surrounded by certain demoralizing influences at a time when his character was being developed; starting in life without resources, but developing a vicious sharpness and cunning; conceiving "enterprises of great pith and moment," that indicated unusual forecast, though beyond his resources; consumed all the while by insatiate vanity and craving for notoriety; violent in temper, selfish in disposition, immoral, and dishonest in every direction; leading a life, for years, of hypocrisy, swindling, and fraud; and finally, as the culmination of a depraved career, working himself into a resolution to startle the country with a crime that would secure him a bad eminence, and, perhaps, a future reward.

The other represents a youth born, as it were, under malign influences, the child of a diseased mother, and a father subject to religious delusions; deprived of his mother at an early age; reared in retirement and under the influence of fanatical religious views; subsequently, with his mind filled with fanatical theories, launched upon the world with no guidance save his own impulses; then evincing an incapacity for any continuous occupation; changing from one pursuit to another—now a lawyer, now a religionist, now a politician—unsuccessful in all; full of wild impracticable schemes, for which he had neither resources nor ability; subject to delusions about his abilities and prospects of success, and his relations with others; his mind incoherent and incapable of reasoning connectedly on any subject; withal, amiable, gentle, and not aggressive, but the victim of surrounding influences, with a mind so weak and a temperament so impressible that, under the excitement of political controversy, he became frenzied and insanely deluded, and thereby impelled to the commission of a crime, the guilt of which he could not, at the moment, understand. It is for you to determine which of these is the portrait of the accused.

§ 3144. *Regard to be given by a jury to remarks of counsel.*

Before saying a last word my attention has just been called to, and I have been requested by counsel for the defendant to give, certain additional instructions. One is: "It is the duty of each juror to consider the evidence, all pertinent remarks of counsel, and all the suggestions of fellow-jurors, but to disregard all statements of counsel and declarations of the prisoner except such as are founded upon the evidence." Of course, that is a truism, and does not require any particular instruction.

"The testimony of the prisoner they will weigh as to credibility, and judge of by the same rules and considerations applied to that of other witnesses." That is all true, provided that all the influences that governed the prisoner are duly weighed and considered.

"And after all, each juror should decide for himself upon his oath as to what his verdict should be. No juror should yield his deliberate, conscientious conviction as to what the verdict should be, either at the instance of a fellow-juror or at the instance of a majority. Above all, no juror should yield his honest convictions for the sake of unanimity, or to avert the disaster of a mistrial. Jurors have nothing to do with the consequences of their verdict." All that, gentlemen, is true. Some of it is substantially embodied, I think, in what I have already said.

"The opinions of experts upon the question of the sanity or insanity of the prisoner on the 2d day of July last, which is the only date as to which it is necessary for the jury to agree upon, on that question, rests wholly upon the hypothetical questions proposed to them, and the jury must believe, from the evidence, that the supposed facts stated in a hypothetical question are true, to entitle the answer thereto to any weight." I cannot give that one because I think their opinions may be founded upon other grounds than the assumed truth of the hypothetical question; or, at least, that is a question for the jury.

"The fact of insanity or sanity of the prisoner before or after the 2d day of July, 1881, is not in issue in this case, except as collateral to the main fact of sanity or insanity at the time of shooting of President Garfield, on the 2d day of July, 1881; and the only evidence as to such main fact is in the testimony of the prisoner himself, his words and acts, and the testimony of the experts in answer to the hypothetical question." That is, I think, one that I cannot give, because the question involved is one of fact for the jury.

And now, to sum up all that I have said, in a few words: If you find from the whole evidence that, at the time of the commission of the homicide, the prisoner, in consequence of disease of mind, was laboring under such a defect of his reason that he was incapable of understanding what he was doing, or that it was wrong,—as, for example, if he was under an insane delusion that the Almighty had commanded him to do the act, and in consequence of that he was incapable of seeing that it was a wrong thing to do,—then he was not in a responsible condition of mind, and was an object of compassion, and not of justice, and ought to be now acquitted. On the other hand, if you find that he was under no insane delusion, such as I have described, but had possession of his faculties and the power to know that his act was wrong, and of his own free will deliberately conceived, planned and executed this homicide, then, whether his motive was personal vindictiveness or political animosity, or a desire to avenge a supposed political wrong, or a morbid desire for notoriety, or fanciful ideas of patriotism or of the divine will, or you are unable to discover any motive at all, the act is simply *murder*, and it is your duty to find him guilty. (Verdict, guilty.)

UNITED STATES v. McGLUE.

(Circuit Court for Massachusetts: 1 Curtis, 1-14. 1851.)

Indictment for murder. Defense of insanity. The facts are stated in the opinion.

§ 3145. *The burden of proving beyond reasonable doubt the guilt of the accused is upon the prosecution.*

Charge by CURTIS, J.

The prisoner is indicted for the murder of Charles A. Johnson. It is incumbent on the government to prove, beyond reasonable doubt, the truth of every fact in the indictment necessary, in point of law, to constitute the offense. These facts need not be proved beyond all possible doubt. But a moral conviction must be produced in your minds, so as to enable you to say that, on your consciences, you do verily believe their truth. These facts are in part controverted, and in part, as I understand the course of the trial, not controverted; and it will be useful to separate the one from the other. That there was an unlawful killing of Mr. Johnson, the person mentioned in the indictment, by means substantially the same as are therein described; that the mortal wound, immediately producing death, was inflicted by the prisoner at the bar; that this wound was given and the death took place on board of the bark *Lewis*, a registered vessel of the United States belonging to citizens of the United States; that Johnson was the first, and the prisoner the second, officer of that vessel, at the time of the occurrence; that the vessel at that time was either on the high seas, as is charged in one count, or upon waters within the dominion of the Sultan of Muscat, a foreign sovereign, as is charged in another count; and that the prisoner was first brought into this district after the commission of the alleged offense,—do not appear to be denied, and the evidence is certainly sufficient to warrant you in finding all these facts. They are testified to by all the witnesses. It is not upon a denial of either of these facts that the defense is rested; but upon the allegation by the defendant that, at the time the act was done, he was so far insane as to be criminally irresponsible for his act.

§ 3146. *Malice is not presumed, but it must be proved by at least indirect evidence.*

And this brings you to consider the remaining allegation in the indictment which involves this defense. It is essential to the crime of murder that the killing should be from what the law denominates malice aforethought; and the government must prove this allegation. But it is not necessary to offer evidence of previous threats, or preparation to kill, or that there was a previously premeditated design to kill. These things, if proved, would be evidence of malice, and proof of this kind is one of the means of sustaining the allegation of malice. But, besides this direct evidence, of what is called in the law express malice, malice may also be inferred, or implied, from the nature of the act of the accused. If a person, without such provocation as the law deems sufficient to reduce the crime to manslaughter, intentionally inflicts, with a dangerous weapon, a blow calculated to produce and actually producing death, the law deems the act malicious, and the offense is murder. The law considers that the party meant to effect what was the natural consequence of his act; that if the natural consequence of his act was death, he meant to kill; and if he so intended, in the absence of such provocation as the law considers sufficient to account for that intent, from the infirmity of human passion, then it is to be inferred that malice existed, and that from that feeling the act was done. In other words, an intention to kill unlawfully, without sufficient provocation, is a malicious intention, and if the intent is executed, the killing is, in law, from malice aforethought, and is murder.

Keeping these principles in view, you will proceed to inquire what the evidence is of a premeditated design to kill; and secondly, whether the act of killing, and the circumstances attending it, were such that malice is to be inferred therefrom. The only evidence at all tending to show premeditated design is given by the master of the vessel, and by Saunders, the cabin-boy. The master states that, in a previous part of the voyage, four or five weeks before the time in question, while the vessel was in port, and he himself was absent on shore, some difficulty occurred between the first and second officer, in consequence of which the latter applied to him for his discharge. The witness does not know anything of the nature or extent of the difficulty, nor of the feeling to which it gave rise in the breast of either party to it, saving that it produced in the prisoner a reluctance to continue under the command of the first officer. His discharge was refused; and there is no evidence of any further quarrel between them. It is also sworn by the master and the cabin-boy, that when Mr. Johnson fell, after being stabbed by the prisoner, some of the crew raised him up, and the prisoner said, It is of no use; I meant to kill him, and I have done it. These expressions are not testified to by any of the crew. In such a scene, it is in accordance with experience, that some witnesses may observe and remember what other witnesses either did not hear or attend to, or have forgotten. And, therefore, when these two witnesses swear to this expression, if you consider they are fair witnesses, and intend to tell the truth, they should be believed in this particular, although others present do not confirm their statement. But at the same time, upon this question of malice, it does not seem to me the expressions, if used, are important, because they only declare in words what the act of the defendant, in its nature and circumstances, evinces with equal clearness. It is testified, by all the witnesses present at the time, that the vessel being at anchor about three miles from the shore of the Island of Zanzibar, orders were given by the master to get under way; that the first offi

cer was forward, on the house over the forecandle, attending to his duty; that the crew were variously employed in preparations to make sail; and that the prisoner, being aft, ran forward, jumped on to the house, seized Mr. Johnson by the collar with his left hand, and with his sheath knife, which he held in his right hand, stabbed him in the breast, and he dropped dead. When the prisoner seized him Mr. Johnson said, What do you mean? and the prisoner, at the instant he struck the blow, replied, I mean what I am doing.

§ 3147. *An insane person is incapable of entertaining legal malice.*

Now, gentlemen, if you believe this statement, and there is certainly no evidence in the case to contradict or vary it, every witness concurring with the rest in the substance of it, there can be no question that the killing was malicious, provided the prisoner was, at the time, in such a condition as to be capable, in law, of malice. If you are satisfied the prisoner designedly stabbed Mr. Johnson with a knife, in such a manner as was likely to cause and did cause death, no provocation whatsoever being given at the time, then, in point of law, the killing was from malice aforethought, unless you should also find that the prisoner, when he did the act, was so far insane as to be incapable in law of entertaining malice; for the rules of law concerning malice are all based upon the assumption that the person who struck the blow was at the time in such a state of mind as to be responsible, criminally, for his act. If he was then so insane that the law holds him irresponsible, it deems him incapable of entertaining legal malice; and, therefore, no malice is, in that case, to be inferred from his act, however atrocious it may have been. And, undoubtedly, one main inquiry in this case is, whether the prisoner, when he struck the blow, was so far insane as to be held by the law irresponsible for intentionally killing Mr. Johnson.

Some observations have been made, by the counsel on each side, respecting the character of this defense. On the one side, it is urged upon you, that the defense of insanity has become of alarming frequency, and that there is reason to believe it is resorted to by great criminals, to shield them from the just consequences of their crimes, when all other defenses are found desperate; that there exist in the community certain theories, concerning what is called moral insanity, held by ingenious and zealous persons, and brought forward on trials of this kind, tending to subvert the criminal law, and render crimes likely not to be punished, somewhat in proportion to their atrocity. On the other hand, the inhumanity, and the intrinsic injustice of holding him guilty of murder, who was not, at the time of the act, a reasonable being, have been brought before you in the most striking forms.

§ 3148. *The question of the insanity of the accused is a question of fact for the jury.*

These observations of the counsel, on both sides, are worthy of your attention, and their just effect should be to cause you to follow, steadily and carefully and exactly, the rules of law upon this subject. The general question, whether the prisoner's state of mind, when he struck the blow, was such as to exempt him from legal responsibility, is a question of fact for your decision; the responsibility of deciding which rightly rests upon you alone. But there are certain rules of law which you are bound to apply, and the court, upon its responsibility, is to lay down; and these rules, when applied, will conduct you to the only safe decision; because these rules will enable you to do what you are sworn to do, that is, to render a verdict according to the law and the evidence given you. You will observe, then, that this defense of insanity is to be

tested and governed by principles of law, and is to be made out in accordance with legal rules. No defendant can be rightly acquitted of a crime by reason of insanity, upon any loose, general notions which may be afloat in the community, or even upon the speculations of men of science. In a court of justice, these must all yield to the known and fixed rules which the law prescribes. And I now proceed to state to you such of them as are applicable to this case.

§ 3149. *The sanity of the accused is presumed until the contrary is shown.*

The first is, that this defendant must be presumed to be sane till his insanity is proved. Men, in general, are sufficiently sane to be responsible for their criminal acts. To be irresponsible because of insanity is an exception to that general rule. And before any man can claim the benefit of such an exception, he must prove that he is within it. You will, therefore, take it to be the law, that the prisoner is not to be acquitted, upon the ground of insanity, unless, upon the whole evidence, you are satisfied that he was insane when he struck the blow.

§ 3150. *If the accused did not understand the nature of the act, and did not know that he was doing wrong, he is not responsible for the consequences thereof.*

The next inquiry is, what is meant by insanity — what is it which exempts from punishment, because its existence is inconsistent with a criminal intent? Clearly, it is not every kind and degree of insanity which is sufficient. There have been, and probably always are, in the world, instances of men of great general ability, filling, with credit and usefulness, eminent positions, and sustaining through life, with high honor, the most important civil and social relations, who were, upon some one topic or subject, unquestionably insane. There have been, and undoubtedly always are, in the world, many men whose minds are such, that the conclusions of their reason and the results of their judgment, tested by those of men in general, would be very far astray from right. There are many more, whose passions are so strong, and whose conscience and reason and judgment are so weak, or so perverted, that not only particular acts, but the whole course of their lives, may, in some sense, be denominated insane. And there are combinations of these, or some of these, deficiencies, or disorders, or perversions, or weaknesses, or diseases. They are an important as well as a deeply interesting study; and they find their place in that science which ministers to diseases of the mind, and which, in recent times, has done so much to alleviate and remove some of the deepest distresses of humanity. But the law is not a medical or a metaphysical science. Its search is after those practical rules which may be administered, without inhumanity, for the security of civil society, by protecting it from crime. And, therefore, it inquires not into the peculiar constitution of the mind of the accused, or what weaknesses, or even disorders, he was afflicted with, but solely whether he was capable of having, and did have, a criminal intent. If he had, it punishes him; if not, it holds him dispensable. And it supplies a test by which the jury is to ascertain whether the accused be so far insane as to be irresponsible. That test is, the capacity to distinguish between right and wrong, as to the particular act with which the accused is charged. If he understands the nature of his act; if he knows his act is criminal, and that if he does it he will do wrong and deserve punishment, then, in the judgment of the law, he has a criminal intent, and is not so far insane as to be exempt from responsibility. On the other hand, if he is under such delusion as not to understand the nature of his act, or if he has not sufficient memory and reason and judgment to know that he is doing

wrong, or not sufficient conscience to discern that his act is criminal and deserving punishment, then he is not responsible.

This is the test which the law prescribes, and these are the inquiries which you are to make on this part of the case: Did the prisoner understand the nature of his act when he stabbed Mr. Johnson? Did he know he was doing wrong, and would deserve punishment? Or, to apply them more nearly to this case: Did the prisoner know that he was killing Mr. Johnson? that so to do was criminal and deserving punishment? If so, he had the criminal intent necessary to convict him of the crime of murder, and he cannot be acquitted on the ground of insanity. It is not necessary here to consider a case of a person killing another under a delusive idea, which, if true, would either mitigate or excuse the offense, for there is no evidence pointing to any such delusion.

§ 3151. *The opinions of experts, given with respect to an hypothetical state of facts, are admissible in evidence.*

It is asserted by the prisoner that when he struck the blow he was suffering under a disease known as *delirium tremens*. He has introduced evidence tending to prove his intemperate drinking of ardent spirits during several days before the time in question, and also certain effects of this intemperance. Physicians of great eminence, and particularly experienced in the observation of this disease, have been examined on both sides. They were not, as you observed, allowed to give their opinions upon the case, because the case, in point of fact, on which any one might give his opinion, might not be the case which you, upon the evidence, would find; and there would be no certain means of knowing whether it was so or not. It is not the province of an expert to draw inferences of fact from the evidence, but simply to declare his opinion upon a known or hypothetical state of facts; and, therefore, the counsel on each side have put to the physicians such states of fact as they deem warranted by the evidence, and have taken their opinions thereon. If you consider that any of these states of fact put to the physicians are proved, then the opinions thereon are admissible evidence to be weighed by you. Otherwise their opinions are not applicable to this case. And here I may remark, gentlemen, that although in general witnesses are held to state only facts, and are not allowed to give their opinions in a court of law, yet this rule does not exclude the opinions of those whose professions and studies, or occupations, are supposed to have rendered them peculiarly skilful concerning questions which arise in trials, and which belong to some particular calling or profession. We take the opinions of physicians in this case for the same reason we resort to them in our own cases out of court, because they are believed to be better able to form a correct opinion upon a subject within the scope of their studies and practice than men in general, and therefore better than those who compose your panel. But these opinions, though proper for your respectful consideration, and entitled to have, in your hands, all that weight which reasonably and justly belongs to them, are nevertheless not binding on you, against your own judgment, but should be weighed and, especially where they differ, compared by you, and such effect allowed to them as you think right, not forgetting that on you alone rests the responsibility of a correct verdict. Besides these opinions upon cases assumed by the counsel, which you may find to correspond more or less nearly with the actual case on trial, the physicians have also described to you the symptoms of the disease of *delirium tremens*. They all agree that it is a dis-

case of a very distinct and strongly marked character, and as little liable to be mistaken as any known in medicine. All the physicians have described it substantially in the same way. I will read to you from my notes that given by Dr. Bell. He says the symptoms are: 1. Delirium, taking the form of apprehensiveness on the part of the patient. He is fearful of something,—fears pursuit by officers or foes. Sometimes demons and snakes are about him. In the earlier stages, in attempting to escape from his imaginary pursuers, he will attack others as well as injure himself. But he is much more apprehensive of receiving injury than desirous of inflicting it, except to escape. He is generally timid and irresolute, and easily pacified and controlled. 2. Sleeplessness. I believe *delirium tremens* cannot exist without this. 3. Tremulousness, especially of the hands, but showing itself in the limbs and the tongue. 4. After a time sleep occurs, and reason thus returns. I do not recall any instance in which sleep came on in less than three days, dating from the last sleep. At first it is rather broken, not giving full relief; and this is followed by a very profound sleep, lasting six or eight hours, from which the patient awakes sane.

Dr. Stedman, who, from his care of the marine hospital at Chelsea, and of the city hospital at South Boston, has had great experience in the treatment of this disease, after describing its symptoms substantially as Dr. Bell did, says its access may be very sudden, and he has often known it first manifest itself by the patients attacking those about them, regarding them as enemies; that it is in accordance with his experience, that a case may terminate within two days of the time when the delirium first manifests itself, and that it rarely lasts more than four days; that he has arrested the disease in forty-eight hours by the use of sulphuric ether.

Taking along with you these accounts of the symptoms and course and termination of this disease, you will inquire whether the evidence proves these symptoms existed in this case; and whether the previous habits and the intemperate use of ardent spirits, from which this disease springs, are shown; and whether the recovery of the prisoner corresponded with the course and termination of the disease of *delirium tremens*, as described by the physicians.

In respect to the previous intemperance of the prisoner, and the symptoms, course and termination of the disease, you are to look to the accounts of the conduct and acts of the prisoner given by his shipmates. Their testimony will be fresh in your recollection, and it is not necessary for me to detail it. How recently before the homicide had he slept? Was his demeanor, for two or three days previous, natural, or was he restless? Was any tremor of the hands or limbs visible, and if so, was it very marked or not? Did he utter any exclamations manifesting apprehensiveness before or immediately after the act? When, and under what circumstances, did he recover his reason, if he was delirious, and especially did he recover it without sleep? These are all important inquiries to be made by you and answered, as a careful consideration of the evidence may convince you they should be answered.

It is not denied, on the part of the government, that the prisoner had drank intemperately of the ardent spirit of the country during some days before the occurrence. But the district attorney insists that he had continued so to drink, down to a short time before the homicide; and that when he struck the blow it was in a fit of drunken madness. And this renders it necessary for me to instruct you concerning the law upon the state of facts which the prosecutor

asserts existed. Although *delirium tremens* is the product of intemperance, and therefore in some sense is voluntarily brought on, yet it is distinguishable, and by the law is distinguished, from that madness which sometimes accompanies drunkenness.

§ 3152. *A person suffering from delirium tremens is not responsible for his acts if he could not understand the nature thereof.*

If a person suffering under *delirium tremens* is so far insane as I have described to be necessary to render him irresponsible, the law does not punish him for any crime he may commit.

§ 3153. *A man is responsible for his acts though committed while in an intoxicated condition.*

But if a person commits a crime under the immediate influence of liquor, and while intoxicated, the law does punish him, however mad he may have been. It is no excuse, but rather an aggravation of his offense, that he first deprived himself of his reason before he did the act. You will easily see that there would be no security for life or property if men were allowed to commit crimes with impunity, provided they would first make themselves drunk enough to cease to be reasonable beings. And, therefore, it is an inquiry of great importance in this case, and, in the actual state of the evidence, I think one of no small difficulty, whether this homicide was committed while the prisoner was suffering under that marked and settled disease of *delirium tremens*, or in a fit of drunken madness. My instruction to you is, that if the prisoner, while sane and responsible, made himself intoxicated, and while intoxicated committed a murder by reason of insanity, which was one of the consequences of that intoxication and one of the attendants on that state, then he is responsible in point of law and must be punished. This is as clearly the law of the land as the other rule, which exempts from punishment acts done under *delirium tremens*. It may sometimes be difficult to determine under which rule, in point of fact, the accused comes. Perhaps you will think it not easy to determine it in this case. But it is the duty of the jury to ascertain from the evidence on which side of the line this case falls and to decide accordingly.

§ 3154. *In criminal cases the burden of proving insanity is on the accused; but if the prosecutor alleges that the insanity arose from some particular cause, and that the accused is therefore liable, then the burden is on him to prove that fact.*

It may be very material for you to know on which party is the burden of proof in this part of the case. I have already told you that it is incumbent on the prisoner to satisfy you he was insane when he struck the blow; for the reason that, as men in general are sane, the law presumes each man to be so till the contrary is proved. But if the contrary has been proved; if you are satisfied the prisoner was insane, the law does not presume his insanity arose from any particular cause; and it is incumbent on the party which asserts that it did arise from a particular cause, and that the prisoner is guilty by law, because it arose from that cause, to make out this necessary element in the charge to the same extent as every other element in it. For the charge then assumes this form,—that the prisoner committed a murder, for which, though insane, he is responsible, because his insanity was produced by and accompanied a state of intoxication. In my judgment the government must satisfy you of these facts, which are necessary to the guilt of the prisoner in point of law, provided you are convinced he was insane. You will look carefully at all the evidence bearing on this question, and if you are convinced that the prisoner was insane, to

that extent which I have described as necessary to render him irresponsible, you will acquit him; unless you are also convinced his insanity was produced by intoxication, and accompanied that state; in which case you will find him guilty. (The prisoner was acquitted.)

UNITED STATES v. DREW.

(Circuit Court for Massachusetts: 5 Mason, 23-30. 1828.)

STATEMENT OF FACTS.—Indictment for the murder of Clark upon the high seas. The defense set up was insanity. It appeared from the evidence that for a considerable time before the act, Drew, the master of the ship John Jay, had indulged in continual drunkenness; that five days before it took place he ordered all liquor to be thrown overboard, which was done; that thereafter he exhibited all the symptoms of *delirium tremens*, and that he committed the murder under the impression that the crew were about to kill him.

§ 3155. *Insanity, of which intemperance is only the remote cause, is a good defense to an indictment for murder.*

Opinion by STORY, J.

We are of opinion that the indictment upon these admitted facts cannot be maintained. The prisoner was unquestionably insane at the time of committing the offense. And the question made at the bar is, whether insanity, whose remote cause is habitual drunkenness, is, or is not, an excuse in a court of law for a homicide committed by the party, while so insane, but not at the time intoxicated or under the influence of liquor. We are clearly of opinion that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility. An exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct, to shelter himself from the legal consequences of such crime. But the crime must take place and be the *immediate* result of the fit of intoxication, *and while it lasts*; and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal in a moral point of view such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offense. The law looks to the immediate, and not to the remote, cause; to the actual state of the party, and not to the causes which remotely produced it. Many species of insanity arise remotely from what in a moral view is a criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, etc. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence. (Verdict, not guilty.)

HOPT v. PEOPLE.

(14 Otto, 631-635. 1881.)

ERROR to the Supreme Court of the Territory of Utah.**Opinion by MR. JUSTICE GRAY.**

STATEMENT OF FACTS.—The plaintiff in error was indicted, convicted and sentenced for the crime of murder in the first degree in the district court of the third judicial district of the territory of Utah, and presented a bill of exceptions, which was allowed by the presiding judge, and from his judgment and sentence appealed to the supreme court of the territory, and that court having affirmed the judgment and sentence, he sued out a writ of error from this court. Of the various errors assigned, we have found it necessary to consider two only.

The Penal Code of Utah contains the following provisions: "Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life,—is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." Sec. 89. "Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years." Sec. 90. Compiled Laws of Utah of 1876, pp. 585, 586.

By the Utah Code of Criminal Procedure, the charge of the judge to the jury at the trial "must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally" (sec. 257, cl. 7); the jury, upon retiring for deliberation, may take with them the written instructions given (sec. 289); and "when written charges have been presented, given or refused, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the indorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions." Sec. 315, Laws of Utah of 1878, pp. 115, 121, 126. It appears by the bill of exceptions that evidence was introduced at the trial tending to show that the defendant was intoxicated at the time of the alleged homicide.

§ 3156. *Drunkenness, when a defense.*

The defendant's fifth request for instructions, which was indorsed "refused" by the judge, was as follows: "Drunkenness is not an excuse for crime; but as in all cases where a jury find a defendant guilty of murder they have to determine the degree of crime, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered, where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration of or attempt to perpetrate arson, rape, robbery or

burglary. The degree of the offense depends entirely upon the question whether the killing was wilful, deliberate and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be; not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime."

Upon this subject the judge gave only the following written instruction: "A man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withal so inexcusable in itself, that law has never recognized it as an excuse for crime." The instruction requested and refused, and the instruction given, being matter of record and subjects of appeal under the provision of the Utah Code of Criminal Procedure, sec. 315, above quoted, their correctness is clearly open to consideration in this court. *Young v. Martin*, 8 Wall., 354.

At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification or extenuation of a crime committed under its influence. *United States v. Drew*, 5 Mason, 28 (§ 3155, *supra*); *United States v. McGlue*, 1 Curt., 1 (§§ 3145-54, *supra*); *Commonwealth v. Hawkins*, 3 Gray (Mass.), 463; *People v. Rogers*, 18 N. Y., 9. But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. The law has been repeatedly so ruled in the supreme judicial court of Massachusetts in cases tried before a full court, one of which is reported upon other points (*Commonwealth v. Dorsey*, 103 Mass., 412); and in well-considered cases in courts of other states. *Pirtle v. State*, 9 Humph. (Tenn.), 663; *Haile v. State*, 11 id., 154; *Kelly v. Commonwealth*, 1 Grant (Penn.), 484; *Keenan v. Commonwealth*, 44 Penn. St., 55; *Jones v. Commonwealth*, 75 id., 403; *People v. Belencia*, 21 Cal., 544; *People v. Williams*, 43 id., 344; *State v. Johnson*, 40 Conn., 136, and 41 id., 584; *Pigman v. State of Ohio*, 14 Ohio, 555, 557. And the same rule is expressly enacted in the Penal Code of Utah, sec. 20: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act." *Compiled Laws of Utah of 1876*, pp. 568, 569. The instruction requested by the defendant clearly and accurately stated the law applicable to the case; and the refusal to give that instruction, taken in connection with the unqualified instruction actually given, necessarily prejudiced him with the jury.

§ 3157. *Where by the law a written charge to the jury is required of the court, such requisition is not fulfilled by a reference to a printed law magazine.*

One other error assigned presents a question of practice of such importance

that it is proper to express an opinion upon it, in order to prevent a repetition of the error upon another trial. By the provisions of the Utah Code of Criminal Procedure, already referred to, the charge of the judge to the jury at the trial must be reduced to writing before it is given, unless the parties consent to its being given orally, and the written charges or instructions form part of the record, may be taken by the jury on retiring for deliberation, and are subjects of appeal. The object of these provisions is to require all the instructions given by the judge to the jury to be reduced to writing and recorded, so that neither the jury, in deliberating upon the case, nor a court of error, upon exceptions or appeal, can have any doubt what those instructions were; and the giving, without the defendant's consent, of charges or instructions to the jury, which are not so reduced to writing and recorded, is error. *Feriter v. State*, 33 Ind., 283; *State of Missouri v. Cooper*, 45 Mo. 64; *People v. Sanford*, 43 Cal., 29; *Gile v. People*, 1 Col., 60; *State v. Potter*, 15 Kan., 302.

The bill of exceptions shows that the presiding judge, after giving to the jury an instruction requested in writing by the defendant upon the general burden of proof, proceeded of his own motion, and without the defendant's consent, to read from a printed book an instruction which was not reduced to writing, nor filed with the other instructions in the case, but was referred to in writing in these words only: "Follow this from Magazine American Law Register, July, 1868, page 559;" and that to the instruction so given an exception was taken and allowed. This was a clear disregard of the provisions of the statute. The instruction was not reduced to writing, filed, and made part of the record, as the statute required. If the book was not given to the jury when they retired for deliberation, they did not have with them the whole of the instructions of the judge, as the statute contemplated. If they were permitted to take the book with them without the defendant's consent, that would of itself be ground of exception. *Merrill v. Nary*, 10 Allen (Mass.), 416.

For these reasons the judgment must be reversed, and the case remanded with instructions to set aside the verdict and order a new trial.

§ 3158. When insanity will excuse crime; how insanity ascertained.—Where a person, charged with crime, cannot discriminate between right and wrong, he is not a proper subject of punishment; and this fact can be best ascertained, not by any medical theory, but by the acts of the individual himself. Does he commit the offense by embracing the most favorable opportunity, in the absence of witnesses, and under circumstances likely to avoid detection; and if he steals money, does he account for the possession of it in an honest way; and does he, under apprehension of arrest, endeavor to elude the officers of the law? *United States v. Shultz*, * 6 McL., 121. See §§ 3103, 3116, 3118.

§ 3159. Although a person is laboring under partial insanity at the time of the commission of a crime, yet if he still understands the nature and character of the act and its consequences, and has a knowledge that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and deserve punishment, such partial insanity is not sufficient to exempt him from criminal responsibility. *United States v. Holmes*, 1 Cliff., 98.

§ 3160. Accused presumed sane.—Every person, on trial, under a criminal charge, is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his criminal acts, unless the contrary is proved to the satisfaction of the jury. *Ibid.* See §§ 3104, 3117, 3121.

§ 3161. Murder; drunkenness.—A prisoner is not guilty of murder, if, at the time of committing the act, he was in such a state of mental insanity, not produced by the immediate effects of intoxicating drink, as not to have been conscious of the moral turpitude of the act. *United States v. Clarke*, 2 Cr. C. C., 158. See §§ 3122-23.

§ 3162. Accused insane at time of trial; inquiry.—Upon a motion for a new trial, after a verdict of guilty in a trial for perjury, based upon the suggestion that at the time of the trial the defendant was of unsound mind, the court ordered a jury to investigate the matter,

and directed them that the question to be determined was whether the prisoner, at the time of his trial, was so far of unsound mind as to be incapable of comprehending the nature of the charge against him, and of properly presenting his defense. *United States v. Lancaster*, 7 Biss., 440.

§ 3163. Upon a motion for a new trial, based upon the insanity of the prisoner at the time of his trial, the burden of proof of insanity is on the prisoner. But he is to have the benefit of any reasonable doubt on that subject. *Ibid.*

§ 3164. Drunkenness is no excuse or palliation for the crime of murder. *United States v. Cornell*, 2 Mason, 91. See §§ 3122-23.

§ 3165. Intoxication is no excuse for crime, when the offense consists merely in doing a criminal act without regarding intention. But when the act done is innocent in itself, and criminal only when done with a corrupt or malicious motive, a jury may presume from the intoxication that there was a want of criminal intention, and that the reasoning faculties did not act. But if the mind act, a state of partial intoxication affords no grounds of favorable presumption in favor of an honest or innocent intention, in cases where a dishonest and criminal intention would be fairly inferred from the commission of the same act when sober. The question to be determined is whether the accused knew what he was about. *United States v. Roudenbush*,* Bald., 514.

§ 3166. Drunkenness is no excuse for an attempt to murder, but the intoxication of the prisoner is a fact proper to be considered by the jury in forming their opinion of the intent with which the acts were done. *United States v. Bowen*, 4 Cr. C. C., 604.

§ 3167. The artificial, voluntarily contracted, and temporary madness produced by drunkenness is rather an aggravation of than apology for a crime committed during that state. A drunkard is a voluntary demon, and his intoxication gives him no privilege. If, however, an habitual or fixed frenzy is produced by this practice, though such madness is contracted by the vice and will of the party, it places the man in the same condition as if it were contracted, at first, involuntarily. Drunkenness is no excuse for crime. Nothing is more easily counterfeited, and no state is so irregular in its operation. *United States v. Forbes*,* Crabbe, 561.

XXXIII. REMOVAL OF CAUSES.

1. *From one Federal Court to Another.*

SUMMARY — *Not required to send original indictment*, § 3168; *too late to object that a copy was sent*, § 3169. — *Libel in District of Columbia*, § 3170. — *Passing upon sufficiency of indictment*, § 3171. — *Arrest on copy of indictment*, §§ 3172, 3173. — *Offense committed in a territory*, § 3174. — *When warrant of removal may be refused*, § 3175. — *In what cases a removal is authorized*, § 3176.

§ 3168. Under the act of congress providing for the removal of pending indictments from the district to the circuit court, it is not necessary that the original indictment be sent to the circuit court, but an exemplified copy of the record including the indictment is sufficient. When found, the indictment becomes a part of the records of the court, and is to be proved by an exemplification. *United States v. McKee*, §§ 3177-83.

§ 3169. When an indictment found in a district court is transmitted to the circuit court for trial, and the defendant goes to trial without objecting that a copy was sent up instead of the original, he cannot make that objection after his conviction under such indictment. *Ibid.*

§ 3170. It seems that the offense of libel in the District of Columbia is an offense against the United States for which the offender may be there indicted as at common law and punished. *In re Buell*, §§ 3183-87.

§ 3171. Where an offender is arrested in another district than that in which the offense is committed, upon an indictment found against him in such place, the district judge, before ordering his removal, has a right to pass upon the sufficiency of the indictment, and order the discharge of the prisoner if it is fatally defective. *Ibid.*

§ 3172. A certified copy of an indictment, if uncontradicted, is sufficient evidence upon which to warrant the arrest and commitment for examination of a person sought to be removed from one judicial district of the United States to another for trial. *United States v. Haskins*, §§ 3188-91.

§ 3173. It is not required that the defendant be confronted with the witnesses on a preliminary examination. And it is held that a copy of an indictment is sufficient evidence to authorize a committing magistrate out of the district to cause the accused person to be bailed for trial in the district in which the indictment was found. *In re Alexander*, § 3194.

§ 3174. A person indicted by a grand jury in a territory for an offense against the United States, and for whose arrest a warrant has been issued by the marshal of the United States for the territory, if found within one of the states, may, under the thirty-third section of the judiciary act, upon affidavit, made before the district judge of the United States in that state, setting out the finding of the indictment, and that it is still pending, and upon an authenticated exhibition of the indictment, be arrested on a warrant issued by such district judge, and upon examination committed or bailed for trial before the court to which the indictment was returned; and if bail be not given a warrant for his removal to the territory may issue. *United States v. Haskins*, §§ 3188-91.

§ 3175. Where a district judge is applied to for a warrant of removal, and it appears from the indictment on which the warrant is asked that the act alleged does not constitute an offense against the United States, or that no trial can be had in the district to which the removal is sought, it is his duty to refuse the warrant. *In re Doig*, §§ 3192-93.

§ 3176. A warrant for the removal of a person accused of a crime from one federal district to another is authorized only where the offender has been first arrested and committed for want of bail in a bailable case. Where a person is arrested in another district from that in which the crime is committed, he is first to be taken before the proper officer, who is to examine as to the crime alleged to have been committed. If there is not probable cause of the defendant's guilt he is entitled to be discharged. If there be found reasonable cause for holding the accused to answer, upon tendering sufficient bail he is entitled to be discharged. Only on failure to furnish bail, if the case is bailable, can he be committed. *United States v. Shepard*, §§ 3195-99.

[NOTES.— See §§ 3200-3208.]

UNITED STATES *v.* McKEE.

(Circuit Court for Missouri: 4 Dillon, 1-10. 1876.)

STATEMENT OF FACTS.—McKee was indicted for a conspiracy with other persons to defraud the United States of the taxes on distilled spirits. The indictment was found in 1875 in the district court for the eastern district of Missouri, and McKee having appeared was arraigned and pleaded not guilty. At the same term an order was duly entered on the record of the district court transferring the case to the circuit court, and McKee appeared in that court in January, 1876, and withdrew his plea of not guilty and demurred to the indictment. His demurrer being overruled he again pleaded not guilty, was tried and found guilty. The case comes before the court on a motion in arrest of judgment, the grounds of which appear sufficiently in the opinion of the court.

Opinion by DILLON, J.

The objection relied on is that the circuit court acquired no jurisdiction over the defendant and the case, because under the order of the district court remitting the indictment, the *original* indictment was never transmitted to this court, but only a certified copy thereof. It is also contended by the defendant, that, if the presence of the original indictment is not a *jurisdictional* requisite, yet, inasmuch as the statute contemplates that the defendant shall be tried upon the original, and not upon a copy, he has not been legally convicted, and judgment should be arrested. Both of these objections fail if the statute does not require the *original* indictment to be transmitted with the rest of the record and the order of remission.

§ 3177. *Under Revised Statutes, section 1037, it is not required in a criminal case that the original indictment be sent up from the district court to the circuit court, when under that statute a case is transmitted from the former to the latter court.*

When this question, which is new, and has never been decided, was first started, it occurred to us that the language of the statute (R. S., sec. 1037), viewed in connection with other statutes as to the removal of causes from

state to federal courts, contemplated that the indictment, that is, the *original* indictment, and all recognizances, processes and papers—in a word, the original files—should be transmitted to the court to which the case is sent. Subsequent reflection and examination have satisfied us that the language of the section, taken altogether, shows that it was the purpose of congress to authorize the transfer from the one court to the other of a criminal case—of the whole case, and all the proceedings in the same,—and this is the burden and object of the statute, and not the particular form in which the record of the one court should be sent to the other. The case originated in the district court. The indictment and other proceedings therein were part of the records of that court. An indictment, when found by a grand jury, and presented to and received by the court, passes into and becomes a part of the records of the court. 1 Bish. Cr. Pro. (2d ed.), sec. 36; *State v. Gibbons*, 1 Southard (N. J.), 40.

§ 3178. *An indictment when found becomes a part of the records of the court, and its existence and contents must be proved by an exemplification of the records and not by the production of the original paper.*

The indictment being the original accusation of the grand jury, and a part of the records of the court to which it is presented, is always before the court, and in that court it is, perhaps (under the practice in this country), the best evidence of its existence and contents. But in other courts the practice and law are settled that the existence of an indictment and its contents may be shown by exemplification of the record of the court in which it is found, and it is not necessary, if, indeed, competent, to produce the original indictment. *Porter v. Cooper*, 6 Carr. & P., 354; *Rex v. Smith*, 8 Barn. & Cress., 341; *Bishop v. State*, 30 Ala., 34; *Roscoe*, Crim. Ev. (7th Am. ed.), 165; *Harrall v. State*, 26 Ala., 52; *Major v. State*, 2 Sneed (Tenn.), 11; *Vail v. Smith*, 4 Cow., 71; 1 Greenl. Ev., sec. 502.

§ 3179. *The English practice in the removal of an indictment to a superior court.*

And in England it is settled that the finding of an indictment in another court cannot be proved by the production of the original by the clerk of the court in which it is found, but it must be proved by a record regularly drawn up containing a copy of it. *Rex v. Smith*, 8 Barn. & Cress., 341; *Roscoe*, Crim. Ev. (7th Am. ed.), 165. In England indictments found in inferior jurisdictions may be removed, with all the proceedings thereon, at any time before trial, into the king's bench, to have their validity determined and to prevent a partial and insufficient trial in the court below. 1 Bl. Com., 320, 321; 1 Chitt. Cr. L., 371 *et seq.* The English books always speak of the "removal of the indictment" and the "delivery of the indictment" to the higher court, but in point of fact the original indictment remains in the court in which it is found, and only the record of it and the proceedings of record touching it are sent to the higher court. The removal is effected by the writ of *certiorari*, which issues out of the king's bench, directed to the judges or officers of the inferior court in which the indictment is pending, and commands them to certify "all and singular the said indictment," etc. 1 Chitt. Cr. L., 387. Notwithstanding the command of the writ is to certify the indictment, the writ is executed by transmitting "the record of the indictment" and the other proceedings of record thereon—and not the original indictment (1 Chitt. Cr. L., 394; *id.*, 334), where it is expressly said that the "copy of the indictment" is transmitted to the superior court. In *The State v. Gibbons*, 1 Southard (N. J.), 40, 44, the *original* indictment was sent to the supreme court, and it was held to be im-

proper and insufficient. The chief justice observed: "When the grand jury return into court and present an indictment, an entry is made in the minutes of such presentment, stating against whom the same is, and for what crime; and then the indictment itself passes to the files of the court, there to remain until it becomes necessary to make up the record, . . . and then to be affixed among the rolls. In all cases where a *certiorari* is presented, whether before or after plea pleaded, it is essential that the proceedings, so far as they have gone, be enrolled, and that that roll, *and nothing else*, be certified to the upper court."

The removal of a criminal case in England after bill of indictment found, by *certiorari*, from an inferior to a superior jurisdiction, for trial by jury and judgment, is quite analogous to the remission provided for by the statutes of the United States from one of its courts to the other. The English books invariably speak of the "removal of indictments" by *certiorari* (see Chitt. Cr. L., ch. 10, p. 371), when, in fact, the removal is not of the original, but of the record duly certified, which includes a *copy* of the indictment. The command of the writ is to "send the *indictment*," which is obeyed by sending the *record* of the indictment. The trial is had upon the copy or record thus returned. So, when our statute provides for the remission of the indictment, it may well be construed to mean an exemplified copy or record of the indictment, to be sent with the other records pertaining to the case. It is just as important or as little important that the original bill of indictment found at the sessions should be in the king's bench for the trial of the defendant thereon by a jury as that it be in the federal court to which a criminal case has been sent by the court to which the indictment was originally presented. It is essential to the jurisdiction of the district court that the indictment should have been presented to it by a grand jury impaneled in that court, and these facts ought to appear of record therein. If that court acquired no jurisdiction before the order remitting the indictment, the circuit court could acquire none in consequence of the filing of the order of remission.

Undoubtedly, all the record relating to the case remitted, including recognizances taken in open court and entered of record, and all the proceedings of record, should be transmitted to the court to which the remission is ordered, as well as the indictment. All these other facts of record *must* go by exemplification or certified copy, and if so, why not in the same manner the indictment and process? This is the usual way of transmitting or sending the record in a case from one court to another; and the practice contended for by the defendant of sending away the originals would compel the court in which the indictment was found to part with its records and leave them incomplete. And the books show that unless the statute requires the original papers to be sent, the practice is to send exemplifications or certified copies. Very little aid is to be had from the decisions of the state courts construing special statutes on the subject of changes of venue in criminal cases. They all concur in holding that when the statute authorizes the trial to be had upon the record copy of the indictment instead of the original, this may be done. *Harrall v. State*, 26 Ala., 52; *Major v. State*, 2 Sneed (Tenn.), 11; *Bishop v. State*, 30 Ala., 34; *Reynolds v. State*, 11 Tex., 120; *Ruby v. State*, 7 Mo., 206; *Bramlette v. State*, 31 Ala., 376.

§ 3180. *Quære: As to trial on a copy of a lost indictment.*

Whether the defendant may be tried or sentenced upon a copy of a *lost* indictment is not a question before us, and in respect of which there may be doubt

under the decisions, unless it is a copy of record. *Ganaway v. State*, 22 Ala., 722; *Bradshaw's Case*, 16 Gratt. (Va.), 107; *Mount v. State*, 14 Ohio, 295; *Ruby v. State*, 7 Mo., 206; 1 Bish. Cr. Pro. (2d ed.), sec. 1215, and cases cited.

§ 3181. *Practice as to records on change of venue.*

In the case of *Browning v. State*, 30 Miss., 656, it was urged that the court erred in forcing the prisoner to trial on a copy of the indictment instead of the original. He was indicted in one county, and the venue was changed to another county. In a change of venue in civil cases the statute directed that the original papers be transmitted, but the statute in criminal cases made no provision on the subject. The clerk transmitted a certified copy of all the orders, etc., including a copy of the indictment, and it was held that the defendant was properly tried thereon. The court remarked that unless authority to transmit the original papers "is conferred by the legislature, it would be clearly illegal for the clerks of the circuit courts to part with the original papers or records pertaining to a prosecution therein pending. All that a clerk could do in such cases — and we must infer that it was all the legislature intended to be done — is to transmit a perfect transcript of all the original papers in the cause, the minutes or records of the court containing the orders, and proceedings of the court in relation to the same, properly certified." In *Shoemaker v. State*, 12 Ohio, 43, 51, the statute in terms required the "original indictment" to be transmitted when the prisoner elected to be tried in the supreme court.

Our judgment is that there is no positive requirement in the statute (R. S., sec. 1037) that the original indictment should be sent; that, like the other proceedings in the case, the indictment is part of the record of the cause, and that it was properly certified as such to the circuit court, and that on the filing of the same, with the order of remission, that court had jurisdiction to try the defendant on the indictment and record thus certified and filed.

§ 3182. *Where a defendant goes to trial on a copy of an indictment without objecting to the absence of the original he waives that objection, and the judgment cannot be arrested on that ground.*

But suppose we are mistaken in the view that the statute authorizes or requires the copy instead of the original indictment to be sent, does it follow that the court acquired no jurisdiction? A certified copy was sent. It is not suggested that it was not a faithful copy, word for word. The defendant treated the exemplified or record copy as the indictment. He demurred to it, and afterwards went to trial upon it. He made no objection to it. If he had been acquitted, it would certainly have been severe to have applied to him the doctrine his counsel now maintain to be correct, namely: that the whole proceeding was *coram non jure* and void, because the court had no jurisdiction, and hence he would be liable to be again tried. It is indisputable that the defendant has suffered no prejudice in fact because he was tried upon the certified copy instead of the original. Having treated the record copy throughout as equivalent to the original, the defendant must be taken to have waived the right, if it exists, to a trial upon the original indictment when he fails to make the objection until after verdict. The cases are numerous, particularly in modern times, and where the offense is a misdemeanor, in which rights, technical in their character, and where no prejudice has resulted, have been considered as waived. *Ruby v. State*, 7 Mo., 206; *Major v. State*, 2 Sneed (Tenn.), 11; *Shaw v. State*, 18 Ala., 547; *Patterson v. United States*, 2 Wheat., 221; 1 Bish. Cr. Pro., secs. 117, 118, 125.

Inasmuch as it is not claimed that the exemplification of the indictment on

which the defendant was tried is in any respect variant from the original on file in the district court, we have the means of a positive assurance that there has been and could be no prejudice to the defendant because the trial was upon the one instead of the other. Thus the case, in any view which can be taken of it, comes within the remedial provisions of section 1025 of the Revised Statutes: "No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceedings thereon be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." The motion in arrest and to dismiss are overruled.

TREAT, J., concurred.

IN RE BUELL

(Circuit Court for Missouri: 8 Dillon, 116-124. 1875.)

STATEMENT OF FACTS.—Buell was indicted in the District of Columbia for the offense of libel. An information was filed before a commissioner in the eastern district of Missouri, and on a hearing he was committed to the custody of the marshal to await the action of the district judge. On writ of *habeas corpus* the district judge discharged Buell, and refused to order his removal to the District of Columbia. An appeal was granted on the application of the district attorney.

Opinion by DILLON, J.

In the argument before me, the counsel for Mr. Buell has not maintained that the matter charged in the indictment to have been composed and published by him concerning Mr. Chandler is not in its nature libelous, and there is no doubt that it is so. Nor has the counsel for Mr. Buell controverted the position that for a libel *composed and published* in the District of Columbia the offender may be *there* indicted and punished as for an offense against the laws of the United States. And of this opinion was the learned judge of the district court—that opinion resting upon the act of congress of February 27, 1801 (2 Stats. at Large, 103), adopting and continuing in force within the District of Columbia the laws of Maryland; the act of February 25, 1865 (13 Stats. at Large, 439), recognizing libel as an indictable offense against the United States in the District of Columbia, and the decisions of the supreme court of the United States concerning the effect of the above mentioned act of February 27, 1801. *Rhodes v. Bell*, 2 How., 397; *United States v. Simms*, 1 Cranch, 258; *Stelle v. Carroll*, 12 Pet., 205; *Kendall v. United States*, 12 Pet., 524; *Ex parte Watkins*, 7 Pet., 575. By the act of 1801, says Chief Justice Taney, "the common law in civil and *criminal* cases, as it existed in Maryland at the date of this act of congress (February 27, 1801), became the law of the District of Columbia on the Maryland side of the Potomac." (The Virginia portion was retroceded in 1846. 9 Stats. at Large, 33.)

§ 3183. *The law as to libel composed and published in the District of Columbia.*

It will therefore be assumed that the offense of libel in the District of Columbia is an offense against the United States, for which the offender may be there indicted as at common law, and punished. This being so, and Mr. Buell having been there indicted for such an offense, one inquiry is, whether there is any law authorizing the removal of persons found beyond the District of Columbia

to that District for trial for offenses committed therein. In this respect there is no difference between libel and other offenses, and the question is a general one, whether, for *any* offense committed in the District of Columbia against the laws of the United States, the offender found elsewhere can be removed there for trial. On this point, under the law as it stands, I have no doubt. The authority is ample, and the language of the Revised Statutes (sec. 1014), in connection with the act of June 22, 1874, removes the doubts arising on the words "such court of the United States as by *this* act (the judiciary act of 1789) has cognizance of the offense." The District of Columbia is not a sanctuary to which persons committing offenses against the United States may fly and be beyond the reach of justice, nor is the law so defective that persons there committing such offenses and escaping, or found elsewhere, cannot be taken back there for trial. I agree to the views in general of the district judge on this point, as expressed in his opinion, which accompanied the record in the case, and do not think it necessary to enlarge upon it.

§ 3184. *Provision for removal of offenders under section 1014, Revised Statutes.*

The statute provides that United States commissioners and certain magistrates, "for any crime or offense against the United States," may "arrest and imprison or bail the offender for trial before such court of the United States as by law has cognizance of the offense" (R. S., sec. 1014). An information was filed before Commissioner Clarke, who committed the prisoner to the custody of the marshal. In such a case, the further provision is that "where any offender is committed in any district other than that where the offense is to be tried, it shall be the *duty of the judge of the district* where such offender is imprisoned, seasonably *to issue*, and the marshal to execute, *a warrant for his removal to the district where the trial is to be had*" (R. S., sec. 1014). On the proceedings before him, the district judge refused to issue the warrant of removal and discharged the prisoner; and the question is whether his action in this case ought to be reversed.

§ 3185. *The question of the sufficiency of the indictment is not for the court in which it is found, but for the court of the district in which the prisoner is at the time application for removal is made.*

The district judge, in making this order, proceeded upon the ground that he might properly look into the indictment, and if it was fatally defective in essential averments to constitute an offense triable in the District of Columbia, he might refuse to issue the warrant for the prisoner's removal. It is argued that the question of the sufficiency of the indictment is for the court in which it was found, and not for the district judge, on such an application. *In re Clarke*, 2 Ben., 540. I cannot agree to this proposition in the breadth claimed for it in the present case. This provision devolves on a high judicial officer of the government a useful and important duty. In a country of such vast extent as ours, it is no light matter to arrest a supposed offender, and, on the mere order of an inferior magistrate, remove him hundreds, it may be thousands, of miles for trial. The law wisely requires the previous sanction of the district judge to such a removal. Mere technical defects in an indictment should not be regarded; but a district judge who should order the removal of a prisoner when the only probable cause relied on or shown was an indictment, and that indictment failed to show any offense against the laws of the United States, or showed an offense not committed or triable in the district to which the removal is sought, would misconceive his duty and fail to protect the lib-

erty of the citizen. It is the constitutional right of the citizen to be tried in the district in which the offense imputed to him is alleged to have been committed, and not elsewhere. Article 2, section 2.

§ 3186. — *when the indictment is defective the district judge will discharge the prisoner.*

In this case the district judge discharged the prisoner on the ground that the indictment failed to show that the alleged libel was published in the District of Columbia, but showed rather that the offense charged therein was an offense, if at all, against the laws of Michigan. If this is a proper view of the indictment, his action was unquestionably proper. The language of the indictment is peculiar. It was only necessary for the pleader to have averred that the defendant did compose and publish the libelous matter, setting it out, within the District of Columbia. Such are the precedents. Why is it alleged, out of the ordinary course, that the libel was composed and written in the form of a newspaper article and printed in the Detroit Free Press, in the state of Michigan, and afterwards, to wit, on the day and year aforesaid, published in the District of Columbia?

The district attorney, notwithstanding some old English cases, very properly admitted that *publication* by the defendant in the District of Columbia was essential to the offense, and that if this libel was published in Michigan by the procurement of the defendant, he could be there indicted for it. But he contended that if the paper containing the libelous article was afterwards *published* (in the legal sense) by the defendant in the District of Columbia, he could also be there indicted for it as an offense against the United States, and he claimed that, in this aspect of the question, the indictment was sufficient to charge such an offense. Whatever may be the correctness of the contention of counsel in these respects, it seems to me quite doubtful whether the indictment intended to charge a substantive publication by the defendant in the District of Columbia, or any publication in that District, except so far as composing a libel there for publication in a newspaper elsewhere is in law a publication in the District. This, without more, would not be a publication in the District. Upon the authorities, it seems clear that if the defendant composed a libel in the District of Columbia with intent to have it published in a newspaper in Michigan, and it was there published by the defendant's procurement or consent, he would be liable to indictment in the latter state. 1 Russell on Crimes, 258, and cases cited; 3 Chitt. Cr. L., 872; Rex v. Johnson, 7 East, 68; Commonwealth v. Blanding, 3 Pick., 304. But the indictment would then be for an offense against the laws of the state of Michigan, and not of the United States. Therefore, the present indictment states facts which show a violation of the laws of Michigan. But it is contended that it also shows an offense against the laws of the United States in the District of Columbia. Merely composing the libel in the District would not be sufficient, as the whole *corpus delicti*, which includes publication in the District, is essential. If it had been intended to charge that the defendant not only wrote the libel in the District of Columbia, but, after its publication in the Detroit Free Press, he had also published it in the District of Columbia, in any manner which in law constitutes a publication, the pleader should either have followed the precedents and omitted all reference to the publication in Michigan, or, if he alleged such publication, he should have made a positive and plain allegation of a substantive and distinct publication by the defendant of the libel in the District of Columbia.

As above remarked, the most natural construction of the indictment is that it is framed upon the erroneous legal notion that if a libel is composed within the District of Columbia for publication elsewhere, and it is accordingly published, this, *without more*, is a publication in the District, and makes the offense complete. But suppose that it can be deduced that the pleader intended to charge a distinct substantive publication of the libel by the defendant in the District of Columbia, it can hardly be expected that the well-known requirements of *certainly* in the allegations of an indictment can be disregarded, and that the court will supply, by inference and argument, the defects or omissions in the indictment. The most essential ingredient of libel is the *publication*; and the all-essential element of the offense charged in the present indictment is the publication by the *defendant within the District of Columbia*. The uncertainty of the indictment in the latter respect is sufficient to vitiate it. As the grand jury have not plainly said that the defendant published the article in the District of Columbia, in addition to the publication in Michigan, the court cannot intend that they meant to say it. It is a fundamental doctrine in English and American law that there can be no constructive offenses; that before a man can be punished, his case must be clearly within the law; the charge is to be unmistakably set forth in the indictment, and if there be uncertainty or fair doubt whether the law embraces the act, or the indictment sufficiently charges the offense, the doubt is to be resolved in favor of the accused. *United States v. Morris*, 14 Pet., 464; *United States v. Wiltberger*, 5 Wheat., 76 (§§ 1633-36, *supra*).

I have no hesitation in applying these liberal and just principles to the present case, because if libel in the District of Columbia be an indictable offense against the United States, it is an exception, curiously brought about, to the general rule that there are no common law offenses against the general government, and because the defect in the present indictment is not merely formal or technical, but goes to the gist of the offense for which the prisoner is sought to be removed.

§ 3187. *The absence of an allegation of a distinct publication of a libel is fatal to an indictment for such crime.*

The provision (Revised Statutes, sec. 731) that when any offense is commenced in one district and terminated in another, the trial may be had in either, and the offense may be deemed to have been committed in both, although urged by the district attorney, has, in my judgment, no application to this case. The argument is that if the defendant composed the libel in Washington, and sent it to Michigan for publication, and it was there published, he may be tried in either place in the courts of the United States. Such an extension of the law of libel can hardly be said to have the sanction of the English courts where prosecutions for libel have been carried very far, and it cannot be very seriously expected that a court in this country will assert any such alarming and dangerous doctrine. Not to mention other fatal objections to the argument, it is sufficient to advert to the fact that, in the case supposed, there is no law in the state of Michigan, where the offense is said to have been "terminated," making libel an offense against the United States. The order of the district court is affirmed, and the prisoner discharged.

UNITED STATES *v.* HASKINS.

(District Court for California: 3 Sawyer, 262-274. 1875.)

STATEMENT OF FACTS.—An indictment was found in the territory of Utah against Haskins, and an affidavit having been made that the indictment (for perjury) was still pending, and that Haskins was in California, a warrant was issued on which he was arrested. The question before the court was the legality of his arrest.

Opinion by HILLYER, J.

The first question to be answered is, whether in a criminal case in which the defendant has been indicted in one district of the United States, he can be arrested and committed in another district, in the mode pursued in the present case, and upon such commitment removed to the district in which the crime charged was committed for trial.

§ 3188. *An offender after indictment found in one district may be arrested in any other district and removed to the proper place for trial.*

While the practice in the several districts has not been entirely uniform, so far as I can find after a somewhat careful search, the propriety of an arrest and removal substantially in the mode pursued by the government in this case, has never been questioned by any judge. If there be any other mode, it is not regarded as the only one or as exclusive of this. The practice is so stated in Conkling's Treatise, p. 630, by the author, as well in cases of arrest after indictment found as before, if the offense is triable in some other district than that in which the arrest is made. In Murray's Treatise on Proceedings in the United States Courts, p. 29, the course pursued in this case is laid down as the proper one, and neither of these authors regards a commitment as essential, if the proceeding is before the district judge, to justify him in issuing his warrant for the removal of the offender.

In *Ex parte Alexander*, 1 Low., 530 (§ 3194, *infra*), the defendant was arrested and brought before a commissioner of Massachusetts for examination, and the only evidence of probable cause was a certified copy of an indictment returned to the circuit court of the United States for Louisiana. No evidence was offered by the defendant. After the defendant had been committed, the district attorney applied to the district judge for a warrant of removal, and the question was, whether the course pursued was the true one. The learned judge of the district of Massachusetts held that the proceedings had been conducted properly, and said also that there were doubts as to whether the court in Louisiana could issue a warrant to arrest the defendant wherever found. He held further, that a certified copy of the indictment was sufficient evidence to authorize the committing magistrate to commit the accused to be bailed for trial in the district where the indictment was pending.

One Clark was arrested on a warrant issued by a commissioner of New York to answer to a charge of conspiring to defraud the United States in Michigan. A hearing was had, and the proof thereat consisted of a copy of the indictment found in Michigan, with further proof that it was still pending and that a warrant had been issued by the court before which it was found. Upon this the accused was committed. When brought before Judge Benedict on *habeas corpus*, that learned judge held the evidence to be sufficient and remanded him to the custody of the marshal. In doing so he said that the question was not whether the proceedings in the district court of Michigan would not have been sufficient to justify the arrest and detention of the defendant had that court

seen proper to issue its bench warrant directly to the marshal of New York; that the proceeding seemed to have been an original one in which the indictment was introduced as evidence sufficient to justify the commitment for trial in Michigan. *In re Clark*, 2 Ben., 540.

An application was made to the judge of the district of Tennessee, for a warrant to arrest and remove one Jacobi to Arkansas, for a contempt committed in the Arkansas district. Jacobi had not been committed to answer, and it was held that no warrant for the removal of the accused *in any case* can be issued until he has been arrested and imprisoned; and that if the accused offered bail it was his right to be discharged on bail. "My opinion is also," says the judge, "that the certified copy of the proceedings of contempt and the attachment are sufficient not only to authorize the United States attorney to make complaint, but also the issuing of a warrant precisely as a certified copy of an indictment would be in any other case of crime, and also *prima facie* to justify the imprisonment of the defendant if he did not give bail." *United States v. Jacobi*, 4 Am. L. T., p. 148. It was also held in *United States v. Shepard*, 1 Abb., 431 (§§ 3195-99, *infra*), that a removal is only authorized after arrest and commitment for want of bail. So that in the last two cases it seems to have been considered that the course taken by the government in the present case is not only the proper but the only one.

There is some correspondence between Mr. Justice Miller and Judge Love of the Iowa district, bearing upon this question, reported in 1 Woolworth, 422. A warrant had been issued by a commissioner in Illinois to arrest the defendant for examination. The warrant and copies of the affidavits used before the commissioner were submitted to Mr. Justice Miller, in Iowa, for an order to the marshal of Iowa to make the arrest. This course seems to have been taken in conformity with the opinion of Judge Drummond. Justice Miller, however, held that the accused could not be removed before examination in the district where he was arrested. Judge Love agreed with this, and added that his practice was, in cases in which an indictment had been found, to have the accused brought before him for identification, and upon that to issue his warrant for removal without further examination, for, he says: "I hardly suppose we could go behind the indictment."

The language of the statute is, That for any offense against the United States, the offender may be arrested, etc. Nothing is said expressly, or by fair implication, limiting the power to arrest and imprison or bail, to those offenses, only, for which no indictment has been found. The second clause of section 33 does, in my judgment, contemplate an examination before the magistrate, as a prerequisite to removal. But an examination can be had after indictment found as well as before; if after, the indictment can be used as a piece of evidence. Whether in such case the indictment is conclusive, or the merits of the charge may be gone into on the examination, are questions not necessary now to decide, as the defendant did not offer any testimony. The construction given to this section, by so many eminent judges, ought to have great weight, especially as for more than eighty years it does not seem to have been departed from.

I conclude, then, that an offender, after indictment found in one district, may, under this section, be arrested and imprisoned or bailed, as the case may be, for trial in any other district the courts of which have cognizance of the offense. This view is strengthened by the consideration that it is, if not certain, at least extremely probable, there is no other mode by which the defendant can be removed. The act of congress, respecting fugitives from justice (1 St. at Large,

302), in pursuance of article IV, section 2, United States constitution, provides a mode by which offenders against state and territorial laws, who have fled from justice, may be delivered up to the authorities of the state or territory demanding them, but makes no provision for the case of those persons who have committed offenses against the United States in one district and have fled to another. If the defendant cannot be reached under this act, and in my judgment he cannot, there remains but one other course possible besides the one adopted in the case now under consideration, that is, for the judge of the district where the indictment was found to issue his warrant to the marshal of this district, where the defendant now is. Such a course has been alluded to in several of the cases above cited, but always with an expression of doubt as to the power of the judge of one district to issue a warrant which will justify the arrest of an offender anywhere in the United States, or a warrant addressed to the marshal of any particular district outside of his own.

Section 27 of the judiciary act provides that it shall be the duty of a marshal to execute throughout his district all lawful precepts directed to him, and issued under the authority of the United States. In its usual form a *capias* is directed to the marshal of that district in which the court issuing it has jurisdiction to try the offense, and commands him to arrest the defendant if he shall be found in his district. By the provisions of the act of March 2, 1792 (1 St. at Large, 333), subpoenas in criminal cases for witnesses, in any district, may run into any other district. There is no similar provision in regard to other process in criminal cases, and this gives some ground to conclude that congress having expressly declared that one kind of process might run throughout the United States, intended to exclude other process, not mentioned, from having such operation. This point, however, is believed never to have been judicially determined. Judge Lowell, in 1871, said he was not aware of any decision of a court or judge upon the question, but that the power of a judge to issue a warrant which would run throughout the United States had been much doubted. In Conkling's Treatise it is positively stated that a *capias* can only be executed within the district, and when issued by a district judge must be directed to the marshal of his district, the criminal jurisdiction of the judge being confined to his district. Treatise, pp. 620, 643. The attorney-general's office, the late Chief Justice Taney being then attorney-general, decided that a judge of the District of Columbia could lawfully issue a warrant for the arrest of a person, then in Virginia, for an offense committed in the District of Columbia. He said, however, that doubts from respectable authorities having been stated, he advised an application to the chief justice of the United States for a warrant, which he thought would doubtless be obeyed without question. 2 Op. Att'y-Gen., 564. The same view was taken by the office in 1864, but in this last opinion it is also stated that "there is another procedure which may be resorted to," and reference is made to section 33 of the judiciary act (11 Op., 127). Thus, while the procedure by simple warrant running throughout the United States has always been doubted and questioned when spoken of, that under the thirty-third section of the judiciary act seems never to have been doubted as proper as well in cases of arrest after indictment found as before. Certainly the proceeding by arrest and examination in the district where the defendant is found before removal, is far more merciful than the other, for if the warrant of the district judge of Maine is authority for an arrest in California, a person may be arrested here and conveyed across the continent without an opportunity even to show that the marshal has mistaken his identity.

§ 3189. *A duly authenticated copy of an indictment in one district is sufficient if uncontradicted to authorize the arrest of the party indicted if found in another district.*

The defendant has admitted that the copy of the indictment is duly authenticated, and has raised no question on its form or substance. He has, however, made the point, that it is not sufficient proof of probable cause to justify the commitment of the defendant. The cases cited above show that a certified copy of an indictment is always considered sufficient for that purpose if uncontradicted, and in this case no proof was offered by the defendant. Such is the evidence on which the governor of a state acts when the extradition of a fugitive from justice is demanded under the act of congress above cited. Section 1550 of the Criminal Code of California provides that a certified copy of an indictment may be received as evidence by the examining magistrate. So that if the language of section 33, that the arrest shall be agreeably to the mode of process against offenders in the state, means that all the proceedings, and not merely the process, shall be governed by the state law, this evidence may be received on an examination like the present, and as has been shown, is sufficient when uncontradicted to justify commitment. In my judgment, then, the defendant must be committed or bailed to answer for the offense charged, unless the fact that the district where the offense is triable is within the territory of Utah precludes his removal to that district.

§ 3190. *A person arrested in a state may upon proof of his having been indicted in a territory be removed to that territory for trial.*

The question for determination is, whether the provisions of the thirty-third section of the judiciary act, touching the arrest and removal of offenders against the United States, must be limited in their operation to cases arising in those districts which embrace a state or some portion thereof? And the answer must be in the affirmative if the words "district in which the trial is to be had," in the third clause of that section, refer only to districts established or organized under that act. The act of 1789 divided the United States into thirteen districts. Since that time, as states have been admitted, new districts have been organized, and so far as I can ascertain it has never been questioned that the general provisions of the judiciary act applied to the new districts without any express enactment of them for such districts; although by a narrow construction of the language it might be held to apply only to those courts and districts organized and to which cognizance of crimes is given by that act. The provision is that if the commitment of an offender is in a district other than that in which the offense is to be tried, the judge shall issue his warrant for the removal of the offender to the district in which the trial is to be had. If, then, an offense against the United States may be tried in a district of Utah territory, there is nothing in the language of this provision necessarily forbidding a construction which will justify the removal of an offender there for trial. The organic act of Utah does extend the constitution and laws of the United States over the territory so far as the same may be applicable. It also makes provision for the organization of three district courts therein, and further provides "that each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States." Thus these courts have cognizance of all offenses committed in their respective districts, and as such an offense can only be tried in the district where it is committed,

the offender, if he escapes from the territory, must go unpunished, unless he can be removed there for trial; and this only can be done under and by virtue of the provisions of the judiciary act. No other provision of law for such a case can be found, and it does not seem probable that congress has left it wholly unprovided for. For, if it is doubtful that the warrant of a district judge of the United States can be executed out of his district, it is certain that the warrant of a territorial judge cannot run out of his territory. In *Clinton v. Englebrecht*, 13 Wall., 434, the supreme court held that there were no "district courts of the United States," in the sense of the constitution, in the territory of Utah; that although jurisdiction was conferred upon them to try cases arising under the constitution and laws of the United States, this jurisdiction was no part of the judicial power conferred by the constitution on the general government; that these courts were the legislative courts of the territory, created in virtue of that clause of the constitution which authorizes congress to make all needful rules and regulations respecting the territories of the United States. It seems to me to follow from this that the warrant of a judge of a territorial court can no more run throughout the United States than can that of the judge of a state court. The case of *Benner v. Porter*, 9 How., 244, makes this clearer, if possible. The court there say that congress must not only ordain and establish inferior courts, but the judges must possess the constitutional tenure of office before they can become invested with any portion of the judicial powers of the Union.

It is doubtless true that the provisions of the judiciary act are, for the most part, confined in their application to courts of the United States in the sense of the constitution. In *Hornbuckle v. Toombs*, 18 Wall., 648, it was held that the clause in the organic act of a territory extending the laws of the United States over the territory had the effect to import laws of a general character and universal application, but whether, when acting in the capacity of United States circuit and district courts, invested with the same jurisdiction in all cases arising under the constitution and laws of the United States, the territorial courts were to be governed by any of the regulations affecting the circuit and district courts of the United States, was a question stated but not decided. Now, the provisions of section 33 are of universal application, and are plainly intended to cover every offense against the United States, committed within the jurisdiction of any of its courts.

Another clause in the section ought to be noticed. The language is that the offender may be imprisoned or bailed for trial before such "court of the United States" as by law has cognizance of the offense. Is this intended as a limitation of the power to arrest and imprison for *any offense* given in the context? I think not. The plain intention is to provide for any and every offense against the United States. The crime charged in this case is such an offense and is triable before the district court of the third judicial district of Utah. While the district courts of Utah are neither state courts nor United States courts in the sense of the constitution, they are still courts established and organized under the authority of the United States, sitting in a territory belonging to the United States and exercising their jurisdiction conferred upon them by that government. The whole territory is under the plenary control of the general government, and the districts, while they are territorial districts, are still districts within which certain offenses against the United States must be tried if tried at all.

§ 3191. *Territorial courts are courts of the United States within the meaning of the judiciary act, section 33.*

It appears to me that, although the district courts of Utah are not courts of the United States as defined in *Clinton v. Englebrecht*, they are, in another sense, not improperly styled courts of the United States, as being organized by that government under the authority to make needful regulations for the territories. They are spoken of as such in acts of congress and in opinions of the supreme court. Thus, in *Hunt v. Palao*, 4 How., 589, the territorial court of Florida is spoken of as a court of the United states in contradistinction to a state court, and in *Clinton v. Englebrecht*, the court speak of these courts as acting, in cases arising under the constitution and laws of the United States, "as circuit and district courts of the United States." So far, then, as these courts have exclusive jurisdiction over crimes committed against the United States, they may, it seems to me, be held to be included in the term "courts of the United States" as used in the thirty-third section of the judiciary act. I cannot see that any sound rule of construction is violated by so doing. The act is remedial in its character, and I do not find any good ground for giving it so narrow and technical a construction as is contended for by the defendant, the practical effect of which must be to leave offenses committed in a territory where they cannot be reached or punished if the offender succeeds in escaping to some state.

My conclusion is that the defendant must be committed, unless he give bail in the sum of \$3,000 to answer to the charge against him before the court to which the indictment was returned. If bail be not given, a warrant for his removal will be issued as the law directs.

IN RE DOIG.

(Circuit Court for California: 4 Federal Reporter, 193-197. 1890.)

Opinion by HOFFMAN, D. J.

STATEMENT OF FACTS.—The return of the marshal shows that he holds the prisoner by virtue of a commitment by United States Commissioner O'Beirne, commanding him to receive into his custody and safely keep the said Thomas Doig to await the action in the premises of the United States district judge for the district of California. The offense for which the petitioner was committed is described in the commitment as follows: "That on or about the 19th of April, 1880, in the district of Oregon, and within the jurisdiction of the district court of the United States for said district, he, the said Thomas Doig, having then and there control and management of a certain steam-vessel called the *Great Republic*, as a pilot, did, by his misconduct, negligence, and inattention to his duty as said pilot, cause the death by drowning of the first officer and others of the crew of said ship, or vessel, whose names are to me unknown." The complaint on which the original warrant of arrest was issued charged the prisoner with the offense of manslaughter on the high seas, but it appears by the commitment, and is admitted by the district attorney, that the only evidence produced to the committing magistrate was a certified copy of an indictment found by the grand jury of the United States for the district of Oregon.

§ 3192. *A district judge should refuse a warrant for the removal of a prisoner where it appears by the indictment that the act with which he is charged is no offense against the United States, and no trial can be had in the district to which his removal is asked.*

It is contended, on behalf of the petitioner, that the indictment nowhere alleges the crime to have been committed on the high seas or within the district of Oregon; but, on the contrary, it affirmatively appears that the offense, if any, was committed in Washington territory. The district attorney objects to the consideration by the court of this question, and contends that the duty of the district judge in the premises is purely ministerial, and restricted to issuing a warrant for the removal of the prisoner "to the district where the trial is to be had." R. S., 1014. This view of the powers and duties of the district judge in this class of cases, or of the powers and duties of the circuit or district court, when the prisoner is brought before it on *habeas corpus*, cannot be maintained. In the case of *In re Buell*, 3 Dill., 116 (§§ 3183-87, *supra*), the question was presented, under circumstances very similar to those of the case at the bar, to the circuit court for the eighth circuit. Buell was arrested and committed in Missouri for trial in the District of Columbia on an indictment found in that District, charging him with having written a libel therein, which he afterwards published in Detroit. It was contended there, as here, that the question of the sufficiency of the indictment was for the court in which it was found, and not for the district judge on an application for the warrant of removal. On this Judge Dillon observes: "I cannot agree to the proposition in the breadth claimed for it in the present case. The provision devolves on a high judicial officer of the government a useful and important duty. In a country of such vast extent as ours, it is not a light matter to arrest a supposed offender, and, on the mere order of an inferior magistrate, remove him hundreds, it may be thousands, of miles for trial. The law wisely requires the previous sanction of the district judge to such removal. Mere technical defects in an indictment should not be regarded, but a district judge who should order the removal of a prisoner, when the only probable cause relied on or shown was an indictment, and that indictment failed to show an offense against the United States, or showed an offense not committed or triable in the district to which the removal is sought, would misconceive his duty, and fail to protect the liberty of the citizen. It is the constitutional right of the citizen to be tried in the district in which the offense imputed to him is alleged to have been committed, and not elsewhere. Article 2, § 2."

The case of *In re Clark*, 2 Ben., 540, is not opposed to this view of the duty of the district judge in cases of this description. The prisoner was remanded, but the court advised that, upon such a proceeding, "the indictment must be held sufficient *unless it be so defective in the material averments that it would be the manifest duty of the court before which it was presented by the grand jury to decline to take action upon it.*" Independently of these authorities, I should have felt no hesitation in holding that, where a district judge is applied to for a warrant of removal, and it appears from the indictment on which the warrant is asked that the act alleged does not constitute an offense against the United States, or that no trial can be had in the district to which the removal is sought, it is his duty to refuse the warrant. I proceed to consider whether the indictment in this case is so defective in material averments that it would be the manifest duty of the court to which it was presented to decline to take

action upon it. The indictment alleges, in substance, that Thomas Doig, on the 19th of April, 1879, in the district of Oregon, and within the jurisdiction of the district court of the United States for the district of Oregon, was a pilot of steam vessels from and over the Columbia river bar and along the Columbia river to Astoria, in said district of Oregon. This is the only jurisdictional averment to be found in the indictment. The instrument then alleges that on the said 19th of April, 1879, the steamer Great Republic was "making a voyage from San Francisco, in the state of California, to Portland, in said district of Oregon, . . . and had on board then and there the said Thomas Doig as pilot, etc.; that said steamer, with said officers, etc., on board, arrived on her said voyage off the Columbia river bar, at or near the automatic buoy, at 12:32 A. M. of the 19th of April; that the master then and there delivered the vessel to Doig to be by him navigated, etc., as pilot as aforesaid, . . . over the said Columbia river bar and to Astoria, as aforesaid; that said Doig received the vessel, etc., into his exclusive charge as such pilot," etc.

The indictment further avers, in substance, that the night was too dark to admit of the vessel being safely navigated; that it was the duty of said Doig, as pilot as aforesaid, to detain the vessel outside the said bar until she could be navigated in safety; that he neglected his duty in that behalf, and that he then and there misconducted himself as such pilot, and negligently undertook then and there to take and navigate the said vessel in said darkness over the said Columbia river bar, and to Astoria aforesaid, and that by reason of his said misconduct, negligence and inattention to his duty as pilot as aforesaid, he, the said Thomas Doig, as such pilot, ran the said vessel ashore on Sand island, in said Columbia river, and said vessel was then and there wrecked and lost, and the certain persons whose names are to the jurors unknown, were by the said misconduct, etc., of said Thomas Doig, as pilot as aforesaid, then and there drowned; that by reason of said misconduct, etc., and the destruction of the lives of said officers, the said Doig became, and was, and is guilty of manslaughter, contrary to the form of the statutes, etc.

§ 3193. *Under section 5344, Revised Statutes, the destruction of human life is the essence of the offense.*

The section of the Revised Statutes under which this indictment is drawn is, so far as is material to this case, in substance as follows: "Every captain, engineer, *pilot*, . . . by whose misconduct, negligence or inattention to his duties the life of any person is destroyed, . . . shall be deemed guilty of manslaughter." It is not sufficient, under this statute, that the officer has been guilty of misconduct, negligence and inattention to duty. Human life must have been destroyed. The destruction of life is the essence of the offense. Misconduct, however gross, is innocent under this section unless it be the cause of the manslaughter. It is evident, therefore, that the offender is guilty, not when the misconduct or negligence occurred (it may be at the beginning of the voyage or trip of the steamer), but where that misconduct bore fruit by causing the death of a human being. The first clause of the indictment merely avers, as we have seen, that Thomas Doig, on the 19th of April, 1879, in the district of Oregon, and within the jurisdiction of the court, was a pilot, etc. It does not even allege that he was then engaged within the district, or within the jurisdiction of the court, in the performance of his duties as such pilot. It further avers that on the 19th of April, 1879, the Great Republic was "making a voyage from San Francisco to Portland," and that on that day she arrived

off the Columbia river, at or near the automatic buoy; that Doig then and there took charge of her, and that by his misconduct she was wrecked on Sand island, where the loss of life by drowning occurred.

It is not alleged that the steamer was, at any time while Doig had charge of her, within the jurisdiction of the court. It is not averred that she was on the high seas, or that she was within the district. It is not averred that the automatic buoy, where the alleged misconduct commenced, is within the jurisdiction of the court, or within the district of Oregon; nor is either of these averments made with respect to Sand island, where the deaths by drowning occurred, and where the offense of manslaughter was committed. But this is not all. It affirmatively appears, from an examination of the statutes which define the northern boundary of Oregon, an inspection of the official charts of the coast survey, and the testimony of an expert who identifies the natural objects called for in the description of the boundary line contained in the statutes and laid down on the chart, that Sand island is not within the district of Oregon, but is within the boundaries of Washington territory. The offense is, therefore, not justiciable in the district of Oregon, and the United States courts of Oregon are without jurisdiction to try the offender. The analogy between this case and *In re Buell*, decided by Judge Dillon, is thus seen to be perfect. In that case, as in this, the indictment showed on its face that the offense was not committed within the jurisdiction of the court in which the indictment was found. The prisoner must be discharged.

IN RE ALEXANDER.

(District Court for Massachusetts: 1 Lowell, 530-532. 1871.)

STATEMENT OF FACTS.—The district attorney made application to have Alexander sent to Louisiana for trial. There was a certified copy of the indictment against him.

Opinion by LOWELL, J.

When an indictment has been found in one judicial district of the United States against a defendant not then within the jurisdiction, it has been much doubted whether the court in that district can issue its warrant to arrest the defendant wherever he may be found within the United States. The late Chief Justice Taney, when attorney-general, gave it as his opinion that the power was possessed by the courts. 2 Opinions Attorneys-General, 564. And this appears to be still the opinion of the office. 11 Opinions, 127. I am not aware of any decision of a court or judge upon the point, and it is not necessary to decide it now.

§ 3194. *A copy of an indictment found in a United States court in another district is competent and sufficient evidence to justify the sending of the defendant to that district.*

That course not having been pursued, the next question is whether a copy of the indictment is sufficient evidence to authorize a committing magistrate out of the district to cause the accused person to be bailed for trial in the district in which the indictment was found. The point taken by the defendant is, that he ought to be confronted with his witnesses before the magistrate, as well as at the final trial. The law of Massachusetts seems to require this (Gen. Stats., ch. 170, § 10, etc.), and it is copied from the Revised Statutes, ch. 135. I have been unable to trace it further back than the Revised Statutes, and I am informed that the practice both here and in Maine is, and so far as is known

always has been, to receive affidavits and other written evidence in proper cases on these preliminary hearings before commissioners. Such a course was sanctioned by the supreme court of the United States in *Bollman's Case*, 4 Cranch, 128; and this decision was acted on and explained by Chief Justice Marshall in *Burr's trial*, pp. 11, 15, 97. Judge Conkling, in his *Treatise*, p. 631, represents this to be the true practice, and it has been usually followed, I believe, in the several circuits, as appears by the following cases: *In re Clark*, 2 Ben., 540; *United States v. Shepard*, 1 Abb., 431 (§§ 3195-99, *infra*). So, too, in extradition between the several states under the constitution and act of congress, such evidence is admitted. The precise question undoubtedly is, what evidence was admitted in such cases in Massachusetts in 1789? *United States v. Reid*, 12 How., 361 (§§ 2694-99, *supra*). But the law of Massachusetts may be presumed, in the absence of evidence to the contrary, to have been the same with that of New York and Virginia, and with the common law of England, of which the cases cited are evidence; and the practice conforms to this view. Although it has been usual both in England and America to examine witnesses before the committing magistrate in the presence of the accused, yet this has never been an essential prerequisite to holding an accused person for trial. He might always be arrested on the warrant of a coroner or of a court upon an *ex parte* examination before a coroner's jury or a grand jury. The indictment in the district in which it is found is an *ex parte* proceeding, but since it is found upon oath, and after the examination of witnesses, it has a presumption of validity. Before the commissioner it is only a piece of evidence, to be sure, and may be met and controlled, but when it stands by itself, and uncontradicted, it seems to be enough according to our practice to authorize the warrant.

Warrant to issue.

UNITED STATES v. SHEPARD.

(District Court, Eastern District of Michigan: 1 Abbott, 431-440. 1870.)

STATEMENT OF FACTS.—Information charging defendant with knowingly and fraudulently bringing into the United States personal property in violation of the act of July 18, 1866, section 4. Motion to quash the indictment.

Opinion by WITHEY, J.

The facts exhibited as the grounds of the motion are, that the information upon which the government seeks to hold the defendant to answer and trial was filed by the district attorney without oath or proof of probable cause, and without application to or leave of court. Before the information was filed, complaint was made before a commissioner at Detroit, and a warrant for the arrest of the accused was issued to the marshal of the eastern district of Michigan. But the accused being absent from the city no arrest was made upon the warrant. The information was then filed by the district attorney, as above stated. As no arrest could be or was made upon the warrant issued by the commissioner, the arrest and holding to bail rests solely on the information. A certified copy of the information was taken to Chicago, when the district judge of the northern district of Illinois, on proof of the identity of the accused, but upon no other evidence of probable cause than such copy, indorsed thereon his warrant for the arrest of defendant, and for his removal to this district for trial. Defendant was arrested and brought to this city; here he was taken before the United States commissioner, waived examination, and gave bail for his appearance to answer the charge contained in the information.

The court will consider three questions involved by the motion to quash. 1. Was the arrest lawful, and, if not, can the defendant be held to answer? 2. Is the information legally sufficient, the names of the witnesses for the prosecution not being indorsed thereon? 3. Can a person be held to answer for an offense, not capital or infamous, on an information filed by the law officer representing the government?

The first question is answered by the fourth constitutional amendment, which declares that "no warrant of arrest shall be issued but upon probable cause supported by oath or affirmation," etc. Had there been any showing for the arrest at Chicago, supported by oath or affirmation, this court could not inquire whether the showing was sufficient to justify the issuance of the warrant by the district judge of Illinois; but when it is alleged there was no showing supported by oath or affirmation, and the illegality of the warrant is made the basis for arresting all further proceedings in the cause, it is our duty to inquire whether the fact is as asserted.

§ 3195. *Where an information is not supported by affidavit, a warrant of arrest is not authorized.*

We have already stated what is proved here,—namely, that the certified copy of the warrant was all that was shown to procure the order of arrest. The constitution declares that "no warrant of arrest shall issue but upon probable cause," etc.; the information is not supported by oath or affirmation; it follows, as a corollary, that the warrant was not authorized. There was no proof of probable cause, supported by oath or affirmation to justify it. Doubtless, the learned judge who issued the warrant acted upon the presumption that the proceedings here had been such as to establish probable cause; treating the information as having been filed upon cause shown, and regarding the certified copy as affording the same evidence as a certified copy of an indictment would furnish, when the evidence of probable cause is presumed to have been given to the grand jury. It now turns out that the proceedings anterior to the issuance of the warrant laid no foundation for the arrest, and all proceedings based upon such unlawful arrest must fail.

§ 3196. *A warrant of removal of an accused is authorized only where he has been arrested and committed for want of bail in a bailable case.*

Under the question we have been considering, a point was made that the warrant to remove defendant from Chicago, in one district, to Detroit, in another district, was unauthorized under the facts exhibited. The only act of congress upon the subject of the arrest and removal of offenders against the laws of the United States is that of September 21, 1789, § 33 (1 Stat. at L., 91), in reference to removal of offenders in one district, to be tried in another. It is this: "If such commitment of the offender . . . shall be in a district other than that in which the offender is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender . . . to the district in which the trial is had." By consulting the previous portions of this section, in connection with the clause I have read, it will appear that the warrant of removal is authorized only where the offender has been first arrested and committed for want of bail, in a bailable case. The statute does not seem to contemplate or warrant removing a person from one district to another in the summary way pursued in this case. He is first to be taken before the proper officer, who is to examine as to the crime alleged against the accused. If there be not probable cause of his guilt,

he is entitled to be discharged; whereas, if there be found reasonable cause for holding the accused to answer, upon tendering sufficient bail, he is entitled to his discharge from arrest. Only on failure to give bail, in a bailable case, can he be committed.

Defendant was at liberty in the city of Chicago; was arrested and immediately removed to Detroit, without opportunity to confront the charge at the place of his arrest. We are at a loss to understand how the defendant could thus be dealt with under the statute. Suppose defendant had been a resident of Galveston, in Texas, or San Francisco, in California, instead of Chicago, and was thus arrested and summarily removed nearly across the continent, before having the opportunity of meeting the charge on which he was arrested. We will suppose, when examined here, before the proper officer upon the charge, it should turn out that the charge is not sustained. Does not this plainly illustrate the wrong and injury which may be done to a citizen under such forms of legal proceedings? We regard the removal as having been wholly without the authority of law.

§ 3197. *State laws do not control in criminal cases on questions of procedure.*

In reference to the second question, we remark that state laws do not control in criminal proceedings in the United States courts, either in the mode or form of charging the offense, in the rules of evidence, or in the manner of conducting the trial. On the contrary, the proceedings throughout are according to the course of the common law, except so far as has been otherwise provided by the laws of congress or by constitutional provision. *United States v. Reid*, 12 How., 365 (§§ 2694-99, *supra*). It was not required by the common law that the names of witnesses for the prosecution should be indorsed on the indictment or information, and there is no act of congress requiring it. In treason, a list of the government witnesses is to be furnished to the accused. The Michigan statute does require the names to be indorsed on the indictment; but if the state statute governed our proceedings, we should regard this provision as directory, and the omission as not affecting the validity of the indictment or information. The other question to be considered presents an interesting inquiry. We have said the common law governs in criminal cases in the United States courts; hence the question whether the accused can be held to answer to a criminal information must be solved by determining, first, what is the common law on that subject; and, second, what modifications have been effected through the laws of congress or the constitution. The English system of jurisprudence brought by our ancestors as the common law, and those statutes of parliament applicable to the situation of the colonies, which extended to them and were adopted by usage or acts of assembly, have been by the United States courts held to be the common law of this country. *Patterson v. Winn*, 5 Pet., 241.

At the time of the Revolution and of the adoption of the constitution, it was the practice in the court of king's bench for the king's attorney-general to file informations in the name and behalf of the king, in a class of cases not above the grade of misdemeanors, without any previous showing to the court, but in the discretion of that officer. This discretion was not, however, exercised, except in cases where the offense tended to disturb or endanger the king's government, or to molest him in the regular discharge of his royal functions, and where delay would be dangerous. There was another class of offenses of the same grade, which could be proceeded against by information filed by the

master of the crown office — a person appointed as the king's attorney to prosecute in behalf of the public, on complaint made by a subject or by a common informer. This officer could not substitute an information for the indictment of a grand jury, unless upon a showing and leave of court. The practice was to present affidavits of the offense, and move the court for a rule on the accused to show cause, and if the affidavits were not sufficiently answered leave was granted to file a criminal information in cases below the degree of felony. 4 Bl. Com., 308-9, 311; 1 Ch. Cr. L., 845-6, 849, 856. Now what changes have been produced by the constitution or laws of the United States, affecting the practice in form or substance, so far as regards the question at bar? Congress has passed no law on the subject, and the only constitutional provision affecting the question is the fifth amendment, proposed the same year that the original instrument went into operation — 1789. It declares, "No person shall be held to answer for a capital or otherwise infamous crime, unless upon a presentment or indictment of a grand jury," etc.

§ 3198. *All offenses not capital nor infamous may be prosecuted by information or by indictment.*

Congress by proposing, and the states by ratifying, that amendment, left all offenses not capital or infamous to be prosecuted by information or by indictment, as the circumstances of each case should seem to require, and as the common law would sanction. Indeed, this constitutional provision produced no change in the practice or law, except, perhaps, as regards a class of misdemeanors regarded as infamous crimes, and which might, before the amendment, be prosecuted by information. The amendment, however, fixed the matter beyond the power of congress or the courts to alter the course of proceeding in bringing forward a charge of crime, in the class of cases embraced by the provision. We regard the converse of the fifth amendment to be that persons may be held to answer for crimes other than such as are capital or infamous, upon information or indictment, according to the course of the common law. We have examined all the cases referred to by counsel, and find no well considered decision which conflicts with the views we have expressed, and therefore we conclude that, so far as the question rests on the common law, it is the right of the government, by its proper law officer, the district attorney, to charge offenses against individuals through the forms and mode of informations.

There are, however, two considerations growing out of this subject to which we should allude to give a proper understanding of our full views. It was said on the argument that the usage since the organization of the United States courts has been to present offenders, in all classes of criminal cases, only through the instrumentality of a grand jury by indictment. If the practice of prosecuting by criminal information has fallen into disuse for eighty years, it certainly presents a strong reason for urging that such proceeding has become obsolete. Our reply, however, is that the fifth amendment, adopted almost at the start of the government under our present constitution, recognized the right to pursue the common law course by criminal information, in all but capital and infamous crimes. And if such rights existed then, not only at common law, but by clear implication in the fifth amendment, as we have shown, then, even though such right has been in abeyance for eighty years, there has been no abrogation of the power of the government to assert that right, particularly as the courts do not seem to have refused, by any well-considered case, the exercise of such right, though we find some intimations by the courts adverse to its exercise.

§ 3199. *Necessary preliminary steps before the right to file a criminal information can be asserted.*

The other consideration concerns the necessary preliminary steps before the right to file a criminal information can be asserted. We incline to the opinion and hold that there must first be a complaint, supported by oath or affirmation showing probable cause, followed by an arrest and examination, agreeably to section 33 of the act of September 24, 1789. If the accused is held to bail or committed, the district attorney, on filing the magistrate's or commissioner's return, with the proofs, will have leave to file a criminal information. This course would seem as nearly adapted to the method of procedure in these courts, and to our laws, as anything which suggests itself. It would certainly be quite foreign to any known practice in the United States courts to pursue the English practice of requiring a rule for the accused to show cause before the court, and there contest the question whether the evidence justified placing him upon trial. The right of the accused to contest the probable cause shown by the prosecution is secured to him on his examination before the commissioner or magistrate, under the complaint on which he was arrested.

We ought, perhaps, to remark that the position assumed by the defendant's attorney, that the charge in this case involves a felony, is not sustained. The fact that the accused is liable on conviction to be imprisoned in the penitentiary does not determine the offense to be a felony. On the contrary, a felony at common law embraces only such crimes as are punished capitally. Nor is it an infamous crime; for if the defendant should be convicted on such charge it would not render him incompetent to testify as a witness, as would be the result if it were a *crimen falsi*. Neither does the charge necessarily involve perjury — which would be a *crimen falsi*, and infamous. The information in this case, as we have shown, was filed without right or authority. The arrest and holding to bail were also unauthorized; and for both grounds the court must refuse to hold the accused to answer. Motion granted.

§ 3200. *Contempt of court.*—A warrant for the removal of a person charged with a contempt of court to another district for trial cannot be issued till the defendant has been arrested and imprisoned or bailed. *United States v. Jacobi*, 1 *Flip.*, 113; 14 *Int. Rev. Rec.*, 45; 3 *Ch. Leg. N.*, 345.

§ 3201. A wilful contempt of a federal court is a crime and offense against the United States within the thirty-third section of the judiciary act of 1789, relating to the removal of offenders from one district to another. *Ibid.*

§ 3202. Where a person charged with a contempt of court flees to another district, the United States may proceed against him in the district where he is, by complaint or by the issuance of the warrant upon certified copies of the proceedings for contempt and the attachment, precisely as on a certified copy of the indictment in other cases. *United States v. Jacobi*, 1 *Flip.*, 113.

§ 3203. Section 17 of the judiciary act of 1789, by declaring that "all said courts of the United States shall have power . . . to punish by fine or imprisonment, at the discretion of the courts, all contempts of authority, in any cause or hearing before the same," makes contempt a crime against the United States. It is, therefore, a crime within the meaning of the thirty-third section of the same act, providing that "for any crime against the United States the offender . . . may be arrested and imprisoned," etc., "and if such commitment of the offender . . . shall be in a district other than that in which the offender is to be tried, it shall be the duty of the judge . . . seasonably to issue, and of the marshal . . . to execute, a warrant for the removal of the offender . . . to the district in which the trial is to be had. *Ibid.*

§ 3204. *After proceedings had in district court.*—Under the act of 1846, providing that the district court may remit indictments pending before it to the circuit court, when, in the opinion of the court, difficult and important questions of law are involved; "and the proceedings thereupon shall be the same in the circuit court as if such indictment had been originally found and presented therein," an indictment may be remitted after any proceedings

have been had in the district court which do not amount to a bar to a future trial. *United States v. Morris*,* 1 Curt., 23.

§ 3205. The act of 1846 provides that the "district court may, moreover, *in like manner*, remit to the circuit court any indictment pending in said district court when, in the opinion of the court, difficult and important questions of law are involved in the case." The direction to remit *in like manner* refers to a previous clause in the same section, which declares that "every indictment for a capital offense presented to the district court" shall be remitted to the circuit court. It is held that the district judge may remit a case for difficult and important questions at any time when in his opinion such questions exist, whether during the term at which the indictment was presented or after such term. *Ibid*.

§ 3206. The term "indictment" does not include an information.—Section 1037 of the Revised Statutes authorizes the district court to remit to the next session of the circuit court of the same district any indictment pending in said district court. *Held*, that the term *indictment* does not include an information. *United States v. Tiernay*,* 3 McC., 603.

§ 3207. Case sent back to circuit court.—The circuit court has jurisdiction to try an indictment found in the circuit court and remitted to the district court, and by the district court remitted back to the circuit court; these transactions having taken place under the act of congress of August 8, 1846, authorizing the remission of an indictment from the circuit court to the district court, on motion of the district attorney, when the offense may be cognizable by the district court; and also authorizing the district court to remit indictments to the circuit court, on motion of the district attorney, or whenever difficult and important questions of law are involved. *United States v. Murphy*,* 3 Wall., 649.

§ 3208. Sending case to district court.—There is no provision of law whereby a circuit court can, of its own motion, or on the application of the defendant, remit an indictment to a district court. This can only be done when the district attorney deems it necessary. *United States v. Bennett*, 16 Blatch., 338 (§§ 2480-89).

2. From State to Federal Courts.

[See CONSTITUTION AND LAWS, VI; VII; XI, 3.]

SUMMARY.—*Prosecution commenced, when*, § 3209.—*What the application must show*, § 3210.

§ 3209. Under section 643 of the Revised Statutes, providing that "when any criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States," etc., the prosecution may, on petition of the defendant to the circuit court of the United States, be removed into such circuit court, it is held that the prosecution is commenced within the meaning of the act when the warrant is issued. It is further held that a prosecution has been commenced in a court of a state, within the meaning of the act, when a justice of the peace in the state of Georgia has, upon affidavit, issued a warrant of arrest, since the constitution of that state vests the judicial power of the state in "the supreme court, superior courts, courts of ordinary, and justices of the peace," and a statute of the state declares that a "justice of the peace may hold a court of inquiry to examine into any accusation against any person legally arrested and brought before him." *United States v. Port*, §§ 3211-12.

§ 3210. An application for the removal of a criminal prosecution from a state to the federal courts under section 643 of the Revised Statutes must show that the offense is within the category of removable crimes. The general assertion of the party that it is so, or any general assertion that does not enable the court to see that it is so, is insufficient. The petition must show that the prosecution is for an act done by the defendants as officers of the United States under the provisions of the title of the statutes headed elective franchise, or on account of some right, title or authority claimed by them under its provisions. *Ex parte Anderson*, §§ 3213-14.

[NOTES.—See §§ 3215-3230.] •

STATE v. PORT.

(Circuit Court for Georgia; 3 Federal Reporter, 117-124. 1890.)

STATEMENT OF FACTS.—Petition to remove into a federal court a prosecution in a state court of Georgia, against Port and others, for alleged murder. Defendants were United States revenue officers, and were arrested under a warrant issued by a justice of the peace.

Opinion by Woods, J.

It is conceded that the petition for removal contains all the averments necessary to be made, under section 643 of the United States Revised Statutes, for the removal of a criminal prosecution from a state to the federal court. Heretofore the constitutionality of the act under which this removal is sought has been vigorously assailed in this court. That question, however, has been definitely settled in favor of the constitutionality of the act by the recent decision of the supreme court of the United States in the case of *The State of Tennessee v. Davis*, 100 U. S., 257 (CONSTR., §§ 2473-2500).

§ 3211. *When a criminal prosecution may be said to have been commenced under Revised Statutes, section 643.* •

The question which has been mainly discussed by counsel is whether, under the facts of this case, it can be held that a criminal prosecution against the accused has been commenced in a court of the state, within the meaning of section 643 of the Revised Statutes of the United States. Leaving out that portion of the section which does not apply to this case it reads as follows: "When any . . . criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under such law, . . . the said prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to such circuit court."

Upon the filing of the petition setting out the facts, and verified and certified as required by law, "the cause shall, thereupon, be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in said court. . . . When the suit is commenced by *capias*, or by any other similar form of proceeding by which a personal arrest is ordered, the clerk shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the state court, or left at his office by the marshal of the district, . . . and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution, upon the delivery of such process, . . . shall be held to be removed to the circuit court, and any further proceedings, trial or judgment therein in the state court shall be void."

The first question for decision under this statute is, has a criminal prosecution been commenced against these petitioners? It is insisted by counsel for the state of Georgia that a criminal prosecution cannot be considered as commenced until indictment found. I have been able to discover no solid ground for this claim. An affidavit charging the defendants with the crime of murder has been made and filed by a competent person before a judicial officer competent to act. The law makes it his duty to consider the affidavit, and to determine whether its averments make it incumbent on him to issue a warrant for the arrest of the parties accused. He has performed that duty and decided judicially that a warrant should issue. He has accordingly issued his warrant and directed it to the proper officers, requiring them to arrest the parties named therein. This warrant has come to the hands of the sheriff of Fulton county, who, in obedience to its mandate, has arrested and taken into custody, and for six days has held in custody, and deprived of their liberty these defendants. To be able to say to them, when they apply for the removal of this prosecution,

that their petition must be denied because no prosecution has been commenced against them, the court must shut its eyes to the conceded facts in the case. It would be hard to convince a man who was taken away from his business and family, and held in custody by a sheriff on a lawful warrant for his arrest, duly issued by a judicial officer upon an affidavit duly made before him, charging him with an offense against the criminal laws of the state, that no criminal prosecution had been commenced against him.

There is nothing in the words of section 643, or in its purpose, to warrant such an idea. Its object is to take from the state courts jurisdiction of all cases that fall within its terms as soon as they are commenced. Now, when is a criminal prosecution commenced? Obviously as soon as the warrant is issued. It has been so held in the case of *Queen v. Brooks*, 1 Denis., 217 (2 Brit. Cr. Cas., 222). This was an indictment upon 9 Geo. IV., ch. 69. By the fourth section of the statute it was declared: "The prosecution for every offense punishable by indictment, by virtue of that act, shall be commenced within twelve calendar months after the commission of the offense."

The offense was committed December 4, 1845. The information before justices and warrant were on December 19, 1845. Brooks was apprehended September 5, 1846, and Gibson October 21, 1846. The indictment was preferred April 5, 1847. The question was reserved for the opinion of the judges whether the prosecution was commenced in time. They all concurred in holding that the prosecution was commenced within twelve calendar months after the commission of the offense. To the same effect see 1 East, P. C., 186; *Rex v. Wallace*, R. & R. C. C., 369; and *Rex v. Phillips*, Russ. & Ry., 369 (1 Brit. Cr. Cas., 369). The difficulties and embarrassments which would arise in this court in the future progress of the case, if it should now be removed, have been urged by counsel for the state of Georgia as an argument against the view above taken. The same argument has been before used in this court against the removal of a criminal prosecution from a state court to this court after indictment found.

It was urged that the statute did not authorize such removal on account here of the difficulties and incongruities which would arise in a trial in this court of an offense against the laws of the state. That argument did not prevail, and an indictment for murder, removed from the state courts, was tried in this court. *Georgia v. O'Grady*, 3 Woods, 496. No insuperable difficulties were encountered in the case, and none, it is fair to presume, will be in this. No reason is perceived why an indictment for an offense against the laws of Georgia may not be found by a grand jury of this court in the case of a prosecution removed from the state court. The difficulties in the way of such an indictment, and the subsequent trial of it, are, in my judgment, imaginary. But, if they were real, it would be no answer to the petitions for removal. In the case of *State of Tennessee v. Davis*, *supra*, the supreme court says: "Whether there is any mode and manner of procedure in the trial prescribed by the act of congress is totally immaterial to the inquiry whether the case is removable, and this question could hardly have arisen upon a motion to remand the case. The imaginary difficulties and incongruities supposed to be in the way of trying in the circuit court an indictment for an alleged offense against the peace and dignity of a state, if they were real, would be for the consideration of congress. But they are unreal."

All this applies to proceedings in criminal practice so removed, no matter at what stage of the prosecution the removal may be made. My conclusion is,

therefore, that when this petition for removal was filed, on July 13th, a criminal prosecution had been commenced against the defendants. But it is insisted that, if there was a criminal prosecution commenced, it was not commenced in a court of the state. The contention is that the proceedings of John B. Suttles, Jr., justice of the peace, in taking the affidavit of Mary E. Jones and filing it, and issuing his warrant of arrest thereon, were not proceedings in a court. It is obvious to remark that, if a criminal prosecution had been commenced at all, it must necessarily have been commenced in a court. The constitution of Georgia, art. 6, § 1, declares: "The judicial powers of this state shall be vested in the supreme court, superior courts, courts of ordinary, and justices of the peace," etc.

§ 3212. *In Georgia a justice of the peace is a judicial officer, and his court is a court in which criminal proceedings may be said to be commenced.*

A justice of the peace is, therefore, an officer, clothed with judicial powers, when acting in his judicial capacity, and within his jurisdiction he is, to all intent and purposes, a court. In receiving the affidavit of Mary E. Jones, and deciding that it sufficiently charged a crime against the laws of the state and authorized the issuance of a warrant, he acted judicially. His proceedings in the matter were the proceedings of a court, having jurisdiction to do everything that was done. By the code of Georgia a justice of the peace, while sitting as a committing magistrate, is recognized as a court. Section 4730 declares: "Any judge . . . or justice of the peace may hold a court of inquiry to examine into any accusation against any person legally arrested and brought before him." This prosecution had progressed so far before the filing of the petition for removal that the very next step would have been the holding of a court of inquiry by the justice of the peace. The prosecution was pending before him for that very purpose and no other. At this stage of the case this petition was interposed, and this court invoked to take the next judicial step in the prosecution. Does the claim that there was no court in which the prosecution was pending stand on any solid ground? In my judgment, clearly not.

My conclusion is, therefore, that when this petition was filed it asked for the removal of a criminal prosecution which had been commenced against the petitioners in a court of the state of Georgia; and, as the petition sets out all the other facts necessary under section 643 of the Revised Statutes to justify a removal of a criminal prosecution from a state to a federal court, that the filing of the petition and the service on the state court of a duplicate of the writ of *habeas corpus cum causa*, *ipso facto*, removes the prosecution to this court.

EX PARTE ANDERSON.

(Circuit Court for Louisiana: 3 Woods, 124-127. 1878.)

Opinion by BRADLEY, J.

STATEMENT OF FACTS.—I have given careful consideration to the application for removing the prosecution in the above case to the circuit court of the United States, and for a writ of *habeas corpus cum causa* to that end. The right of removal is claimed under section 643 of the Revised Statutes of the United States; and under that clause of the section which authorizes a removal when any civil or criminal prosecution is commenced in a state court against an officer of the United States, or other person, on account of any act done under the provisions of title xxvi, "The Elective Franchise," or on account of any right,

title or authority claimed by such officer or other person, under any of said provisions. To entitle the petitioners to the removal sought, therefore, their petition ought to show that the prosecution against them is either for some act done by them as officers of the United States, or otherwise under the provisions of title xxvi, or on account of some right, title or authority claimed by them under any of said provisions. Does the petition show this? It states that the information against them charges them with falsely and feloniously uttering and publishing as true, in their capacity of returning board officers, a certain altered, false, forged and counterfeited public record, to wit, the returns from the parish of Vernon of an election held for presidential electors in the state of Louisiana, on the 7th day of November, A. D. 1876, under a writ of election dated September 16, 1876, ordering the same, knowing the said public record to be false, altered, forged and counterfeit.

The petition further states that the acts for which they are accused are charged to have been done whilst they were acting under authority of law, and under oath of office, as a board of canvassers of election returns for presidential electors; and it claims that, in so acting, they were officers of the United States, and that the correctness and legality of their said election returns were duly presented by the said presidential electors before the electoral commission appointed under act of congress, passed January 29, 1877; and were by said commission fully investigated, adjudicated and sustained, and thereby became a thing adjudged.

The petition further states that all their acts in the premises were done in accordance with the true intent and meaning of the fifteenth amendment to the constitution of the United States, and of the enactments of congress passed to enforce it — those acts consisting of officially inspecting, certifying, reporting and giving effect to the votes of all the citizens legally polled at said election in said parish of Vernon, and to none other. The petition denies the charge of making false, altered or forged returns, and insists that the petitioners are prosecuted for having, in their official capacity, given effect to the laws of the United States for the enforcement of the equal, civil and political rights of citizens of the United States, growing out of and appertaining to the elective franchise.

§ 3213. *Returning board, officers of the state, not of the United States.*

The claim that the petitioners, in acting as members of the returning board of Louisiana, were officers of the United States in reference to the election returns of presidential electors, is not tenable. They were state officers, appointed under a state law and acting under state authority. The claim that the correctness of their returns was adjudicated by the electoral commission is equally untenable. The electoral commission declined to go behind the returns, or to examine into their correctness. It denied its jurisdiction to do this. These grounds of removal, therefore, are not founded on fact.

§ 3214. *In a petition for the removal of a cause to a federal court the facts authorizing a removal must be explicitly stated.*

The other ground alleged, namely, that the acts on which the charge of making false returns is based were done by the petitioners in pursuance of the enforcement laws of the United States, is more to the purpose. The difficulty is an entire want of specification of the acts referred to. This may be owing to the fact that no specification of particular acts is made in the information against them. The charge is simply that of falsely and feloniously uttering and publishing as true false and forged returns from the parish of Vernon, of

an election for presidential electors. What evidence will be presented in support of the charge does not appear. It may have no respect to the acts of the petitioners, done by them in pursuance of the acts of congress. The charge does not necessarily, nor presumptively, imply this. The petitioners can only conjecture that it will be so. In many cases there would not exist any doubt as to the specific acts complained of, and the defendants would have no difficulty in affirming the authority under which they were done. A revenue officer making a seizure, for example, and being prosecuted for taking the party's goods, could, with reasonable certainty, affirm what goods he was charged with taking, and could safely and with due certainty allege the authority by which he did the acts complained of, and thus be enabled to remove the cause to the federal courts. So if, in obedience to the enforcement act, an officer of election receives the votes of unregistered persons, not allowed to register on account of color, and is indicted for receiving unlawful votes, to wit, the votes of A., B. and C., specified by name, or even without such specification, he could very properly affirm what particular acts he was indicted for, and could have no difficulty in removing his cause.

But in the present case the charge is for publishing a false return of an election held at a particular place. The defendants cannot allege that the return was made under an act of congress. It was not. But they suspect that it will be attempted to make out against them the falsity charged, by proving certain acts which they did under the enforcement act. This, however, they can hardly know with sufficient certainty, and, if they do know it, they have not specified the acts or class of acts which they suppose to be the basis of the charge, so that the court may see with sufficient clearness that the case is one that is removable. It seems to me, therefore, that no sufficient case is presented for the removal of the cause. To be entitled to removal, the case must be shown to be within the category of removable causes. The general assertion of the party that it is so, or any general assertion that does not enable the court to see that it is so, is not sufficient. But the petitioners are not without remedy. If on the trial it should be attempted to sustain the charge by acts of the petitioners done by them in pursuance of the acts of congress, they can then claim the benefit of those acts; and, if refused by the court, can carry their case to the supreme court of the United States by writ of error. The application must be denied.

§ 8215. District attorney not required to prosecute.—Deputy marshals of the United States were indicted in a state court in Delaware for resisting certain special state officers, appointed to keep the peace at an election for representatives in the congress of the United States. Their cases were transferred for arbitrament and final decision from the courts where the indictments were pending to the circuit court of the United States, under the provisions of section 643 of the Revised Statutes. The state declined to take any part in the trial, and no counsel for the state appeared. The court held that the United States attorney had no right to prosecute the pleas of the state, and that he was to be considered as counsel for the defendants; and further, that the defendants were entitled to a trial, and therefore ordered a jury to be impaneled to give a verdict in the case. *State of Delaware v. Emerson*, * 8 Fed. R., 411.

§ 8216. Proof of justification.—On a petition for the removal of a cause from a state court, under section 7 of the act of March 2, 1833, the court ruled as follows: From a consideration of the facts and the arguments of counsel in this case, while I am of opinion that the homicide for which this petitioner is in custody was accidental, yet as the burden of proof in support of the facts alleged in his petition is upon the prisoner to show that justification which is contemplated by the seventh section of the act of 1833, I cannot satisfy myself that he has fully and affirmatively done so. This he must do before I have jurisdiction

to discharge him, and I can only therefore now dismiss the petition. *Ex parte Carson*,* 4 Hughes, 215.

§ 3217. Under act of 1833.—A petition to remove a criminal case from a state to a federal court must be filed under section 7 of the act of March 2, 1833; section 3 of said act applies to civil cases. *Ibid*.

§ 3218. Cases within section 641.—Section 641 of the Revised Statutes, which provides for the removal to the federal courts of causes commenced in state courts against a person who is denied or cannot enforce any of the rights secured by the act, has reference to a denial of the right to equal protection by the law, or impediments to its enforcement arising from state law, regulation, or custom. It is only when some such hostile state legislation can be shown to exist, interfering with a party's right of defense, that a man can have his cause removed to the federal court. Allegations in the petition for removal, of manipulation of the law in such a manner as to secure a jury inimical to the petitioners, and of the existence of a general prejudice in the minds of the court, the jurors, the officials and the people of the state, are not within the purview of the statute authorizing such removal. *Ex parte Wells*,* 3 Woods, 128.

§ 3219. Power of state court.—Where a petition for the removal of a criminal prosecution to a federal court is presented to a state court it has a right to pass upon the sufficiency of the petition. But if a proper application is refused a removal may be compelled by the federal court by virtue of its superior jurisdiction in such cases. To accomplish such purpose it may issue a *certiorari* or a writ of *habeas corpus cum causa*. *Ibid*.

§ 3220. Power of congress.—Congress has the constitutional power to provide for the removal from state courts into the courts of the United States for trial there, criminal prosecutions commenced in the state courts, against persons executing the revenue laws of the United States, for acts done under color of those laws, or on account of rights claimed by such persons under those laws, and to prohibit the state courts from proceeding further with the prosecution after the prescribed steps for removal have been taken. *Findley v. Satterfield*,* 3 Woods, 504.

§ 3221. United States officers.—Where an officer executing in a lawful manner a law of the United States meets with resistance, and, to overcome that resistance, uses necessary force, and, for such use of force, is charged with a crime against the state, the case is one arising under the laws of the United States, and it may be removed to the federal courts. *Ibid*.

§ 3222. As to time of removal.—A criminal prosecution is commenced when the warrant is issued. And under section 643 of the Revised Statutes, providing for the removal to the circuit court of the United States of prosecutions commenced in a state court against the revenue officers of the United States for offenses committed in the execution of their duties as such officers, the case may be removed before indictment and as soon as the warrant is issued by the committing magistrate of the state. *State of Georgia v. Bolton*,* 11 Fed. R., 217.

§ 3223. Laws constitutional.—The statute which permits actions, whether civil or criminal, against all persons acting under the revenue laws of the United States, to be removed from the state to the federal courts upon application of the defendant, is valid and constitutional. *Tennessee v. Davis*, 10 Otto, 261 (CONSTR., §§ 2473-2500).

§ 3224. Congress has the same power to authorize the removal from the state to the federal courts, when a federal question is involved, in criminal as in civil cases. To authorize such removal is no invasion of the state's sovereignty. *Ibid*.

§ 3225. Procedure in federal court.—In case of a removal of a criminal case from the state to the federal courts, the procedure on the trial is that of the state courts so far as it is applicable. *Ibid*.

§ 3226. Petition held sufficient.—A person indicted for murder in a state court presented a petition to the circuit court of the United States for that district, setting up that no murder was actually committed, and that the homicide was committed by him in self-defense while he was performing his duty as a revenue officer of the United States. Held, that the petition showed sufficient cause for the removal of the case from the state to the federal court under the statutes of the United States. *Ibid*.

§ 3227. Local prejudice against a colored person by reason of his race and color, although alleged to be so great that he cannot have a fair trial in the state courts, is not a sufficient ground under the civil rights act for removing a criminal action from the state to the federal court. *State of Texas v. Gaines*,* 2 Woods, 343.

§ 3228. Citizenship or alienage.—A criminal case cannot be removed from a state court to a federal court, under the act of March 3, 1875, on account of citizenship or alienage. *New Hampshire v. Grand Trunk R'y*,* 3 Fed. R., 887.

§ 3229. Right to trial by a mixed jury.—The equal protection of the laws guaranteed to all the citizens of a state by the fourteenth amendment can only be had in criminal cases

through juries composed of the same persons, and constituted in the same mode, for each and every class of citizens. So where the laws of a state provide for mixed juries, white and colored, in all cases, a denial to a negro of his right to a trial by a mixed jury is a denial of a right guarantied by such amendment, and presents a good cause for the removal of the case to the federal circuit court of the same district. *Ex parte Reynolds*, 3 Hughes, 571.

§ 3230. Two negroes being indicted for the murder of a white man in Virginia petitioned the state court in which their trial was pending to so modify the venire, which was composed entirely of white men, that one-third thereof should be composed of colored men. The court denied the motion on the ground that it had no authority to change the venire, as it appeared to the satisfaction of the court that it had been drawn from the jury-box according to law. Thereupon before trial the defendants moved to have the case transmitted to the federal circuit court. The petition stated the facts above shown; also, that negroes were by the laws of the state, liable to jury service; that a strong prejudice existed against them among the white race in the county where they were tried, both on account of their race, and of their killing a white man; that no colored man had been allowed to serve on a jury in that county; and that the right secured to the petitioners by the law providing for the equal civil rights of the citizens of the United States was denied them, because they could not obtain an impartial trial by a jury exclusively of white men. The petition was denied, and the trial proceeded with. *Held*, that section 641, R. S., providing for the removal to the federal courts of causes commenced in any state court against a person who is denied, or cannot enforce in such court, any right secured by the laws of the United States, has no applicability to judicial infractions of a person's rights during trial, but to infractions of such rights by state laws; that judicial infractions are to be remedied by the revisory powers of superior courts, and as the removal provided for by section 641 is before trial or final hearing, it is obvious that such an infraction can furnish no ground for a removal before trial, because, at that time, no one can tell whether or not such an infraction will be committed on the trial; and, therefore, that the petition in the case was insufficient, and did not present a case under the section in question. *Virginia v. Rives*, 10 Otto, 314 (CONSTR., §§ 929-940). See, also, *Neal v. Delaware*, 13 Otto, 386 (CONSTR., §§ 963-974).

XXXIV. PARDON.

SUMMARY — *Must be brought to the attention of the court*, § 3231. — *Delivery necessary*, § 3232. — *Effect of a pardon*, § 3233. — *Power to release penalties and forfeitures*, § 3231. — *Conditioned that the party should not claim proceeds of property sold*, § 3235. — *Conditional*, § 3236. — *Discharge on habeas corpus*, § 3237. — *Re-arrest and commitment*, § 3238. — *Proclamation of December 8, 1863*, § 3239. — *Construction of proclamations of pardon*, § 3240. — *Cannot be held void because accepted under duress*, § 3241. — *Judicial notice*, § 3242. — *Granted on supposition of guilt*, § 3243. — *Limited to offense specified*, § 3244.

§ 3231. A pardon, to avail the defendant in a criminal trial, must be brought judicially before the court by a plea, motion or otherwise. *United States v. Wilson*, §§ 3245-47.

§ 3232. A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. *Ibid.* See § 3201.

§ 3233. The pardon of an offense necessarily carries with it the release of the penalty attached to its commission, so far as such release is in the power of the government, unless it is specially restricted by exceptions embraced in the instrument itself. It is of the very essence of a pardon that it releases the offender from the consequences of his offenses. The rights of third parties which have become vested by proceedings to establish the culpability of the accused, taken before the pardon was granted, cannot be impaired by it. The government having parted with its power over such rights they necessarily remain as they existed prior to the grant of the pardon. But unless rights of others in the property condemned have accrued, the penalty of the forfeiture annexed to the commission of the offense must fall with the pardon of the offense itself, provided the full operation of the pardon is not restrained by the conditions upon which it was granted. *Osborn v. United States*, §§ 3248-51. See § 3812.

§ 3234. The constitutional grant to the president of the power to pardon offenses carries with it, as an incident, the power to release penalties and forfeitures which accrue from the offenses. *Ibid.* See § 3275.

§ 3235. A pardon was granted on condition that the offender should not claim any property, or the proceeds of any property, which had been sold by the order, judgment or decree of a court under the confiscation laws of congress. Certain bonds belonging to the offender had been seized, and some of them had been paid voluntarily to officers of the court, and

some had been collected by selling the securities, but the bonds had none of them been sold. *Held*, that the condition did not prevent the recovery of the proceeds of the bonds. *Ibid*.

§ 3236. The president has constitutional power to grant a conditional pardon to a convicted murderer, sentenced to be hung, offering to change that punishment to imprisonment for life; and if such a pardon is accepted by the convict, it is binding upon him, and he cannot claim to be released upon a writ of *habeas corpus*, on the ground that the condition is void and the pardon absolute. (McLEAN, J., dissented.) *Ex parte Wells*, §§ 3252-56. See § 3296.

§ 3237. A prisoner in custody under a valid conviction and sentence may be discharged on *habeas corpus* on production of a pardon. Greathouse's Case, §§ 3257-62.

§ 3238. A court does not become *functus officio* in a case by passing sentence. The prisoner is detained in custody by virtue of its sentence, and it seems that where he has been discharged on a conditional pardon he may be re-arrested and remanded by the court in execution of the original sentence. *Ibid*.

§ 3239. The proclamation of amnesty by the president of December 8, 1863, embraced those convicted of offenses mentioned therein previous to its date. *Ibid*. See § 3339.

§ 3240. It is the duty of a court to construe a proclamation of pardon like any other public act or law, and to apply to it the well settled rules of construction irrespective of any opinion or even knowledge of the private but unexpressed intention of its author. *Ibid*.

§ 3241. A prisoner accepting a conditional pardon while in confinement cannot be said so to have accepted it under duress that such acceptance is void. *Ibid*.

§ 3242. A court will take judicial notice of a proclamation of pardon and amnesty. *Ibid*.

§ 3243. All pardons, except in cases of illegal convictions, etc., proceed upon the hypothesis of the legal guilt of the person pardoned. If he be not guilty it is presumed that he will be acquitted, and he has no need of pardon. The pardon is granted on considerations which satisfy the executive that, in the particular case, the offender, though guilty, should be pardoned. *Ibid*.

§ 3244. Where a pardon recites a distinct and specific offense, its effect is to be limited thereto, and does not embrace any other offense for which separate penalties and punishments are provided. So a pardon for conspiracy against the government to defraud the revenue does not embrace a forfeiture of property seized for violation of the revenue laws. *Ex parte Weimer*, § 3263.

[NOTES.—See §§ 3264-3363.]

UNITED STATES v. WILSON.

(7 Peters, 150-163. 1833.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Eastern District of Pennsylvania.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—In this case, the grand jury had found an indictment against the prisoner for robbing the mail, to which he had pleaded not guilty. Afterwards he withdrew this plea and pleaded guilty. On a motion by the district attorney, at a subsequent day, for judgment, the court suggested the propriety of inquiring as to the effect of a certain pardon, understood to have been granted by the president of the United States to the defendant, since the conviction on this indictment, alleged to relate to a conviction on another indictment, and that the motion was adjourned till the next day. On the succeeding day, the counsel for the prisoner appeared in court, and, on his behalf, waived and declined any advantage or protection which might be supposed to arise from the pardon referred to; and thereupon the following points were made by the district attorney: 1. That the pardon referred to is expressly restricted to the sentence of death passed upon the defendant under another conviction, and as expressly reserves from its operation the conviction now before the court. 2. That the prisoner can, under this conviction, derive no advantage from the pardon without bringing the same judicially before the court.

The prisoner, being asked by the court whether he had anything to say why sentence should not be pronounced for the crime whereof he stood convicted in this particular case, and whether he wished in any manner to avail himself

of the pardon referred to, answered that he had nothing to say, and that he did not wish in any manner to avail himself, in order to avoid the sentence in this particular case, of the pardon referred to. The judges were thereupon divided in opinion on both points made by the district attorney, and ordered them to be certified to this court.

A *certiorari* was afterwards awarded to bring up the record of the case in which judgment of death had been pronounced against the prisoner. The indictment charges a robbery of the mail, and putting the life of the driver in jeopardy. The robbery charged in each indictment is on the same day, at the same place, and on the same carrier. We do not think that this record is admissible, since no direct reference is made to it in the points adjourned by the circuit court; and without its aid we cannot readily comprehend the questions submitted to us.

If this difficulty be removed, another is presented by the terms in which the first point is stated on the record. The attorney argued, first, that the pardon referred to is expressly restricted to the sentence of death passed upon the defendant under another conviction, and as expressly reserves from its operation the conviction now before the court. Upon this point the judges were opposed in opinion. Whether they were opposed on the fact, or on the inference drawn from it by the attorney; and what that inference was, the record does not explicitly inform us. If the question on which the judges doubted was, whether such a pardon ought to restrain the court from pronouncing judgment in the case before them, which was expressly excluded from it, the first inquiry is, whether the robbery charged in the one indictment is the same with that charged in the other. This is neither expressly affirmed nor denied. If the convictions be for different robberies, no question of law can arise on the effect which the pardon of the one may have on the proceedings for the others. If the statement on the record be sufficient to inform this court judicially that the robberies are the same, we are not told on what point of law the judges were divided. The only inference we can draw from the statement is, that it was doubted whether the terms of the pardon could restrain the court from pronouncing the judgment of law on the conviction before them. The prisoner was convicted of robbing the mail, and putting the life of the carrier in jeopardy, for which the punishment is death. He had also been convicted on an indictment for the same robbery, as we now suppose, without putting life in jeopardy, for which the punishment is fine and imprisonment; and the question supposed to be submitted is, whether a pardon of the greater offense, excluding the less, necessarily comprehends the less, against its own express terms.

We should feel not much difficulty on this statement of the question, but it is unnecessary to discuss or decide it. Whether the pardon reached the less offense or not, the first indictment comprehended both the robbery and the putting life in jeopardy, and the conviction and judgment pronounced upon it extended to both. After the judgment, no subsequent prosecution could be maintained for the same offense, or for any part of it, provided the former conviction was pleaded. Whether it could avail without being pleaded, or in any manner relied on by the prisoner, is substantially the same question with that presented in the second point, which is, "that the prisoner can, under this conviction, derive no advantage from the pardon, without bringing the same judicially before the court by plea, motion or otherwise." The constitution gives to the president, in general terms, "the power to grant reprieves and

pardons for offenses against the United States." As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

§ 3245. *Pardon defined. Judicial notice.*

A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system that the judge sees only with judicial eyes, and knows nothing respecting any particular case of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages. Is there anything peculiar in a pardon which ought to distinguish it in this respect from other facts? We know of no legal principle which will sustain such a distinction.

§ 3246. *A pardon is not complete until accepted.*

A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him. It may be supposed that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment. The pardon may possibly apply to a different person or a different crime. It may be absolute or conditional. It may be controverted by the prosecutor, and must be expounded by the court. These circumstances combine to show that this, like any other deed, ought to be brought "judicially before the court by plea, motion or otherwise."

§ 3247. — *and must be brought to the attention of the court by plea or motion.*

The decisions on this point conform to these principles. Hawkins, b. 2, c. 37, § 59, says: "But it is certain that a man may waive the benefit of a pardon under the great seal, as where one who hath such a pardon doth not plead it, but takes the general issue, after which he shall not resort to the pardon." In section 67 he says, "an exception is made of a pardon after plea." Notwithstanding this general assertion, a court would undoubtedly at this day permit a pardon to be used after the general issue. Still, where the benefit is to be obtained through the agency of the court, it must be brought regularly to the notice of that tribunal. Hawkins says, section 64, "it will be error to allow a man the benefit of such a pardon unless it be pleaded." In section 65 he says, "he who pleads such a pardon must produce it *sub fide sigilli*, though it be a plea in bar, because it is presumed to be in his custody, and the property of it belongs to

him." Comyn, in his Digest, tit. Pardon, letter H, says: "If a man has a charter of pardon from the king, he ought to plead it in bar of the indictment; and if he pleads not guilty he waives his pardon." The same law is laid down in Bacon's Abridgment, title Pardon, and is confirmed by the cases these authors quote.

We have met with only one case which might seem to question it. Jenkins, page 129, case 62, says: "If the king pardons a felon, and it is shown to the court, and yet the felon pleads guilty, and waives the pardon, he shall not be hanged; for it is the king's will that he shall not, and the king has an interest in the life of his subject. The books to the contrary are to be understood where the charter of pardon is not shown to the court." This vague *dictum* supposes the pardon to be shown to the court. The waiver spoken of is probably that implied waiver which arises from pleading the general issue; and the case may be considered as determining nothing more than that the prisoner may avail himself of the pardon by showing it to the court, even after waiving it by pleading the general issue. If this be, and it most probably is, the fair and sound construction of this case, it is reconciled with all the other decisions, so far as respects the present inquiry.

Blackstone, in his 4th vol., p. 337, says, "a pardon may be pleaded in bar." In p. 376 he says, "it may also be pleaded in arrest of judgment." In p. 401 he says, "a pardon by act of parliament is more beneficial than by the king's charter; for a man is not bound to plead it, but the court must, *ex officio*, take notice of it; neither can he lose the benefit of it by his own laches or negligence, as he may of the king's charter of pardon. The king's charter of pardon must be specially pleaded, and that at a proper time; for if a man is indicted and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon. But if a man avails himself thereof, as by course of law he may, a pardon may either be pleaded on arraignment, or in arrest of judgment, or, in the present stage of proceedings, in bar of execution." The reason why a court must *ex officio* take notice of a pardon by act of parliament is, that it is considered as a public law; having the same effect on the case as if the general law punishing the offense had been repealed or annulled.

This court is of opinion that the pardon in the proceedings mentioned, not having been brought judicially before the court by plea, motion or otherwise, cannot be noticed by the judges.

OSBORN v. UNITED STATES.

(1 Otto, 474-479. 1875.)

ERROR to U. S. Circuit Court, District of Kansas.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—The material questions presented in this case for our determination relate, first, to the effect of the president's pardon upon the rights of the petitioner to the proceeds of his property confiscated by the decree of the district court; and, second, to the power of the court to compel restitution to its registry of moneys illegally received by its former officers.

In May, 1863, the district court of Kansas decreed the condemnation and forfeiture to the United States of the several bonds and mortgages described in the information filed by the government. In June following, it ordered that the several debtors on these bonds should, within five months thereafter, pay

into court the money due by them respectively; and that, in default of such payment, the clerk should issue to the marshal orders for the sale of the mortgaged property, upon which he should proceed as on execution under the laws of Kansas. Some of the debtors paid the amounts due by them into court; but the majority of them failed in this respect, and orders for the sale of the property mortgaged were issued to the marshal. To him the greater number paid without sale; but in some instances sales were made. Over \$20,000 in this way came into the possession of officers of the court. There were, at the time, numerous other confiscation cases pending in the court, and the moneys received from them were indiscriminately mixed with the moneys received in the cases against the property of the petitioner. None of the moneys received in any of the cases were paid into the treasury of the United States, and no order was made by the court for any such payment. Some of them were deposited in a banking-house at Leavenworth, designated as the place of deposit of moneys paid into court, and afterwards drawn out; some were obtained by officers of the court, and to an extent greatly in excess of their legal charges; and some of them were paid to the judge. The moneys from the different confiscation cases, being indiscriminately mixed, would seem to have been taken by the officers of the court whenever funds were needed by them, without regard to the sources from which they were derived, or the propriety of their application to the purposes for which they were used.

In April, 1866, the petitioner applied to the court for leave to file a petition for the restoration to him of the proceeds of his property, after deducting the costs of the legal proceedings, alleging that he had been pardoned by the president of the United States, and setting forth a copy of the pardon. The pardon was issued in September, 1865, and was in terms a full pardon and amnesty for all offenses committed by the petitioner arising from participation, direct or indirect, in the rebellion, subject to certain conditions. One of these conditions provided that the petitioner should pay all costs which may have accrued in proceedings instituted or pending against his person or property before the acceptance of the pardon. Another condition was, that the petitioner should not by virtue of the pardon claim any property, or the proceeds of any property, which had been sold by the order, judgment or decree of a court under the confiscation laws of the United States.

§ 3248. *Effect of a pardon. Restoration of rights of property.*

The district court refused the application; but the circuit court, on appeal, reversed its order, and allowed the petition to be filed. The district court held, it would seem, that the conditions attached to the pardon precluded the petitioner from seeking to obtain the proceeds of his property; but the circuit court was of opinion that the effect of a pardon was to restore to its recipient all rights of property lost by the offense pardoned, unless the property had, by judicial process, become vested in other persons, subject to such exceptions as were prescribed by the pardon itself; that until an order of distribution of the proceeds was made in these cases, or the proceeds were actually paid into the hands of the party entitled as informer to receive them, or into the treasury of the United States, they were within the control of the court, and that no vested right to the proceeds had accrued so as to prevent the pardon from restoring them to the petitioner. Woolworth's Rep., 198. This ruling is here assailed by officers of the court, who are called upon to make restitution of a portion of the proceeds they obtained, not by the United States, who are alone interested in the decision. It is not a matter for these

officers to complain that proceeds of property adjudged forfeited to the United States are held subject to the further disposition of the court, and possible restitution to the original owner. That is a matter which concerns only the United States, and they have not seen fit to object to the decision. But, independently of this consideration, we are clear that the decision was correct. The pardon, as is seen, embraces all offenses arising from participation of the petitioner, direct or indirect, in the rebellion. It covers, therefore, the offenses for which the forfeiture of his property was decreed. The confiscation law of 1862, though construed to apply only to public enemies, is limited to such of them as were engaged in and gave aid and comfort to the rebellion. 12 Stat., sec. 7, p. 590. The pardon of that offense necessarily carried with it the release of the penalty attached to its commission, so far as such release was in the power of the government, unless specially restrained by exceptions embraced in the instrument itself. It is of the very essence of a pardon that it releases the offender from the consequences of his offense. If in the proceedings to establish his culpability and enforce the penalty, and before the grant of the pardon, the rights of others than the government have vested, those rights cannot be impaired by the pardon. The government having parted with its power over such rights, they necessarily remain as they existed previously to the grant of the pardon. The government can only release what it holds.

§ 3249. *Effect of a condition in a pardon that the person pardoned shall not claim confiscated property.*

But unless rights of others in the property condemned have accrued, the penalty of forfeiture annexed to the commission of the offense must fall with the pardon of the offense itself, provided the full operation of the pardon be not restrained by the conditions upon which it is granted. The condition annexed to the pardon of the petitioner does not defeat such operation in the present case. The property of the petitioner forfeited consisted of numerous money-bonds, secured by mortgage on lands in Kansas. These bonds were not sold under the confiscation laws; they were collected by the officers of the court, in part by voluntary payments by the obligors, and in part by sale of the lands mortgaged. These lands did not belong to the petitioner. A mortgage in Kansas does not pass the title of the property mortgaged; it is a mere security for the debt, to which the creditor may resort to enforce payment. The property mortgaged was not confiscated nor sold under the confiscation laws. When a bond of one of the debtors was not voluntarily paid, the court proceeded to enforce its payment by the ordinary measure resorted to in the case of mortgages; that is, a sale of the security. The object of the condition in question annexed to the pardon was to protect the purchaser of property of the petitioner, at a judicial sale decreed under the confiscation laws, from any claim by him either for the property or the purchase money. Numerous sales had been made under decrees in confiscation cases, and a similar condition was usually inserted in pardons to secure the purchasers from molestation. Full effect is thus given to the condition; and, as a pardon is an act of grace, limitations upon its operation should be strictly construed.

But it is contended that, as the bonds were forfeited to the government by the decree of the district court, there can be no restitution except by grant or conveyance of some kind from the government, and that the proprietary interests of the government can only be disposed of by act of congress. The answer is, that the forfeiture results, not from the decree of the court, but from the offense which the decree establishes and declares. The pardon, in releasing the

offense, obliterating it in legal contemplation (*Carlisle v. United States*, 16 Wall., 151), removes the ground of the forfeiture upon which the decree rests, and the source of title is then gone. But were this otherwise, the constitutional grant to the president of the power to pardon offenses must be held to carry with it, as an incident, the power to release penalties and forfeitures which accrue from the offenses.

§ 3250. *The powers of the court over money belonging to its registry continue until the money is distributed pursuant to final decrees in the cases in which it is paid.*

The petitioner being restored by the pardon to his rights in the proceeds of the property forfeited, after deducting from them the costs of the legal proceedings, naturally invoked the aid of the court in which the proceedings were had, or to which they were transferred, for restitution of the proceeds. Proceedings in confiscation cases are required by the statute to conform as nearly as may be to proceedings in admiralty or revenue cases; and in admiralty it is the constant practice for persons having an interest in proceeds in the registry of the court to intervene by petition and summary proceedings to obtain a delivery of the moneys to which they are entitled. The forty-third admiralty rule recognizes this right; and in cases without number the right has been enforced. The power of the court over moneys belonging to its registry continues until they are distributed pursuant to final decrees in the cases in which the moneys are paid.

§ 3251. — *and if such moneys are previously withdrawn from the registry without authority of law, the court can, by summary proceedings, compel their restitution.*

If from any cause they are previously withdrawn from the registry without authority of law, the court can, by summary proceedings, compel their restitution. In the present case, it is no answer to the order for restitution that the appellants received the moneys they obtained as officers of the court, and that they have long since ceased to be such officers. If the moneys were illegally taken, they must be restored; and, until a decree of distribution is made and enforced, the summary power of the court to compel restitution remains intact. The power could be applied in no case more fittingly than to previous officers of the court. The careful and labored reports of the commissioners appointed by the court to examine into the proceedings in the confiscation cases, ascertain the expenses incurred, and trace out as far as possible the moneys received, were properly confirmed. There is no objection to their findings which merits consideration.

The decree brought before us for review must be affirmed, except as to the costs of the proceedings subsequent to the presentation of the application of the petitioner. Those costs should be apportioned against the parties ordered to make restitution, according to the respective amounts they are adjudged to restore. The cause will, therefore, be remanded, with directions to modify the decree in this particular; but, in all other respects, the decree is affirmed.

EX PARTE WELLS.

(18 Howard, 307-331. 1855.)

PETITION to the Supreme Court.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—The petitioner was convicted of murder in the District of Columbia, and sentenced to be hung on the 23d of April, 1852.

President Fillmore granted to him a conditional pardon. The material part of it is as follows: "For divers good and sufficient reasons I have granted, and do hereby grant, unto him, the said William Wells, a pardon of the offense of which he was convicted, upon condition that he be imprisoned during his natural life; that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary at Washington." On the same day the pardon was accepted, in these words: "I hereby accept the above and within pardon with condition annexed." An application was made by the petitioner to the circuit court of the District of Columbia for a writ of *habeas corpus*. It was rejected, and is now before this court by way of appeal.

§ 3252. *The pardoning power of the president extends to the granting of a conditional commutation of punishment, subject to acceptance by the accused.*

The second article of the constitution of the United States, section 2, contains this provision: "The president shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Under this power the president has granted reprieves and pardons since the commencement of the present government. Sandry provisions have been enacted, regulating its exercise for the army and navy, in virtue of the constitutional power of congress to make rules and regulations for the government of the army and navy. No statute has ever been passed regulating it in cases of conviction by the civil authorities. In such cases, the president has acted exclusively under the power as it is expressed in the constitution. This case raises the question whether the president can constitutionally grant a conditional pardon to a convicted murderer, sentenced to be hung, offering to change that punishment to imprisonment for life; and if he does, and it be accepted by the convict, whether it is not binding upon him, to justify a court to refuse him a writ of *habeas corpus*, applied for upon the ground that the pardon is absolute, and the condition of it void.

The counsel for the prisoner contends that the pardon is valid, to remit entirely the sentence of the court for his execution, and that the condition annexed to the pardon, and accepted by the prisoner, is illegal. It is also said that a president granting such a pardon assumes a power not conferred by the constitution — that he legislates a new punishment into existence, and sentences the convict to suffer it; in this way violating the legislative and judicial powers of the government, it being the province of the first to enact laws for the punishment of offenses against the United States, and that of the judiciary to sentence convicts for violations of those laws, according to them. It is said to be the exercise of prerogative, such as the king of England has in such cases; and that, under our system, there can be no other foundation, empowering a president of the United States to show the same clemency. We think this is a mistake arising from the want of due consideration of the legal meaning of the word pardon. It is supposed that it was meant to be used exclusively with reference to an absolute pardon, exempting a criminal from the punishment which the law inflicts for a crime he has committed.

But such is not the sense or meaning of the word, either in common parlance or in law. In the first, it is forgiveness, release, remission. Forgiveness for an offense, whether it be one for which the person committing it is liable in law or otherwise. Release from pecuniary obligation, as where it is said, I pardon you your debt. Or it is the remission of a penalty, to which one may have subjected himself by the non-performance of an undertaking or contract, or when a statutory penalty in money has been incurred, and it is remitted by a

public functionary having power to remit it. In the law it has different meanings, which were as well understood when the constitution was made as any other legal word in the constitution now is.

§ 3253. *The meaning of the term "pardon" is to be ascertained by reference to English authorities.*

Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course. Sometimes, though, an express pardon for one is a pardon for another, such as in approver and appellee, principal and accessory in certain cases, or where many are indicted for felony in the same indictment, because the felony is several in all of them, and not joint, and the pardon for one of them is a pardon for all, though they may not be mentioned in it; or it discharges sureties for a fine, payable at a certain day, and the king pardons the principal; or sureties for the peace, if the principal is pardoned after forfeiture. We might mention other legal incidents of a pardon, but those mentioned are enough to illustrate the subject of pardon, and the extent or meaning of the president's power to grant reprieves and pardons. It meant that the power was to be used according to law; that is, as it had been used in England, and these states when they were colonies; not because it was a prerogative power, but as incidents of the power to pardon, particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice. Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy. And it was with the fullest knowledge of the law upon the subject of pardons, and the philosophy of government in its bearing upon the constitution, when this court instructed Chief Justice Marshall to say, in *The United States v. Wilson*, 7 Pet., 162: "As the power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." We still think so, and that the language used in the constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the king, as the chief executive. Prior to the Revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same

meaning to the word pardon. In the convention which framed the constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.

We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution. This is in conformity with the principles laid down by this court in *Cathcart v. Robinson*, 5 Pet., 264, 280; and in *Flavel's Case*, 8 Watts & S., 197; Attorney-General's brief. A pardon is said by Lord Coke to be a work of mercy, whereby the king, either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt or duty, temporal or ecclesiastical. 3 Inst., 233. And the king's coronation oath is, "that he will cause justice to be executed in mercy." It is frequently conditional, as he may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend. Co. Litt., 274, 276; 2 Hawkins, ch. 37, § 45; 4 Black. Com., 401. And if the felon does not perform the condition of the pardon, it will be altogether void; and he may be brought to the bar and remanded, to suffer the punishment to which he was originally sentenced. *Cole's Case*, Moore, 466; Bac. Abr., Pardon, E. In the case of *Packer and others* — Canadian prisoners — 5 Mees. & W., 32, Lord Abinger decided for the court, if the condition upon which alone the pardon was granted be void, the pardon must also be void. If the condition were lawful, but the prisoner did not assent to it, nor submit to be transported, he cannot have the benefit of the pardon — or if, having assented to it, his assent be revocable, we must consider him to have retracted it by the application to be set at liberty, in which case he is equally unable to avail himself of the pardon.

§ 3254. *Limitations of the power to pardon.*

But to the power of pardoning there are limitations. The king cannot, by any previous license, make an offense punishable which is *malum in se*, i. e., unlawful in itself, as being against the law of nature, or so far against the public good as to be indictable at common law. A grant of this kind would be against reason and the common good, and therefore void. 3 Hawk., ch. 37, § 28. So he cannot release a recognizance to keep the peace with another by name, and generally with other lieges of the king, because it is for the benefit and safety of all his subjects. 3 Inst., 238. Nor, after suit has been brought in a popular action, can the king discharge the informer's part of the penalty (3 Inst., 238); and if the action be given to the party grieved, the king cannot discharge the same. 3 Inst., 237. Nor can the king pardon for a common nuisance, because it would take away the means of compelling a redress of it, unless it be in a case where the fine is to the king, and not a forfeiture to the party grieved. Hawk., ch. 37, § 33; 5 Chit. Burn., 2.

And this power to pardon has also been restrained by particular statutes. By the act of settlement (12 & 13 Will. III., ch. 2, Eng.), no pardon under the great seal is pleadable to an impeachment by the commons in parliament, but after the articles of impeachment have been heard and determined, he may pardon. The provision in our constitution, excepting cases of impeachment out of the power of the president to pardon, was evidently taken from that statute, and is an improvement upon the same. Nor does the power to pardon in England extend to the *habeas corpus* act (31 Car. II., ch. 2), which makes it a *premunire* to send a subject to any prison out of England, etc., or beyond the seas, and further provides that any person so offending shall be incapable of

the king's pardon. There are also pardons grantable as of common right, without any exercise of the king's discretion; as where a statute creating an offense, or enacting penalties for its future punishment, holds out a promise of immunity to accomplices to aid in the conviction of their associates. When accomplices do so voluntarily they have a right absolutely to a pardon. 1 Chit. C. L., 766. Also when, by the king's proclamation, they are promised immunity on discovering their accomplices and are the means of convicting them. Rudd's Case, Cowp., 334; 1 Leach, 118. But except in these cases accomplices, though admitted according to the usual phrase to be "king's evidence," have no absolute claim or legal right to a pardon. But they have an equitable claim to pardon if upon the trial a full and fair disclosure of the joint guilt of one of them and his associates is made. He cannot plead it in bar of an indictment for such offense, but he may use it to put off the trial, in order to give him time to apply for a pardon. Rudd's Case, Cowp., 331; 1 Leach, 115. So, conditional pardons by the king do not permit transportation or exile as a commutable punishment, unless the same has been provided for by legislation. See 39 Eliz., ch. 45, and 5 Geo. IV., ch. 84, a consolidation of all the laws regulating the transportation of offenders from Great Britain.

Having shown, by the citation of many authorities, the king's power to grant conditional pardons, with the restraints upon the power, also when pardons for offenses and crimes are grantable of course, and when a party has an equitable right to apply for a pardon, we now proceed to show, by the decisions of some of the courts of the states of this Union, that they have expressed opinions coincident with what has been stated to be the law of England, and more particularly how the pardoning power may be exercised in them by the governors of the states, whose constitutions have clauses giving to them the power to grant pardons, in terms identical with those used in the constitution of the United States. In the constitution of the state of Pennsylvania, of 1790, it is declared in the second article, section 9, that the governor shall have power to remit fines and penalties, and grant reprieves and pardons, except in cases of impeachment.

Sergeant, Justice, said, in *Flavel's Case*, 8 Watts & S., 197, "several propositions were made in the convention which formed the constitution of 1838, to limit and control the exercise of the power of pardon by the executive, but they were overruled and the provision left as it stood." "Now, no principle is better settled than that for the definition of legal terms and construction of legal powers mentioned in our constitution and laws, we must resort to the common law when no act of assembly or judicial interpretation or settled usage has altered their meaning."

Then proceeding to show the nature and application of conditions, the learned judge remarks: "And so may the king make a charter of pardon to a man of his life, upon condition. A pardon, therefore, being an act of such a nature as that by the common law it may be upon any condition, it has the same nature and operation in Pennsylvania, and it follows that the governor may annex to a pardon any condition, whether subsequent or precedent, not forbidden by law. And it lies upon the grantee to perform the condition; or if the condition is not performed, the original sentence remains in full vigor, and may be carried into effect." To this case we add those of *The State v. Smith*, 1 Bailey (S. C.), 283, 288; also *Addington's Case*, in 2 id., 516; also *Hunt*, *Ex parte*; also that of the *People v. Potter*. N. Y. Leg. Obs., 177; S. C., 1 Park. Cr

Rep., 4; and the case of *United States v. Wilson*, 7 Pet., 150 (§§ 3245-47, *supra*).

§ 3255. *The power to grant conditional pardons is conferred in terms by the constitution.*

But it was urged by the counsel who represents the petitioner that the power to reprieve and pardon does not include the power to grant a conditional pardon, the latter not having been enumerated in the constitution as a distinct power. And he cited the constitutions of several of the states, the legislation of others, and two decisions, to show that when the power to commute punishment had not been given in terms legislation had authorized it; and that when that had not been done, the courts had decided against the commutation by the governors of the states. And it was said, so far from the president having such a power, that, as the grant was not in the constitution, congress could not give it. It not unfrequently happens in discussions upon the constitution that an involuntary change is made in the words of it, or in their order, from which, as they are used, there may be a logical conclusion, though it be different from what the constitution is in fact. And even though the change may appear to be equivalent, it will be found upon reflection not to convey the full meaning of the words used in the constitution. This is an example of it. The power as given is not to reprieve and pardon, but that the president shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. The difference between the real language and that used in the argument is material. The first conveys only the idea of an absolute power as to the purpose or object for which it is given. The real language of the constitution is general, that is, common to the class of pardons, or extending the power to pardon to all kinds of pardons known in the law as such, whatever may be their denomination. We have shown that a conditional pardon is one of them. A single remark from the power to grant reprieves will illustrate the point. That is not only to be used to delay a judicial sentence when the president shall think the merits of the case, or some cause connected with the offender, may require it, but it extends also to cases *ex necessitate legis*, as where a female after conviction is found to be *enceinte*, or where a convict becomes insane, or is alleged to be so. Though the reprieve in either case produces delay in the execution of a sentence, the means to be used to determine either of the two just mentioned, are clearly within the president's power to direct; and reprieves in such cases are different in their legal character, and different as to the causes which may induce the exercise of the power to reprieve.

In this view of the constitution, by giving to its words their proper meaning, the power to pardon conditionally is not one of inference at all, but one conferred in terms. The mistake in the argument is in considering an incident of the power to pardon the exercise of a new power, instead of its being a part of the power to pardon. We use the word incident as a legal term, meaning something appertaining to and necessarily depending upon another, which is termed the principal. But admitting that to be so, it may be said, as the condition when accepted becomes a substitute for the sentence of the court, involving another punishment, the latter is substantially the exercise of a new power. But this is not so, for the power to offer a condition, without ability to enforce its acceptance, when accepted by the convict, is the substitution by himself of a lesser punishment than the law has imposed upon him, and he cannot complain if the law executes the choice he has made.

§ 3256. *Where a man is legally in prison, he cannot be said to accept a conditional pardon under duress.*

As to the suggestion that conditional pardons cannot be considered as being voluntarily accepted by convicts so as to be binding upon them, because they are made whilst under *duress per minas* and duress of imprisonment, it is only necessary to remark that neither applies to this case, as the petitioner was legally in prison. "If a man be legally imprisoned, and either to procure his discharge, or on any other fair account, seal a bond or deed, this is not duress of imprisonment, and he is not at liberty to avoid it. And a man condemned to be hung cannot be permitted to escape the punishment altogether, by pleading that he had accepted his life by *duress per minas*." And if it be further urged, as it was in the argument of this case, that no man can make himself a slave for life by convention, the answer is, that the petitioner had forfeited his life for crime, and had no liberty to part with.

We believe we have now noticed every point made in the argument by counsel on both sides, except that which deduces the president's power to grant a conditional pardon from the local law of Maryland, of force in the District of Columbia. We do not think it necessary to discuss it, as we have shown that the president's power to do so exists under the constitution of the United States. We are of opinion that the circuit court of the District of Columbia rightly refused the petitioner's application, and this court affirms it.

MR. JUSTICE McLEAN dissented, holding that the condition annexed to the pardon was not within the power of the president, and that the pardon was absolute. JUSTICES CURTIS and CAMPBELL dissented on the question of jurisdiction, holding that where a circuit court examines a commitment on *habeas corpus*, and recommitts the prisoner, the supreme court has no jurisdiction by *habeas corpus* to review the sentence of the circuit court.

GREATHOUSE'S CASE.

(Circuit Court for California: 2 Abbott, 332-398. 1864.)

Opinion by HOFFMAN, J.

STATEMENT OF FACTS.—A writ of *habeas corpus* is applied for on the part of Ridgley Greathouse, a prisoner now in execution under the judgment and sentence of this court, for the crime of engaging in and giving aid and comfort to the existing rebellion. The legality of the conviction and sentence is not denied; but it is claimed that the prisoner is entitled to his discharge under the proclamation of the president of December 8, 1863. The application is resisted by the district attorney on two grounds: 1st. That the court has no jurisdiction to award the writ or discharge the prisoner, even though it be clear that he is within the terms of the proclamation; and, 2d. That the proclamation does not apply to his and similar cases.

§ 3257. *A prisoner in custody under a valid conviction and sentence may be discharged on habeas corpus on the production of a pardon by the president.*

1. As to the jurisdiction of the court. The authority of the courts of the United States, and of the judges thereof, to issue writs of *habeas corpus*, is derived from section 14 of the act of September 24, 1789. That section provides that "either of the justices of the supreme court, as well as the judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. Provided, that writs of *habeas*

corpus shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or necessary to be brought into court to testify."

It is contended by the district attorney that the authority here given does not embrace cases where a prisoner is in custody under conviction and sentence. That the court, when sentence is pronounced, is *functus officio*, and has no further power over the case; that the marshal's return that he holds the prisoner by virtue of such conviction and sentence is conclusive; and that even a special pardon issued to the prisoner cannot be set up in answer to it. For this position no authority is cited. It will be seen that, if correct, it would be the duty of the court to remand the prisoner to undergo execution of a capital sentence, even though he should produce a full and free pardon by the president, under the great seal of state. Even this result the district attorney did not hesitate to admit to be the necessary consequence of the principle contended for.

The terms of the statute embrace, it will be observed, all cases of commitment; and the proviso by implication includes not only cases of commitment for trial before some court of the United States, but also all cases where persons are in jail *under or by color of the authority of the United States*. It is evident that this language extends to all persons imprisoned under the authority of the United States, whether under the judgment of a court or the warrant of a committing magistrate. The duty of the court, on the return of the writ, is plain. If it appear that the prisoner is held by virtue of a warrant issued by a competent officer, or by the judgment and sentence of a court of competent jurisdiction, he will be remanded. But if it appear that though the original commitment was lawful, yet, that in consequence of some subsequent event, his further detention is no longer lawful, he will be discharged. Thus, if he be committed until he pay a fine, which he has paid accordingly, and the return states the commitment only, the court will inquire into the fact and release the prisoner. "So, after a conviction he may allege a pardon, or that the judgment under which he was imprisoned has been reversed." 1 Hill, 404. In *People v. Cassels*, 5 id., 167, Judge Bronson says: "The officers may also inquire whether any cause has arisen since the commitment for putting an end to the imprisonment, as a pardon, reversal of the judgment, payment of the fine, and the like." That the court does not become, by passing sentence, *functus officio*, to all intents and purposes, is evident from the consideration that it is by virtue of the authority of the court, and by force of its sentence, that the prisoner is detained; and even when he has obtained a conditional pardon and been discharged, yet, if he violate the condition, he may be re-arrested and remanded by the court in execution of the original sentence.

But the point is authoritatively settled by the supreme court of the United States. In *Ex parte Wells* (18 How., 307, §§ 3252-56, *supra*), a motion was made in the circuit court for a *habeas corpus* on behalf of Wells, a prisoner convicted of murder and sentenced to death, but who had been pardoned by the president upon condition that he be imprisoned during his natural life. Under this pardon the prisoner claimed to be entitled to his discharge. The application was refused by the circuit court, and came before the supreme court by way of appeal. The questions debated were, whether the supreme court was not, in entertaining the application, exercising an original instead of the appellate jurisdiction to which, in such cases, the constitution restricts it; and, secondly, as to the force and effect of the pardon, and the legality of an im-

prisonment by virtue of the condition contained in it, and the prisoner's acceptance of it. It was held that the jurisdiction invoked was an appellate jurisdiction, and that the imprisonment pursuant to the condition of the pardon was legal. But no doubt seems to have been suggested, either by the court or at the bar, of the authority of the circuit court to award the writ; nor of that of the supreme court, provided the jurisdiction exercised was appellate, and not original. In *Ex parte Watkins*, 7 Pet., 568, the court awarded the writ in the case of a person convicted of offenses against the United States, and sentenced to imprisonment and the payment of fines. It is nowhere suggested in the case that the authority of the circuit court, or that of the supreme court (if the jurisdiction was to be deemed appellate) to inquire into the force and effect of the sentence, and the legality of a further imprisonment under it, was open to controversy. It is plain, from the foregoing, that it is the right and duty of the court in this case to inquire into the cause of commitment of the prisoner, and that, if he is held by virtue of the sentence of this court, to ascertain and decide whether, by reason of any matter subsequent thereto, such as the payment of his fine, the expiration of his term of imprisonment, a pardon, or the like, he is now entitled to be discharged.

§ 3258. *The proclamation of amnesty of 1863 embraced persons convicted of the offenses therein mentioned prior to its date.*

2. The pardon whereby it is claimed that the sentence of the prisoner is avoided is contained in the proclamation of the president of December, 8, 1863. The part requisite to consider is as follows: "Therefore, I, Abraham Lincoln, president of the United States, do proclaim, declare and make known to all persons who have, directly or by implication, participated in the existing rebellion, except as hereinafter excepted, that a full pardon is granted to them and each of them, with restoration of all rights, except where rights of third parties shall have intervened, and upon the condition that every such person shall take and subscribe an oath, and thenceforward keep and maintain said oath, and which oath shall be registered for permanent preservation, and shall be of the tenor and effect following, to wit:" etc.

The authority of the president to grant an effectual pardon to all persons embraced within the terms of this proclamation is not disputed. It is derived from the power confided to him by the constitution, and in this case is exercised in pursuance, as the preamble recites, of an express authority given by congress to the president, "to extend by proclamation to all persons who may have participated in the existing rebellion in any state or part thereof, pardon and amnesty, with such exceptions, and at such terms, and on such conditions, as he may deem expedient for the public welfare."

§ 3259. *The court takes judicial notice of a proclamation of pardon and amnesty by the president.*

The pardon and amnesty thus proclaimed is therefore a public and official act, of which the court will take judicial notice, and it corresponds to a class of pardons well known in England—pardons by act of parliament. Nor is it disputed that the crime described in the proclamation is the same crime as that whereof the prisoner has been convicted. The language of the proclamation is, "All persons who have directly, or by implication, participated in the existing rebellion." The offense of the prisoner, as charged in the indictment, is, "That he engaged in the existing rebellion, and gave to it aid and comfort." The offense pardoned is, therefore, evidently the offense committed by the prisoner.

§ 3260. *Whether the proclamation of 1863 extended to persons already convicted and sentenced.*

But it is urged by the district attorney that this proclamation does not extend to persons who, at its date, had been convicted and sentenced for the offenses described in it. In support of this position, he cites various ancient English authorities. It is not disputed that, by the common law, if a man be attainted of felony, and get a pardon which doth not mention the attainder, the pardon will be ineffectual. So, also, it has been held that the pardon of a person convicted by verdict of felony is void unless it recite the indictment and verdict. It has even been questioned if the pardon of a person barely indicted of felony be good without mentioning the indictment. Bacon's Abr., Pardon, D., and cases cited.

These and similar decisions are founded on the general principle that whenever it appears, by the recital of the pardon, that the king was misinformed, or not rightly apprised, both of the heinousness of the crime, and also how far the party stands convicted upon the record, the pardon is void, upon the presumption that it was gained from the king by imposition. Any suppression of truth or suggestion of falsehood in a charter of pardon was therefore held to vitiate it. But it may be doubted whether, at the present day, such rules would be enforced in this country, or even in England. We learn from Barington (Obs. on Statutes, 27, 231) that at the time of Magna Charta, and for many years subsequently, the abuse of the pardoning power by the king, and the impositions practiced upon him, were the subject of frequent and clamorous complaint. The ancient punishment for murder was a *were gild*, paid as a satisfaction to the nearest relative of the deceased. It was, therefore, a most crying abuse of power in the king not only to pardon this most heinous crime, but in consideration also of the mulct, which otherwise should have been given to the relation who prosecuted. Hence, we find it enacted by statute of 27 Edward III., that in every pardon of felony granted at any man's suggestion, the suggestion, and the name of him that makes it, shall be compared, and if it be found untrue the charter shall be disallowed, and the justices before whom the charges shall be alleged shall inquire of the same suggestion, and if they find it untrue shall disallow the charter. So, by statute 13 Richard II., it was enacted that no pardon for murder or rape shall be allowed, unless the offense be particularly specified therein, and especially in murder it shall be expressed whether it was committed by lying in wait, assault or *malice pre-pense*. 18 Steph. Com., 463.

In analogy to these statutory requirements, and to carry out the same policy, the courts held a pardon to be void whenever it might reasonably be presumed that the king was deceived; and they considered the omission to recite the fact that the person pardoned had been attainted or convicted, or perhaps even indicted, as evidence that an imposition had been practiced on the king. How far these rules would now be enforced in this country is not very clear. In *In re Eddymoin*, 8 How. Pr., 478, a pardon was held on *habeas corpus* to be valid, although it appeared that a gross fraud had been perpetrated on the executive; that no notice of the application for pardon had been given to the district attorney, as required by law; that the signatures of the officers of the prison to the application for pardon had been forged, as also a letter accompanying the petition purporting to be from the physician of the prison; and that on these papers the pardon was granted.

In *United States v. Stetter* (United States Circuit Court, Philadelphia), it was

held by Judge Kane that where the pardon recited a conviction "at the June term" of the district court of counterfeiting the silver coin of the United States, and a sentence of imprisonment for one year, and the record showed a conviction at the "May sessions" of two felonies, one counterfeiting and forging ten pieces of coin, and the other uttering and passing them, on which there was a sentence of fine as well as imprisonment, the pardon was ineffectual to restore the competency of the party as witness. Whart. Cr. L., § 766, *in notis*. Whether a similar inaccuracy as to the term at which the conviction was had, and the description of the offense as stated in the indictment, would, in a capital case, and in the face of the plain intention of the executive to pardon, be held to vitiate it, and the prisoner remanded for execution, may be doubted.

The case cited from the New York Reports is clearly an authority that the fact that the executive was grossly deceived will not avoid the pardon; and if this be law, it follows that the omission to recite the fact of a conviction and judgment, which is in England adjudged to avoid the pardon only because it affords evidence that the king was deceived, would not have the like effect in this country. Independently of the presumption of deception, arising from a failure to recite a previous conviction or indictment, the absence of such recitals would seem to afford no ground for avoiding the pardon. All pardons, except in cases of illegal convictions, etc., proceed upon the hypothesis of the legal guilt of the person pardoned. If he be not guilty, it is presumed that he will be acquitted, and he has no need of a pardon. The pardon is granted on considerations which satisfy the executive that, in the particular case, an offender, though guilty, should be pardoned.

It would seem, therefore, to be of slight importance whether the guilt of the offender be judicially ascertained or not, provided the executive is fully apprised of the nature of the offense pardoned. For the pardon goes upon the presumption that the offender, if not already convicted, will be; else he would not need to plead his pardon to the indictment, but would be saved under his plea of not guilty. It is believed, however, that in the United States few pardons have ever been granted until after conviction. But whatever be the rules with respect to private pardons by charter from the king, or special pardons by the executive in this country, it is very clear that they have no application, even in England, to general pardons by act of parliament.

This is evident on grounds of reason, as well as on authority. The only reason assigned for holding void the pardon of a convict, the which does not recite the conviction or indicting of a person indicted, is, that it appears from the omission that the king was not acquainted with the facts of the case. But this reason can have no application to general acts of amnesty and pardon, which are intended to include whole classes of offenders, and are in no respect founded on any consideration of the circumstances of particular cases, except of those which by name or special description may be excepted out of them. They are, like the amnesty bills passed on the accession of Henry VII., at the restoration of Charles II., and by William III. at the revolution of 1688, or in this country after the whisky rebellion, public and general acts, dictated by motives of policy and considerations of state, as well as of clemency; but not founded, except as before stated as to those excluded from their benefits, on any particular examination of the circumstances of individual cases. As to those included within their terms, there can be no reason to allege that the king was misinformed or deceived.

Neither can it, when an act of state or of so great importance is contemplated, be presumed to be intended that the accidental difference in the situation of offenders — some of whom, perhaps the most guilty, may not have been arrested, or, if arrested, not indicted or convicted; while others, perhaps less guilty, have been tried and convicted — should enable the former to avail themselves of the offer of grace, while the latter would be excluded. A moment's consideration of the operation of such a rule of discrimination between offenders at large and offenders in custody will convince us of its unreasonableness. The diligence of the district attorney has failed to discover a single case where the benefit of a general pardon, by act of parliament or by royal proclamation of amnesty, has been withheld on the ground that the party had already been convicted.

Baron Comyn says (Dig., § 53): "Also, it hath been adjudged that where an act of parliament expressly pardons such and such crimes from a certain day before the session, it thereby avoids all convictions and deprivations, and awards of costs and amerciaments for such crimes, whether such convictions were before or after the sessions, because it appears to be the intent of the parliament that such crimes shall in no way be punished which cannot take effect, if such convictions, etc., remain in force." And for this he cites numerous authorities. It was even adjudged, when a parson had been deprived for adultery, and by subsequent act of parliament the offenses of adultery, *inter alia*, were pardoned, the sentence was thereby made void, and the parson reinstated in his living, notwithstanding that in the mean time, and while the deprivation stood in force, another had been admitted, instituted, and inducted. 3 Coke, 6, 14. So if one be attainted of felony, and afterward, by relation of a general pardon, the felony is pardoned, he shall be discharged, for he has not the remedy by error or otherwise to reverse the attainder. Plowd., 401. It even seems that the ancient fiction by which acts of parliament were deemed to relate to the first day of the session has been allowed to give a retrospective effect to an act of pardon enacted during the session, and to make utterly void sentences passed before the passage of said act.

On these authorities, and for the reasons assigned above, it appears to me indisputable that where by act of parliament or by royal proclamation of amnesty, certain kinds of offenses or classes of offenders are pardoned, all offenders embraced within the description, and all persons included within the classes designated, are, unless specially excepted, entitled to the benefit of the pardon. If there be any case where the benefit of such a pardon or amnesty has been refused to a person otherwise within it, on the ground that his guilt had already been judicially ascertained, I have failed to discover it.

It is suggested by the district attorney that the proclamation was intended to apply only to rebels in arms, or in a situation to injure the government, and not to such as are already arrested and incarcerated. But the language of the proclamation expresses no such limitation. A full pardon is granted "to all persons who have directly, or by *implication*, *participated* in the existing rebellion." It therefore includes not only those who have joined the rebellion in arms, but those who have in any way been implicated in it. I know of no rule of construction which would authorize a court to interpolate into the language of a statute or public act a qualification such as is suggested by the district attorney.

It may be observed, in addition, that the interpretation contended for would

degrade what was evidently intended as an act of mercy and conciliation into a mere bargain, by which the president barter away impunity for crime, in consideration of an exemption from future attacks upon the government; and that it makes his clemency merely commensurate with his apprehensions. The active and dangerous rebel is to be pardoned if he will renounce his treasonable designs; but the terrors of the law are unmitigated for the impotent and harmless rebel, who is not formidable enough to be entitled to forgiveness. Such a construction of the proclamation seems to me too repugnant to reason and sound policy to be for a moment admitted.

It was also urged by the district attorney that the president has himself given a practical construction to his proclamation, by issuing to Albert Rubery, a co-defendant with the petitioner, a special pardon, thereby showing that he did not consider him within the purview of the proclamation. It has even been suggested that there are good though private grounds for the belief that the case of the Chapman prisoners was not intended by the president to be covered by the proclamation. But it is to be observed that the pardon of Rubery was granted as a mark of respect and good will to Mr. Bright, by whom it had been solicited, and on condition that Rubery should leave the country within thirty days. As Rubery was a British subject, the oath, the taking of which is the condition imposed by the proclamation, could not have reasonably been exacted of him, and he might thus, if unwilling to take it, have been deprived of the general pardon.

§ 3261. *A proclamation of pardon and amnesty is to be interpreted according to the ordinary rules of construction, irrespective of any opinion, or even knowledge, of the private but unexpressed intention of its author.*

Whether or not the failure to except the case of the Chapman prisoners from the operation of the general terms of the proclamation arose from accident or inadvertence, the court cannot judicially know. Its plain duty is to construe the proclamation like any other public act or law, and to apply to it the well-settled rules of interpretation, irrespective of any opinion, or even knowledge, of the private but unexpressed intention of its author. Such is the rule, even with respect to a private pardon of an individual offender. "A pardon," says Mr. Ch. J. Marshall, "is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed. It is the private though official act of the executive magistrate delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system that the judge sees only with judicial eyes, and knows nothing respecting any particular case of which he is not informed judicially. A private deed not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding in ordinary cases would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages." "Is there anything peculiar in a pardon which ought to distinguish it in this respect from other facts? We know of no legal principles which will sustain such a distinction." . . . "The pardon may possibly apply to a different person or a different crime. It may be absolute or conditional. It may be controverted by the prosecutor, and must be expounded by

the court. These circumstances combine to show that this, like any other deed, ought to be brought judicially before the court by plea, motion or otherwise." *United States v. Wilson*, 7 Pet., 161 (§§ 3245-47, *supra*).

In the case in which these observations were made, the prisoner had declined to avail himself of a pardon which he had received. It was held that the court could not judicially notice the pardon unless produced and brought before it. But if the court, though aware that a pardon has been granted, cannot know of its existence until it is judicially brought before it, how can it, when the pardon is produced, be governed in its construction or the expounding of its effect by any extrinsic fact of which judicially it is ignorant? And especially in the case of a general pardon by proclamation or act of legislature, of which the court takes judicial notice, must it dismiss all knowledge of the intentions of the pardoning power except such as is to be derived from the terms of the act of grace itself.

§ 3262. *A prisoner accepting a conditional pardon while in prison cannot be said to accept under duress, so as to render the acceptance of no effect.*

Finally, it is urged by the district attorney that the proclamation, or pardon contained therein, is of the nature of a contract, by which the president remits the punishment for the offense, in consideration of the oath to be taken by the offender that he will support the constitution. That the petitioner, being in prison and under duress, could not take such an oath, nor was he in a position to render the consideration exacted by the proclamation before its provisions can be availed of. This view of the proclamation has already been considered. It is not a contract between equals, each receiving an equivalent for what he surrenders. It is an act of clemency, grace and conciliation. Its condition was intended, not as a consideration, but merely to exclude from its benefits the obdurate, and those who are not willing to renounce the future commission of the same offenses. The duty of supporting the constitution is of paramount obligation on every American citizen. The promise or the oath to perform this duty is no more a good or a valuable consideration for the remission of penalties incurred by its previous violation, than repentance and a resolution to amend are considerations for the forgiveness of all sins promised on those conditions by the Divine goodness.

That a conditional pardon accepted by a convict is deemed to be accepted voluntarily, and not under duress *per minas*, or by imprisonment, has been expressly adjudged by the supreme court. "As to the suggestion that conditional pardons cannot be considered as being voluntarily accepted by convicts so as to be binding on them, because they are made while under duress *per minas* and duress of imprisonment, it is only necessary to remark that neither applies to this case, as the petitioner was legally in prison. *Ex parte Wells*, 18 How., 315 (§§ 3252-56, *supra*). If the petitioner in the case at bar had been sentenced to death, and had accepted a pardon which commuted his punishment to imprisonment for life, his acceptance would, under this decision, have been deemed voluntary, and his imprisonment for life legal. Can it be contended that when the condition is that he shall take an oath which binds him to discharge his duties as a citizen, and to refrain from the further committing of treason, his acceptance of the pardon is not voluntary and legal?

How far the promise of the petitioner, or any other person who may accept the conditions of the proclamation, is sincere, and expresses a real determination to fulfil it, we cannot know. The president has seen fit to invite all persons guilty of treason (with certain exceptions) solemnly to assume anew their

obligations as citizens, and, as an inducement, he has offered them pardon for past offenses. It appears to me plain that all persons not included in the excepted classes are to be deemed to be pardoned, on their complying with the required condition.

I have thus noticed, I believe, every objection or suggestion urged by the district attorney, to show that the petitioner is not within the operation of the proclamation. My conclusion is, that the punishment to which he was sentenced has been remitted by the executive, and his offense pardoned. He is, consequently, entitled to the writ prayed for, on the return of which, if nothing further appears, he must be discharged. I reach this conclusion not without reluctance. The crime of the prisoner has been grave, for it involved not only the violation of the duty he owed as an American citizen to this country, but the breach of the allegiance he owed to this state, of which he has long been a resident and citizen, as well as an intended outrage upon his neighbors and fellow-citizens, whose property he proposed to plunder. I am, perhaps, justified in assuming that if the special circumstances of this case had been brought to the attention of the president, or had been in his mind when he was framing his proclamation, the petitioner and his associates would probably have been excepted from its operation. But my duty is to administer the law, and to construe this proclamation like a public statute, according to its terms and legal import. I am not at liberty to withhold its benefits from any persons embraced by its terms, whether they have been so embraced by inadvertence or design.

EX PARTE WEIMER AND REYNOLDS.

(Circuit Court for Wisconsin: 8 Bissell, 321-326. 1878.)

Opinion by DYER, J.

STATEMENT OF FACTS.—On the 23d day of June, 1875, an information was filed in the district court against certain property of the petitioner Weimer, situated in his rectifying house in Milwaukee, and the property was seized for condemnation. The causes of forfeiture as alleged in the information arose from violations of various sections of the Revised Statutes relating to such frauds upon the revenue as distinctly involve forfeitures of property. In this proceeding Weimer appeared as claimant and filed an answer to the information. After the seizure he gave bond to answer for the property to the extent of its appraised value, which was \$1,346.25, and subsequently such proceedings were had in the forfeiture case that the property was condemned as forfeited, and on the 2d day of March, 1876, judgment was entered against Weimer and the stipulators in the bond for the amount of the bond, namely, \$1,346.25 and costs, which judgment remains unsatisfied of record.

On the 20th day of July, 1875, Weimer was indicted with one John S. Taft, a revenue gauger, under section 5440 of the Revised Statutes, for a conspiracy to defraud the United States of the tax on distilled spirits then being in the rectifying house of Weimer, upon which the tax had not been paid, which conspiracy was alleged to have been formed and carried into effect in April, 1875. To this indictment there was a plea of not guilty. Upon trial the defendants in the indictment were convicted, and Weimer was sentenced to pay a fine and to imprisonment. While suffering such imprisonment pursuant to the sentence he was pardoned by the president.

The case of the petitioner, Reynolds, was this: On the 1st day of May,

1875, certain property situated in the rectifying house of the petitioner and his partner, Burbach, was seized as forfeited to the United States. Subsequently, an information was filed against the property, in the district court, the alleged causes of forfeiture set forth in the information being substantially identical with those recited in the information in the case of Weimer. Burbach & Reynolds appeared in the proceeding as claimants of the property, gave bond for its appraised value and filed an answer. Subsequently, decree of forfeiture and condemnation was rendered, and judgment against Reynolds and the stipulators in the bond was entered for \$2,944.92, and costs, which judgment is unsatisfied of record. On the 20th day of July, 1875, Reynolds was indicted with Burbach and Taft for conspiracy, under section 5440. Upon trial of the defendants in the indictment there was a conviction, and Reynolds was sentenced to pay a fine and to imprisonment. While the sentence was being executed he was pardoned by the president and discharged from further imprisonment.

The parties, Weimer and Reynolds, now present their separate petitions setting forth the foregoing facts, and ask the court, because of the pardons granted to them in the criminal cases, to direct that satisfaction of the judgments in the forfeiture cases be entered. Counsel for petitioners contend that as a consequence of the pardons, and by operation of law, the judgments in question became extinguished, and that their cancellation of record should be ordered by the court. Their argument is, that the pardons extend to and remit to the petitioners all penalties and all forfeitures of property which are denounced by any law of the United States, as a consequence of any crime or misdemeanor committed by the petitioners, at any time anterior to the date of the pardon, unless saved by exception appearing on the face of the pardon itself.

I cannot concur with counsel in giving to the pardons in these cases so broad a construction. The pardons recite the offense of which petitioners were convicted, namely, conspiracy to defraud the United States of the tax on distilled spirits, which recital is followed by a declaration of pardon. Now, though it be true that a full pardon is granted in each case, it is a pardon only of the offense specified in the preceding part of the instrument. The offense of conspiracy to defraud the United States is entirely distinct from every other offense under the revenue laws, for which specific penalties and punishments are prescribed. The offense of conspiracy may be pardoned, and yet the offender may be liable to have his property forfeited because of other violations of law which do not constitute a conspiracy. Counsel for petitioners construe the pardons as if they had, in terms, pardoned all offenses against the laws of the United States which have any reference to the statutes relating to internal revenue. If such a general pardon could be sustained, it is clear that none such has been granted in these cases.

§ 3263. *The recital of a distinct offense in a pardon by the president limits its operation to that offense, and the pardon embraces no other offense for which separate penalties are prescribed.*

Concerning the general effect and operation of a pardon there need be no dispute. The language of the opinion in *Ex parte Garland*, 4 Wall., 380 (Constr., §§ 619-637), is clear and full upon that question: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction, from attaching; if

granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

It is to be borne in mind, however, that the offense here spoken of is the precise offense of which the offender is pardoned, and none other. The punishment, penalties and disabilities referred to are such as result from the identical offense of which the person is, in the eye of the law, by virtue of the pardon, made innocent. The restoration to former rights is commensurate only with the scope of the pardon, as it relates to the offense in the particular case. Now, undoubtedly, the president may remit forfeitures and penalties. Judge Story was of opinion that the power of pardon was so general and unqualified that the power to remit fines, penalties and forfeitures was included in it. Story, Const., sec. 1504 and note. See, also, *Osborn v. United States*, 91 U. S., 474 (§§ 3248-51, *supra*). But in the present cases the president did not in terms, nor, as I think, in legal effect, make such a remission. He only pardoned a distinct offense, specifically described in the instrument of pardon, and such a pardon cannot embrace any other offense for which separate penalties and punishments are prescribed.

Several cases decided by the supreme court of the United States, bearing upon the effect of a pardon, are cited upon the brief of counsel, as sustaining the present applications. In the case of *Garland*, 4 Wall., 333, it was held that the pardon received by the petitioner restored him to his civil rights, including a previously acquired right to appear as an attorney and counselor in the federal courts. But the pardon, in terms, was "for all offenses by him committed, arising from participation, direct or implied, in the rebellion;" and it was held that the effect of such a pardon was to relieve him from all penalties and disabilities attached to the offense of treason. So, in the case of *Armstrong's Foundry*, 6 Wall., 766, in which it was held that the pardon granted to the party relieved him from forfeiture of property employed in aid of the rebellion, the pardon was of all offenses, and the consent of the owner to such use of his property was an offense, the penalty for which was forfeiture.

Again, in *Osborn v. United States*, 91 U. S., 474 (§§ 3248-51, *supra*), in which it was held that the effect of the pardon in that case was to restore to its recipient all rights of property lost by the offense pardoned, unless the property had, by judicial process, become vested in other persons, subject to such exceptions as were prescribed by the pardon itself, the pardon was as comprehensive in terms as in the cases previously noticed, and the decision is placed on the ground that the pardon covered the identical offenses for which a forfeiture of property had been decreed. So, again, in *Knote v. United States*, 95 U. S., 149, the pardon was general, with an express restoration of all rights under the constitution and laws. It is clear that these adjudications do not sustain the construction placed by counsel upon the pardon in the cases at bar. The principle established by these decisions is, simply, that a pardon releases an offender from the consequences of the offense pardoned, and from the disabilities imposed by that offense. In other words, the penalties and forfeitures from which the person is released by a pardon are such as accrue from the particular offense or offenses embraced in the instrument of pardon. To affirm the doctrine urged in behalf of the present petitioners is to say that though a pardon in terms and evident intent only relieves its recipient from punishment for the offense therein named, nevertheless, in legal effect, it grants a release from the consequences of all offenses committed anterior to the date of the pardon,

whatever may have been their nature, and however foreign to that which is expressed in the instrument of pardon. Such a view of the scope and effect of the pardons in the cases under consideration is not maintainable. The application of petitioners is denied.

MR. JUSTICE HARLAN concurred.

§ 3264. **Power of the president.**—The power of the president to pardon offenses against the United States extends to every offense known to the law, except in cases of impeachment, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power is unlimited, with the exception stated, and is subject to no legislative control. *Ex parte Garland*, 4 Wall., 333 (CONST., §§ 619-637).

§ 3265. Applications for pardon are addressed to the president of the United States, who may decide upon the application upon his own examination, and may refer the matter to any of the departments for advice. Where he has referred such an application to the secretary of war for advice, the officer of that department cannot call upon the attorney-general for an opinion. Applications for Pardon,* 14 Op. Att'y Gen'l, 20.

§ 3266. The president's power of pardon is not subject to legislation, and congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. And hence the repeal of the act of July 17, 1862, authorizing the president to extend pardon and amnesty to all persons who may have participated in the rebellion, could not alter the operation of the pardon and amnesty granted of December 25, 1868, without exception, unconditionally and without reservation, to all who participated in the rebellion, with restoration of rights of property as before. Nor could such repeal change the national obligation, or reduce in any degree the obligations of congress under the constitution to give full effect to it, if necessary, by legislation. *United States v. Klein*, 13 Wall., 128.

§ 3267. The pardoning power is co-extensive with the power to punish, except only in cases of impeachment and proceedings for contempts. It includes the remission of fines, penalties and forfeitures under the revenue laws, but it cannot compel their restitution after the money has reached the treasury. Pardons and Remissions,* 2 Op. Att'y Gen'l, 329.

§ 3268. The president has no power to make an open offer of pardon which could be relied upon as a protection for offenses committed after notice of the offer. Pardoning Power,* 11 Op. Att'y Gen'l, 227.

§ 3269. — **costs.**—Costs being a part of the judgment and sentence in a criminal case, the power of the president extends to the remission of costs in a criminal case. Reprieves and Pardons,* 3 Op. Att'y Gen'l, 418.

§ 3270. — **releasing fines.**—The pardoning power of the president extends to and includes a contempt of a federal court, and this though the fine imposed for such contempt is to be paid to the plaintiff in the suit in which the defendant was guilty of disobedience to the order of the court. *In re Mullee*, 7 Blatch., 25.

§ 3271. The president's remission of a fine after it has been paid is of no effect. The money cannot be refunded without an appropriation by congress. *Smith's Case*,* 10 Op. Att'y Gen'l, 1.

§ 3272. The pardoning power vested in the president authorizes him to remit a fine imposed for contempt in refusing to serve as a juror. Power of President to Remit Fines,* 4 Op. Att'y Gen'l, 317.

§ 3273. The president has power to pardon or remit a fine imposed for a contempt, committed by an affray in the presence of the judges of the circuit court. Respecting the Pardoning Power,* 3 Op. Att'y Gen'l, 623.

§ 3274. The president has constitutional power to remit fines imposed by the courts of the United States upon defaulting jurors. Power of President to Remit Fines,* 4 Op. Att'y Gen'l, 458.

§ 3275. — **remission of forfeitures.**—The supreme court having decided that the power of the secretary of the treasury, under the authority vested in him by law, extends to the remission of a forfeiture at any time before or after condemnation, until the money is actually paid over to the collector for distribution, the pardoning power of the president cannot be restricted within narrower limits. Pardons and Remissions,* 2 Op. Att'y Gen'l, 329. See § 3234.

§ 3276. The pardoning power of the president does not extend to the remission of the forfeiture of a vessel incurred under the act of July 7, 1833. This power is limited to offenses against the United States, *i. e.*, crimes and misdemeanors. A judgment on a bond entered in place of the vessel is likewise incapable of being affected by the pardoning power of the executive. *Steamboat Minnesota*,* 11 Op. Att'y Gen'l, 122.

§ 3277. The president has full power to pardon or remit the fines, forfeitures and other penalties imposed under the first, second and fifth sections of the act of February 27, 1842, regulating the transportation of passengers. The first section of this act defines the portion of space in a passenger ship which the law requires for each passenger, and for excess of passengers subjects the master to imprisonment, and a fine of \$50 for each passenger in excess. The second section subjects the vessel to forfeiture if the excess shall exceed twenty. And the fifth section declares that the penalties so imposed shall be liens on the vessel violating its provisions, and that such vessel may be libeled and sold therefor. The fact that the secretary of the treasury has power to remit all forfeitures arising under the second section does not interfere with the power of the president to pardon the offenses under that section. It is doubtful, however, whether the president has power to remit that portion of any penalty which has vested by law in some party other than the United States. *Passenger Laws — Pardoning Power*, * 6 Op. Att'y Gen'l, 393, 488.

§ 3278. The pardoning power of the president is limited to *offenses*,—to crimes and misdemeanors against the United States,—and does not embrace any case of forfeiture, loss or condemnation, not imposed by law, as a punishment for an offense. The condemnation of a vessel and cargo in a prize court is not a criminal sentence; no person is charged with an offense, and so no person is in a condition to be relieved and reinstated by a pardon. The powers of the president in this respect cannot be enlarged by analogy to the powers of an English king, because the powers of the two have their origin and mode of existence in different and opposite principles. After a regular condemnation, therefore, of a vessel and cargo, in a prize court, for breach of blockade, the president has no lawful power to remit the forfeiture, and restore the property or its proceeds to the claimant. That the prize money is already appropriated and distributed by law is a further objection to this power. *Pardoning Power*, * 10 Op. Att'y Gen'l, 452.

§ 3279. The president has no power to discontinue the proceedings in prize after the condemnation of the vessel as a prize of war. Nor has he any power to remit the forfeiture to the claimants. *The Adeldo*, * 11 Op. Att'y Gen'l, 445.

§ 3280. — *release of judgment against sureties*.—The president has no constitutional power to remit a judgment against a surety on a recognizance for the appearance of an accused in court. The act of June 17, 1812, gives the president power to remit forfeitures of recognizances taken in criminal proceedings before the courts, judges and justices of the District of Columbia. But no act of congress grants this power generally. *McCracken's Case*, * 11 Op. Att'y Gen'l, 124.

§ 3281. *Presumption as to validity*.—Where a pardon is issued under the great seal of a state, and signed by one purporting to be the governor of the state, it is to be presumed to be in all respects valid and effectual. *United States v. Wilson*, * Bald., 78.

§ 3282. "*Amnesty*" and "*pardon*" synonymous.—It seems that amnesty and pardon mean the same thing and the same good accrues to the recipient of each. *Knote v. United States*, 5 Otto, 152.

§ 3283. *Revocable*.—A pardon is revocable until it is delivered. *In re De Puy*, * 3 Ben., 307.

§ 3284. An incoming president may revoke a pardon issued by his predecessor if the same has not been delivered. *Ibid*.

§ 3285. *Power of courts to release fine*.—A federal court, committing and fining a person for contempt, has no authority to release him on account of his inability to pay the fine, for the offense is within the pardoning power of the president. *In re Mullee*, 7 Blatch., 25.

§ 3286. *Setting forth the offense*.—Where the preamble of a pardon recites the offense, and the grant contains a full and unconditional pardon to the offender, it cannot be objected that the pardon does not set forth the offense pardoned, and that the offender and not the offense is pardoned. *Stetler's Case*, * 1 Phil., 302.

§ 3287. *Infringement of pardoning power*.—The power conferred by congress upon the secretary of the treasury to remit penalties imposed for the violation of the laws relating to the regulation of steam vessels does not infringe the pardoning power of the president, and is valid. *The Laura*, 19 Blatch., 565.

§ 3288. *Right to practice as an attorney*.—A full pardon from the president for all offenses committed, arising from participation in the rebellion, relieves the offender from all penalties and disabilities attached to the offense of treason committed by participation in the rebellion. After such a pardon, the oath that he had never voluntarily borne arms against the United States, etc., required by the act of January 24, 1865, of an attorney before practicing at the bar of any of the federal courts, cannot be exacted. (*MILLER, SWAYNE and DAVIS, JJ.*, and the CHIEF JUSTICE dissent, holding that the president cannot by pardon dispense with the qualification imposed by the act.) *Ex parte Garland*, 4 Wall, 333 (CONSTR., §§ 619-637).

§ 8289. **Remission of a part of a sentence.**—The president may pardon or remit a portion of a sentence at one time and a different portion at another. Where one executive releases a convict from his imprisonment, upon his paying or securing the costs which have accrued in the prosecution, his successor may remit the payment of such costs, having been secured. *Reprieves and Pardons*,* 3 Op. Att'y Gen'l, 418.

§ 3290. **Inoperative—Estoppel.**—A pardon which is inoperative, and from which the grantee receives no benefit, is no estoppel as to the matters recited therein. *Scott v. United States*,* 8 Ct. Cl., 457.

§ 3291. **Delivery.**—A pardon is a deed, and a delivery is essential to its validity. *In re De Puy*,* 3 Ben., 307. See § 3232.

§ 3292. A pardon is not delivered by delivering it to the marshal of the district in which the person pardoned is confined. It must be actually delivered to the keeper of the prison in which he is confined, and if transmitted to such keeper by the marshal, it may be revoked at any time before actual delivery. *Ibid.*

§ 3293. **Proper case for executive clemency.**—Where one is sentenced to be hung, and the testimony did not warrant a verdict of conviction, and there is reasonable ground to doubt the guilt of the accused, the case is a proper one for the exercise of executive clemency, either by general pardon or commutation of the punishment. *Application for the Pardon*, etc.,* 5 Op. Att'y Gen'l, 368.

§ 3294. It is a proper case for the exercise of the pardoning power, in a case of forfeiture under the revenue laws, where there is an entire absence of all criminal intent in the commission of the act from which the forfeiture arises. *Pardons and Remissions*,* 2 Op. Att'y Gen'l, 329.

§ 3295. A pardon should not be granted by the president where the facts on which the application is based, and the questions of law growing out of them, belonged to the merits of the case and should have been set up at the trial, and these facts, too, unsupported by proof. And especially when it is manifest, from the ability of the prisoner's counsel, that these facts would have been taken advantage of by the prisoner, if really existing, and were to his advantage. *Pardon of Piratical Murder*,* 1 Op. Att'y Gen'l, 359.

§ 3296. **Conditional.**—Pardons may be special in their character, and subject to conditions and exceptions. *Semmes v. United States*, 1 Otto, 27. The condition must be compatible with the genius of our constitution and laws. *Conditional Pardons*,* 1 Op. Att'y Gen'l, 482. The conditions must be lawful ones. *United States v. Six Lots of Ground*, 1 Woods, 237. Where the condition is such that the government has no power to carry it into effect, the pardon will operate as a general or unconditional pardon. *Application for the Pardon*, etc.,* 5 Op. Att'y Gen'l, 368. The condition must be one that can be enforced. *Pardons*,* 1 Op. Att'y Gen'l, 841.

§ 3297. He who seeks to avail himself of the benefits of a pardon, granted conditionally, must show a rigid compliance with the conditions which it imposes. *Scott v. United States*,* 8 Ct. Cl., 457; *Waring v. United States*,* 7 Ct. Cl., 501; *Hayne v. United States*,* 7 Ct. Cl., 443. See § 3236.

§ 3298. Where a pardon is granted to begin and take effect on the day a certain oath shall be taken by the grantee, it has no effect until the oath is taken. The acceptance of the pardon does not supersede the necessity of taking the oath prescribed by it. *Waring v. United States*,* 7 Ct. Cl., 501. It is not a compliance with the condition that the oath was taken before the pardon was granted. *Hayne v. United States*,* 7 Ct. Cl., 443; *Scott v. United States*,* 8 Ct. Cl., 457.

§ 3299. It seems that a person may refuse or accept an unconditional pardon as he sees fit, and that a prisoner is not prevented by a pardon from prosecuting a writ of error to obtain a reversal of a judgment against him; but he cannot avail himself of the writ of *habeas corpus* in such a case, unless the writ performs the office of writ of error. *In re Callicot*, 8 Blatch., 98.

§ 3300. A court does not become *functus officio*, by passing sentence in a criminal case, to all intents and purposes, as is evident from the consideration that it is by virtue of its authority, and by force of its sentence, that the prisoner is detained; and when he has obtained a conditional pardon and been released, yet if he violates the condition, he may be re-arrested and remanded by the court in execution of the original sentence. *Greathouse's Case*, 2 Abb., 385 (§§ 3257-62); S. C., *In re Greathouse*, 4 Saw., 489.

§ 3301. The prisoner having been convicted of a misdemeanor, and sentenced to fine and imprisonment, the president pardoned him upon condition of his paying the fine and costs. *Held*, that, without complying with this condition, he was not entitled to be discharged under section 1042, Revised Statutes, declaring that "When a poor convict, sentenced by any court of the United States to pay a fine, or fine and costs, whether with or without imprisonment, has been confined in prison thirty days solely for the non-payment of such fine, or fine and

costs," he may make application, etc. The prisoner must comply with the condition of the pardon before it becomes operative. *In re Ruhl*,* 5 Saw., 186.

§ 3302. **Before conviction.**—Where a prisoner petitioned for pardon before trial, upon a confession of his crime, and there did not appear to the attorney-general anything in the prisoner's case which called for particular indulgence, that officer recommended that further consideration of the petition be postponed until after trial. The Pardoning Power,* 5 Op. Att'y Gen'l, 687.

§ 3303. The president of the United States has, undoubtedly, the power to grant a pardon as well before conviction as afterwards, because the act of clemency and grace is applied to the crime itself, not to the mere formal proof of crime by process of law. But there must be some satisfactory evidence of some kind as to the guilt of the party. It is generally unwise and inexpedient to interpose the pardoning power before conviction, especially when the application is *ex parte*. Pardoning Power,* 6 Op. Att'y Gen'l, 20.

§ 3304. A pardon may be granted by the president before condemnation. Where such a pardon is granted on the voluntary confession of one who has not been indicted, the confession should be in writing, and the pardon founded on the specific offense confessed; in other words, it should be a special pardon, so as not to protect the party against a prosecution for a more aggravated offense than he has thought proper to confess. Pardons,* 1 Op. Att'y Gen'l, 341.

§ 3305. It is inexpedient, generally, to interpose the pardoning power previously to trial. But cases may exist in which such an interposition would be proper. Pardon before Conviction,* 2 Op. Att'y Gen'l, 275.

§ 3306. **Constructive pardon.**—Appointment by the president of an officer of marines to a new commission is a constructive pardon of previous sentence by a court-martial, to be cashiered, which sentence is yet unexecuted. Court-Martial,* 6 Op. Att'y Gen'l, 123.

§ 3307. Where an officer in the navy has been sentenced by a court-martial to be dismissed from the service, and the president has mitigated the sentence to suspension from service and pay for one year, an order, during this term, from the secretary of the navy to the officer to attend a court-martial as a witness, does not operate as a constructive pardon of the remaining part of the sentence, and still less an annulment of the whole sentence. Constructive Pardon,* 6 Op. Att'y Gen'l, 714.

§ 3308. **Commutation.**—By the forty-second article of the act of April 23, 1800, relating to the government of the navy, it is provided that the president of the United States . . . shall possess full power to pardon any offense committed against these articles, after conviction, or to mitigate the punishment decreed by a court-martial. Therefore where a surgeon in the navy is sentenced by a court-martial to be dismissed from the naval service, the president has power to commute the sentence to suspension for one year without pay or emoluments, and the surgeon has no right to pay or emoluments during the period of his suspension, since by the original sentence he was deprived of pay and emoluments forever. Power of the President to Mitigate Sentences,* 5 Op. Att'y Gen'l, 43. See § 3336.

§ 3309. There can be no doubt of the power of carrying into effect a pardon commuting the sentence of death into confinement or imprisonment in any state prison or penitentiary within the district where the conviction took place, the use of which may have been allowed or granted by the legislature of the state. Application for the Pardon, etc.,* 5 Op. Att'y Gen'l, 368.

§ 3310. The forty-second article of the rules and regulations for the government of the navy of the United States, which provides that "the president of the United States shall possess full power to pardon any offense committed against these articles, after conviction, or to mitigate the punishment decreed by a court-martial," includes the power to change the species of the punishment when it is capital. He may therefore mitigate a sentence of death and substitute a milder punishment. Power of President to Mitigate Sentence,* 1 Op. Att'y Gen'l, 827.

§ 3311. Where a commander in the navy was sentenced by a court-martial to be suspended from all rank and command in the navy during the period of five years, and the president indorsed on the record: "Upon a full review of all the facts and circumstances in this case, I regard the sentence as too severe. Let it be commuted to a suspension of six months from this day, without pay," it was held that this was not an exercise of the pardoning power, there being no delivery or acceptance of a pardon. It was further held that the power of the president to mitigate the sentence did not extend to the substitution of a different punishment for that inflicted by the sentence, and that as the sentence of the court did not suspend the pay of the commander, he was entitled to draw it during the six months to which the president limited his suspension. Power of President to Mitigate Sentence,* 4 Op. Att'y Gen'l, 444.

§ 3312. **Effect of a pardon.**—A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment

and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. *Ex parte Garland*, 4 Wall., 333 (CONST., §§ 619-637). See § 3233.

§ 3313. The effect of a pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past, and cannot annihilate the established fact that he was guilty of the offense. Where an alien was convicted of perjury while a resident here, such conviction negatives the fact of his behaving as a man of good moral character while a resident of the United States, though he may have been pardoned for the offense. *In re Spencer*, 5 Saw., 198 (CITIZENS, §§ 350-354).

§ 3314. A pardon is an act of mercy flowing from the fountain of bounty and grace. Its effect, when it is a full pardon, is to obliterate every stain which the law attaches to the offender, and to place him where he stood before he committed the pardoned offense, to free him from the penalties and forfeitures to which the law has subjected his person and property, and to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtained the pardon. *United States v. The Athens Armory*, 2 Abb., 149.

§ 3315. A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores him to all his civil rights. In contemplation of law it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose on the government any obligation to give it. The offense being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done, and justly suffered, and no satisfaction can be required for it. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offense, or which have been acquired by others while the judgment was in force. *Knote v. United States*, 5 Otto, 153.

§ 3316. The effect of a pardon is to discharge the person from all penal disabilities which attach by law to the offense pardoned. It is co-extensive with the punishing power, and is applicable to the remission of fines, penalties and forfeitures which are imposed by law as punishment for offenses. There is no offense when the crime is pardoned, and there cannot be any penalty imposed for it. *President's Pardon*,* 12 Op. Att'y Gen'l, 81.

§ 3317. Where a captain in the army has been sentenced by a court-martial to reduction in rank by having his name placed lower down on the list of officers of the same grade, a remission of the penalty by the president, in the exercise of the pardoning power, will have the effect of restoring the officer to his former relative rank, according to the date of his commission. *Effect of President's Pardon*,* 12 Op. Att'y Gen'l, 547.

§ 3318. A pardon does not annul a past judicial confiscation and sale. *United States v. Six Lots of Ground*, 1 Woods, 237.

§ 3319. A pardon by the president for all the offenses for which one's property is forfeited to the government restores to the grantee in the pardon all rights of property which he had lost by his offenses, except in those cases where the property has become vested in other persons by judicial proceedings, and with such exceptions as the pardon itself prescribes. Such a pardon may be pleaded in proceedings for the confiscation of his property. *Brown v. United States*, McCahon, 229.

§ 3320. Proceedings under the confiscation act of 1862 are justified as an exercise of belligerent rights against a public enemy, and are not, in their nature, a punishment for treason. Consequently, confiscation being a proceeding distinct from and independent of the treasonable guilt of the owner of the property confiscated, a pardon for treason will not restore rights to property previously condemned and sold in the exercise of such belligerent rights, as against a purchaser in good faith and for value. *Semmes v. United States*, 1 Otto, 26.

§ 3321. The president may remit a fine after the death of the offender leaving the fine unpaid. The technical reason which may prevent a pardon from operating in favor of a dead man does not apply to the remission of a fine, for that may be accepted by the heirs to the estate whose interests are affected by it. *Caldwell's Case*,* 11 Op. Att'y Gen'l, 35.

§ 3322. Where a person has been convicted of a crime against the United States and sentenced to be imprisoned and to pay a fine, which fine has been paid into court, an unconditional pardon by the president restores the pecuniary penalty, provided it has not actually reached the treasury. *Effect of Pardon*,* 14 Op. Att'y Gen'l, 599.

§ 3323. While it is true that the pardoning power is completely vested in the president, and does not require in its exercise any aid from congress, nor can be curtailed by congress,

yet, by virtue of the constitutional provision that "no money shall be drawn from the treasury but in consequence of appropriations made by law," the pardoning power cannot operate to refund any fine or forfeiture which has actually passed into the treasury, by a covering warrant or otherwise. Where the forfeiture is consummated so far as the guilty party is concerned, and its money value has passed into the hands of an officer of the government, it may be refunded by an executive warrant in execution of a pardon, provided it is a forfeiture accruing to the United States, and the payment was not in such form as to constitute a complete severance from intermediate official custody, and an absolute entry into the treasury of the United States. *Effect of Pardons*,* 8 Op. Att'y Gen'l, 281.

§ 3324. **Bar to a civil suit.**—An unconditional pardon for an offense against the revenue laws is a bar to a civil suit by the government to recover, as a penalty, twice the amount of the tax out of which the government was defrauded by the criminal act. *United States v. McKee*, 4 Dill., 130.

§ 3325. Where a person is convicted of knowingly purchasing smuggled goods, and is pardoned by the president, such pardon is a bar to an action of debt brought to recover twice the value of the property smuggled. *United States v. Tilton*,* 7 Ben., 306.

§ 3326. Where the defendant has been pardoned after indictment, trial and sentence, for an offense under section 3169, Revised Statutes, the offense is fully purged and he stands as if it had not been committed, and consequently is not liable to an action on his official bond for the offense pardoned. *United States v. Cullerton*, 8 Biss., 170.

§ 3327. A full pardon, or a conditional one, after the performance of the condition, releases its recipient from all the penalties, whether civil or criminal, attached to the offense. He is purged of the offense and stands as if it had never been committed. *Ibid.*

§ 3328. **Restoration of civil rights.**—It is competent for the president to restore civil rights by a pardon issued after the expiration of the term of sentence. *Stetler's Case*,* 1 Phil., 302.

§ 3329. A person convicted of an offense against the laws of the United States, which disfranchises him as a citizen, can be restored to all the rights which he had before conviction, by a free and full pardon from the president of the United States. Such a pardon may be given after he has suffered the other penalties incident to his conviction, as well as before. *Effect of Pardon*,* 9 Op. Att'y Gen'l, 478.

§ 3330. A pardon restores to his competency as a witness one who has been convicted of an infamous crime. *United States v. Rutherford*, 2 Cr. C. C., 538.

§ 3331. Where the pardon speaks of a conviction, at the "June term," of the offense of "counterfeiting the silver coin," and a sentence thereon of "imprisonment;" and the record shows a conviction at the "May sessions," of two felonies, one "forging and counterfeiting ten pieces" of coin, the other "uttering and passing them," on which there is a sentence of "fine," as well as imprisonment, the pardon will not restore the competency of the convict as a witness. *Stetler's Case*,* 1 Phil., 302.

§ 3332. Where a state statute provides that no person "convicted of an infamous crime" shall vote at any election "unless he shall have been pardoned and restored to all the rights of a citizen," if the pardon by the president of one convicted in such state of an infamous crime under an act of congress does not restore the offender to his political rights in such state, it is not within the power of the president to remove such disability. *Pardons*,* 7 Op. Att'y Gen'l, 760.

§ 3333. **Vested rights to fines.**—Where one was convicted and fined for having in his possession merchandise subject to duty for the purpose of selling the same with the design of avoiding the payment of the duties imposed thereon, and one-half of the fine was adjudged to be for the use of the informer and the other half to the United States, it was held that a pardon and a remission of the fine by the president was inoperative to divest the share vested in the informer by the judgment. *United States v. Harris*, 1 Abb., 110.

§ 3334. It seems that the pardoning power of the president has never been construed to extend to the taking away of the right of an informer, asserted by him in his own name alone, to recover a penalty imposed for a violation of the laws of the United States, where the penalty belongs wholly to the informer, and the United States has no interest therein. *The Laura*, 19 Blatch., 570.

§ 3335. It seems that the right of a private person to a share of a penalty by reason of his being an informer, or having instituted a prosecution under a penal law, is released by a pardon unless actually vested by a judgment. *United States v. Cullerton*, 8 Biss., 172.

§ 3336. In an action of debt by the United States to recover a penalty incurred under the internal revenue law of June 30, 1864, judgment was rendered against the defendants, and one-half of the penalty was adjudged to the use of the first informer in accordance with the above act. A subsequent pardon of the offense and remission of the penalties by the president was

held to remit the moiety adjudged to the informer, as well as the moiety belonging to the United States. *United States v. Thomasson*, 4 Biss., 336.

§ 3337. The pardoning power of the president does not extend to the remission or release of a private right or interest in a fine, penalty or forfeiture, accrued under the laws of the United States, and consummated by judgment or condemnation. And hence, in case of a judgment in the District of Columbia, in the name of the United States, against an offender against the laws of Maryland (adopted and continued by act of congress as the law of that part of the District of Columbia), prohibiting the unlawful transportation of slaves, where by the law constituting and defining the offense, and by the judgment of the court, one-half of the fine belongs to the respective owners of the slaves unlawfully transported; and by law the other half of the fine belongs to the board of commissioners of the county of Washington, in the District of Columbia, for the use of the county, the president has no power to remit the fine, or the imprisonment of the offender, committed to compel payment of the fine. *Pardoning Power*,* 5 Op. Att'y Gen'l, 532. The same incumbent a short time afterwards gave it as his opinion that the president could remit both the fine and the imprisonment. *Pardoning Power*,* 5 Op. Att'y Gen'l, 579.

§ 3338. Where a vessel had been seized for a violation of the embargo laws, and restored at its appraised value upon bond given with condition to respond for said value in the event of condemnation, it was held that a pardon of the president, issued after the condemnation, remitting all the interest of the United States in the penalty or forfeiture of such bond, and requiring all further proceedings in the case on behalf of the United States to be discontinued, did not affect the moiety of the penalty claimed by the officers of the customs. *United States v. Lancaster*, 4 Wash., 64.

§ 3339. *Participation in rebellion*.—Under the act of congress of August 6, 1861, which enacted that property used in aid of the rebellion with the consent of the owner should be the lawful subject of prize and capture wherever found, and made it the duty of the president to cause it to be seized, confiscated and condemned, the forfeiture arose not from the mode in which the property was used independent of the act of the owner, but from the consent of the owner to the employment of his property in aid of the rebellion, as an offense. And hence a full pardon and amnesty for all offenses, committed by the owner, arising from participation, direct or indirect, in the rebellion, will release the owner from the forfeiture of his property. (MILLER, J., dissents.) *Armstrong's Foundry*, 6 Wall., 766. See § 3239.

§ 3340. A full pardon and amnesty granted by the president to one formerly in rebellion, and accepted before the institution of any proceedings to condemn property confiscated by act of congress, is a bar to a judgment of condemnation. *United States v. Athens Armory*, 2 Abb., 147.

§ 3341. A petitioner for the recovery of the proceeds of his property under the abandoned or captured property act, who frames his petition without alleging and swearing that he has not in any way aided, abetted or given encouragement to the rebellion, cannot maintain his action, although he has received pardon and amnesty from the president by virtue of the thirteenth section of the act of July 17, 1862, and under his proclamation of amnesty of May 29, 1865. (CASEY, C. J., dissents.) *Pargoud v. United States*,* 4 Ct. Cl., 337.

§ 3342. The form of pardon granted by the executive to persons engaged in the late rebellion does not restore them, by its own operation, to any property, or proceeds of any property, sold under a judgment of confiscation. *President's Pardon*,* 12 Op. Att'y Gen'l, 81.

§ 3343. A pardon which recites that "by taking part in the late rebellion" he "has made himself liable to heavy pains and penalties" is of no force as an admission of crime, as it is vague, uncertain, and dependent upon abstruse legal conclusions. *Scott v. United States*,* 8 Ct. Cl., 457.

§ 3344. Where the name, place of residence and occupation of the claimant of rights, secured by an amnesty, are all identical with the name, place of residence and business of the person mentioned and described in the oath of amnesty, he will be held to be the person who took the oath, and entitled to all the benefits conferred by it. *Backer v. United States*,* 7 Ct. Cl., 551.

§ 3345. *Validity of act of July 12, 1870*.—The proviso in the act of July 12, 1870, which declares in substance that the acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it, is void, as an invasion of the powers of the judicial and executive departments. *United States v. Klein*, 13 Wall., 128. Said article is unconstitutional, because it denies to pardons granted by the president the effect which the supreme court has adjudged them to have. *Backer v. United States*,* 7 Ct. Cl., 551; *Witkowski v. United States*,* 7 Ct. Cl., 393.

§ 3346. **Proclamation of 1863.**—The amnesty proclamation of December 8, 1863, was abrogated by that of May 29, 1865. *Scott v. United States*,* 8 Ct. Cl., 457.

§ 3347. The proclamation of the president, of the 8th of December, 1863, offering a full pardon, with restoration of all rights of property except as to slaves, to all who, having engaged in the rebellion as actual participants, or as aiders or abettors, would take and keep inviolate a prescribed oath, entitled persons who accepted this condition to the proceeds in the treasury of their property, abandoned to the agent of the treasury department. *United States v. Klein*, 13 Wall., 128.

§ 3348. A citizen of a loyal state charged with treason against the United States, by giving aid and comfort to the rebellion, is included within the amnesty proclamation of December 8, 1863. *United States v. Hughes*,* 1 Bond, 574.

§ 3349. Where a citizen, by complying with the terms of mercy proposed in the proclamation of amnesty of December 8, 1863, has entitled himself to its benefits, no subsequent act of the president, or of any other department of the government, can deprive him of the rights so acquired. The amended or explanatory proclamation of March 26, 1864, could not therefore exclude a citizen from right already acquired by compliance with the former proclamation. *Ibid.*

§ 3350. **Amnesty of 1864.**—All citizens and residents of the rebel states, not excepted from the amnesty of March 26, 1864, who did, after the issuing of the proclamation, or after notice thereof, or within a reasonable time, within which it must be supposed that they had notice, refrain from further hostilities and take the oath of amnesty voluntarily, with the purpose of restoring peace and establishing the national authority—being at the time free from arrest, confinement or duress, and not under bonds,—were entitled to all the benefits and rights granted. Where the oath was taken without the purpose of restoring peace and establishing the national authority, though taken promptly, the amnesty and pardon did not attach. *Pardoning Power*,* 11 Op. Att'y Gen'l, 227.

§ 3351. **Amnesty of 1865.**—The proclamation of May 29, 1865, requires persons seeking to avail themselves of the amnesty offered by it, to take an oath to "support, protect and defend the constitution," and to "abide by and faithfully support all laws and proclamations which have been made during the late rebellion with reference to the emancipation of slaves." It is held that an oath which substitutes the word "existing" for "late," and omits the word "protect," is sufficient. *Hamilton v. United States*,* 7 Ct. Cl., 444.

§ 3352. **Proclamation of 1867.**—The president's proclamation of September 7, 1867, did not work a dismissal of proceedings against the property of persons implicated in the rebellion. *Semmes v. United States*, 1 Otto, 25.

§ 3353. **Amnesty of 1868.**—The proclamation of general amnesty by the president of the United States, made on December 25, 1868, granting, unconditionally and without reservation, to all who had participated in the rebellion, full pardon and amnesty for the offense of treason against the United States, put an end to the prosecution of Jefferson Davis for treason, then pending in the supreme court on a certificate of division of opinion. *United States v. Davis*, 1 Chase's Dec., 1.

§ 3354. It relieved claimants of the proceeds of property under the abandoned or captured property act from the consequences of their participation in the rebellion, and from the necessity of establishing their loyalty to the Union. *Carlisle v. United States*, 16 Wall., 147.

§ 3355. It relieves claimants of abandoned and captured property from proof of adhesion to the United States during the late civil war. *Pargoud v. United States*, 13 Wall., 156; *Armstrong v. United States*, 13 Wall., 154.

§ 3356. It will not have the effect to restore to a person who did not participate in the rebellion property belonging to him which was forfeited to the government under the laws forbidding the transportation of goods into the rebel lines. *Gay's Gold*, 13 Wall., 358.

§ 3357. It does not entitle a person included within its terms to the proceeds of his property previously condemned and sold under the confiscation act of 1862, after such proceeds have been paid into the treasury. *Knote v. United States*, 5 Otto, 152.

§ 3358. It relieves a citizen coming within its terms from making proof of loyalty in order to recover his property under the abandoned or captured property act. *Witkowski v. United States*,* 7 Ct. Cl., 393.

§ 3359. It restored all persons who had participated in the rebellion to their rights of property, and enabled them to sue in the court of claims under the abandoned or captured property act. *Waring v. United States*,* 7 Ct. Cl., 501.

§ 3360. It applies to persons, and not to the general obliteration of treasonable offenses. It does not extend to one who died previously. *Scott v. United States*,* 8 Ct. Cl., 457. It included aliens resident within the United States who had participated with the Confederates in their treasonable purposes. *Carlisle v. United States*, 16 Wall., 147.

§ 3361. The abandoned or captured property act, having required the claimant to prove

that he had never given any aid or comfort to the rebellion, the administratrix of a disloyal owner of captured property who died before the proclamation of December 25, 1863, without taking the oath of amnesty or accepting the special pardon offered him by the president, cannot avail herself of that act. *Meldrim v. United States*, * 7 Ct. Cl., 595.

§ 3362. The proclamation of amnesty and pardon issued by the president on July 4, 1868, did not restore to the owner property which was condemned, and the title divested out of the owner and vested in the United States, by a decree of court, before the date of the proclamation. The proclamation expressly excepts from its effects "any property of which any person may have been legally divested under the laws of the United States." *Bragg v. Lorio*, 1 Woods, 209.

§ 3363. *Cherokee Indian — Treaty of 1846.*—The second article of the treaty of Washington of August 6, 1846, declares that "all offenses and crimes committed by a citizen or citizens of the Cherokee nation against the nation, or against an individual or individuals, are hereby pardoned." It is held under this treaty that a Cherokee Indian is pardoned of the offense of killing a white man, who incorporated himself with that tribe as one of them, married one of their women, and was treated and recognized by the authorities of the tribe as one of their number, and entitled to all the rights and privileges of a Cherokee Indian. *United States v. Ragdale, Hemp.*, 497.

XXXV. EXTRADITION.

1. Foreign.

SUMMARY — *Right depends upon treaty stipulations*, § 3364; *courts have no power to hold in custody*, § 3365.—*Power of a commissioner in absence of a mandate*, § 3366.—*Treaty with Switzerland; crimes subject to infamous punishment*, § 3367.—*Warrant of arrest; may be served in any state*, § 3368.—*Complaint need not allege issue of mandate*, § 3369.—*Description of offense in complaint*, §§ 3370, 3371, 3373.—*Variance between complaint and mandate*, § 3372.—*By whom complaint to be made*, § 3373.—*The complaint should charge the substance of the offense*, § 3374.—*Complaint setting forth several offenses*, § 3375.—*Offense of forgery not sufficiently described*, § 3376.—*Requisites of warrant of arrest*, § 3377.—*Issue of warrant abroad not a necessary preliminary step*, § 3378.—*Showing of warrant as to appointment of commissioner*, § 3379; *must show authority of commissioner*, § 3380.—*Description of offense in the mandate*, § 3381.—*Judiciary cannot act without a previous requisition*, § 3382.—*Judge not to inquire as to authority from foreign government*, § 3383.—*Arrest not authorized until demand made*, § 3384.—*Evidence in a case of forgery*, § 3385.—*What papers admissible in evidence under act of 1860*, § 3386.—*Authentication of papers*, §§ 3387, 3393, 3394.—*Several documents may be certified as one paper*, 3388.—*Procedure, by what law governed; right of prisoner to testify*, § 3389.—*Sufficiency of evidence*, §§ 3390, 3391.—*Right of fugitive to be confronted by witnesses; admissibility of depositions*, § 3392.—*Documents offered in evidence must be such as would be received in the fugitive's own country*, § 3395.—*Copies of original information and warrant in evidence*, § 3396.—*Depositions may be authenticated by parol*, § 3397.—*Depositions; act not repealed*, § 3398.—*Certificate as to admissibility of depositions*, § 3399.—*Adjournments*, §§ 3400, 3401.—*Review of proceedings before commissioner*, §§ 3402-3406.—*Power of the executive department*, §§ 3407-3409.—*Right of accused to examine foreign consul*, § 3410.—*Prosecution for other offenses*, §§ 3411-3413.—*British extradition act of 1870, no force in this country*, § 3414.

§ 3364. A nation, whose citizen or subject commits a crime within its own jurisdiction, and is afterwards found within that of another, has no right, by the law of nations, upon its demand, to have him delivered up by that of the other, for the purpose of being tried where the crime was committed. The United States are, therefore, under no obligation to deliver up a fugitive criminal, in the absence of treaty stipulation. Case of Jose Ferreira dos Santos, §§ 3415-16.

§ 3365. If the United States were bound to deliver up a fugitive criminal at the demand of a foreign government, by the law of nations and in the absence of treaty stipulations, the courts of the United States would have no authority to detain him in custody until the government from which he fled should make a demand on the government of the United States for his surrender. *Ibid.*

§ 3366. Whether a commissioner has jurisdiction to entertain proceedings for the apprehension of an alleged fugitive, under our treaty stipulations with Great Britain on that subject, until authority for that purpose has been granted by the executive department of the United States, *quære*. *In re Macdonnell*, §§ 3417-24.

§ 8367. The convention for extradition between the United States and Switzerland says that persons shall be delivered up according to the provisions of the convention, who shall be charged with the crimes therein specified, "when these crimes are subject to infamous punishment." It is held that this provision requires only that the crime shall be subject to infamous punishment in the country where it was committed, and not that it should be subject to infamous punishment in the country from which extradition is sought. *In re Farez*, §§ 8425-37.

§ 8368. The implied restrictions of the twenty-seventh section of the judiciary act of September 24, 1789, relative to the service of process by marshals, without their own districts, has no application to warrants for the arrest of fugitives from foreign countries. Nor has the thirty-third section of the same act, authorizing and regulating the removal of persons arrested in one district, to be held for trial in another, any application to proceedings in international extradition. A warrant issued by a judge of the circuit court in the southern district of New York, addressed to the marshals of the United States for any district respectively, and to their deputies, or the deputies of any of them, or to any of the said deputies, for the arrest of an alleged fugitive from the justice of a foreign country, and to bring him before the said judge or before a commissioner, authorizes the arrest of the fugitive in Wisconsin, by a special deputy of the marshal of the southern district of New York. *In re Henrich*, §§ 8447-53.

§ 8369. The complaint upon which the warrant for the apprehension of the fugitive is issued by the commissioner need not state that a mandate has been issued to the commissioner by the executive department, in pursuance of a requisition from the foreign government. *In re Macdonnell*, §§ 8417-24.

§ 8370. The complaint upon which the warrant of arrest is issued in a proceeding for extradition need not, in order to confer jurisdiction to proceed thereon, describe the offense with the technical precision required in an indictment for the offense. It is sufficient for the jurisdiction of the commissioner that the complaint makes a *prima facie* case. *Ibid*.

§ 8371. It is no ground of objection that the complaint in a proceeding for extradition is more specific than the mandate in describing the offense. *Ibid*.

§ 8372. It is no material variance between the mandate, in a proceeding for the extradition of a fugitive, and the complaint and the warrant, that, in the former, the alleged offender is called "George Macdonell," and in the latter, "George Macdonell, otherwise Macdonnell," where the warrant recites the requisition and mandate and shows that the warrant is issued in pursuance thereof and directs the arrest of the offender named therein. *Ibid*.

§ 8373. In carrying out the provisions of extradition treaties, the complaint must, in many cases, be made by the representative of the foreign government; and all that can be required is that it shall be sufficiently specific, clear and distinct in its averments, to enable the party accused to understand precisely what it is he is charged with. *In re Farez*, §§ 8425-37.

§ 8374. It is not sufficient, in a complaint for a warrant of arrest for an alleged fugitive from justice, to charge the crime named in the convention generally. It should set forth clearly and briefly the substance of the offense charged. *In re Farez*, §§ 8433-42.

§ 8375. It is no objection to the proceedings for the extradition of a fugitive that the complaint upon which the warrant of arrest is issued contains charges of a large number of offenses, the offenses being distinctly alleged in the complaint, and being set forth with all the particularity necessary in such proceedings. *In re Henrich*, §§ 8447-53.

§ 8376. In proceedings for the extradition of an alleged fugitive from justice, the complaint, in order to justify an arrest, must charge the offense in such a way that the warrant might properly issue had the crime been committed here. So a complaint charging that in Belgium the accused "wilfully and knowingly and maliciously uttered and put in circulation forged papers, or counterfeit papers, or counterfeit obligations, or other titles or instruments of credits," without specifying the kind, character or nature thereof, was held insufficient, for the reason that it did not inform the accused of the nature of the crime so as to enable him to meet and prepare for the investigation. *Ex parte Van Hoven*, §§ 8454-56.

§ 8377. A warrant for the arrest of an alleged fugitive from justice, which shows on its face that the jurisdiction has been regularly and formally invoked, for the arrest of the alleged fugitive; and declares in terms the special authority on which the proceeding is based, to wit, the treaty with Great Britain, the act of congress, and the appointment of the officer to execute the law; and declares the demand of the foreign government, the mandate of our own, and describes the offense in the language of the treaty, is sufficient. It is not necessary that the particulars required to be proved, in order to establish the offense mentioned in the treaty, should be specified in the warrant; nor is it the province of the warrant to disclose the details, to notify the prisoner of those details. *In re Macdonnell*, §§ 8417-24.

§ 8378. It is not a necessary preliminary step to an investigation, under an extradition treaty, that a warrant shall have been issued abroad. Therefore where the complaint recites

that a warrant has been issued abroad, it need not show by what magistrate the warrant was issued. *In re Farez*, §§ 3425-37.

§ 3379. A warrant for the arrest of a fugitive in pursuance of an extradition treaty need not show that the commissioner issuing it was appointed by the circuit court to issue the particular warrant. It is sufficient if it appears on the warrant that the commissioner was appointed by the circuit court, and is specially appointed to execute the act of August 12, 1848, and the act of June 22, 1860, passed to carry into execution treaty stipulations for the extradition of fugitives from justice. *Ibid.*

§ 3380. A warrant issued by a commissioner for the apprehension of a fugitive from justice, with a view to his extradition in pursuance of the convention between the United States and the Swiss confederation, must show upon its face that the commissioner issuing it is so authorized under the act of August 12, 1848, passed to give effect to treaty stipulations for the extradition of fugitives. *In re Farez*, §§ 3433-42.

§ 3381. It is sufficient if the mandate of the executive department to the commissioner, to inquire into the charge of criminality against the alleged fugitive from justice, describes the particular charge to be investigated, in the terms of the treaty in aid of the execution whereof the proceeding is directed. *In re Macdonnell*, §§ 3417-24.

§ 3382. The judiciary possess no jurisdiction to entertain proceedings, under any treaty or convention between the United States and a foreign government, for the apprehension and committal of any alleged fugitive from justice, whose extradition is demanded by such foreign government, without a previous requisition having been made, under the authority of the foreign government, upon the government of the United States, and the authority of the latter government obtained to apprehend such fugitive. The complaint on which the warrant of arrest is issued should not only show such a requisition and authority, but such facts should also be set forth on the face of the warrant. *In re Farez*, §§ 3438-42.

§ 3383. In extradition cases the judge has nothing to do with the question whether the government of the foreign country has duly authorized an application for the extradition to be made. When complaint is made on oath, the judge is to examine the evidence of criminality, and if he deems it sufficient to sustain the charge shall certify the same to the secretary of state. *In re Dugau*, §§ 3443-46.

§ 3384. An alleged fugitive from justice whose extradition is sought cannot be arrested by the authority of the United States until demand for his arrest is made by the foreign government whose laws he has violated, and authority is given by the United States, pursuant to such demand, for the apprehension of such fugitive. The warrant need not be signed by the president, but it is sufficient if issued by the secretary of state under his official seal, as it is through this department that the executive acts in all intercourse between this and foreign nations. *Ex parte Van Hoven*, §§ 3454-56.

§ 3385. In a proceeding for extradition for the crime of forgery, it cannot be objected to the admissibility of the papers from the foreign country that the alleged forged papers have not been first introduced, when the depositions produced are the depositions of witnesses who had the alleged forged papers before them at the time of giving such depositions. *In re Farez*, §§ 3425-37.

§ 3386. By the act of June 22, 1860, any depositions, warrant or other papers, properly authenticated, are admissible in support of the charge of criminality in a proceeding for extradition, and hence it is no objection to papers offered that they do not appear to have been papers on which the warrant of arrest was issued abroad against the prisoner. *Ibid.*

§ 3387. Under the act of June 22, 1860, providing that in extradition proceedings the certificate of the principal diplomatic or consular officer of the United States, resident in the foreign country, shall be proof that any paper or other document offered in evidence is authenticated in the manner required by the act, the certificate of the minister of the United States, resident in the country demanding extradition, that "the foregoing copies of the warrant, depositions and other papers are legally and properly authenticated so as to entitle them to be received for similar purposes by the tribunals of the Swiss confederation, and to be received by said tribunals for the purposes and similar purposes mentioned in the second section of the act of congress entitled 'An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivery up of certain offenders,' approved August 12, 1848," is a sufficient certificate. It follows the language of the act of 1860. *Ibid.*

§ 3388. Where papers received from a foreign country, and constituting the evidence of criminality in a proceeding for extradition, form substantially one proceeding and one document, and each paper refers to the papers which precede it, and all of them are proceedings before the same magistrate and relate to the same transaction, they may be properly certified as one paper by our minister resident in such foreign country. *Ibid.*

§ 3389. Proceedings for the extradition of fugitives from the justice of a foreign country

must be governed by the laws of the state in which such proceedings are had, in particulars in which such proceedings are not specially regulated by a statute of the United States. It is, therefore, error for the commissioner to refuse to permit the prisoner to be examined in his own behalf, in a state in which that right is granted in all proceedings in their nature criminal. The thirteenth article of the convention with Switzerland, providing that a person charged with a crime shall be delivered up only when the fact of the commission of the crime shall be so established as to justify his apprehension and commitment for trial, if the crime had been committed in the country where such person shall be found, is held to require this. *Ibid.*

§ 3390. The convention stipulating for extradition declaring that the fact of the commission of the crime must be so established as to justify the commitment of the accused for trial if the crime had been committed in the country where he is found, the magistrate will not require evidence which would be sufficient to convict the prisoner on the trial in chief, but will certify the evidence as sufficient to warrant the extradition of the accused, if it would be sufficient to commit him for trial if he had committed the crime here, *i. e.*, reasonable ground to hold the accused for trial. *Ibid.*

§ 3391. The convention with the Swiss confederation, in saying, in the thirteenth article, that the delivery up to justice of persons charged with crimes enumerated in the fourteenth article shall be done only when the fact of the commission of the crime shall be so established as to justify their apprehension and commitment for trial, if the crime had been committed in the country where the persons so accused shall be found, refers not only to the evidence upon which the fugitive is to be delivered up, but also means that the fugitive shall not be apprehended or arrested except upon such *prima facie* evidence as would justify his apprehension and arrest, if the crime had been committed in the place where he is found. *In re Farez*, §§ 3438-42.

§ 3392. Under the treaty with Great Britain, the alleged fugitive has not the right to be confronted by the witnesses against him. Depositions, duly authenticated, are admissible if they would be admissible for such purposes in the country where the crime was committed. The provision of the treaty, that the offender shall be delivered up only "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed," refers only to the degree of proof, and not to the mode in which it shall be given. *In re Dugau*, §§ 3443-46.

§ 3393. An information of the directors of the Rhenish Railroad Company is dated at Cologne, addressed to the royal chief procurator, containing an elaborate statement of facts in support of the charge, attested by the secretary of the county court, under seal; the secretary's signature is attested by the president of the court, under seal, the latter adding a certificate that the document is a valid piece of evidence by the laws of Prussia; the signature of the president is then attested, under seal, by the first president of the Royal Rhenish court of appeals, adding the same certificate as to the validity of the document as evidence; the signature of the latter being then attested by the minister of foreign affairs; the document being then authenticated by our minister at Berlin, with his certificate that the paper is legally authenticated, so as to be received for similar purposes by the tribunals of Prussia; and this certificate being under the seal of the United States legation, the paper is admissible, under the acts of August 12, 1848, and June 23, 1860, with regard to the authentication of evidence in proceedings for extradition. *In re Henrich*, §§ 3447-53.

§ 3394. Under section 5271 of the Revised Statutes, as amended by the act of June 19, 1876, relating to the authentication of evidence in proceedings for extradition, a certificate by our minister residing in the foreign country, that the documents "are authenticated in the manner required by the statute of the United States," is not sufficient. *In re Fowler*, §§ 3457-61.

§ 3395. Under the above section as amended, the document must appear to be one which would be received as evidence of the criminality of the accused by the tribunals in the country from which he fled, if the inquiry were going on there, in respect to the offense as committed there, and not a document which would be received by the tribunals of that country as evidence of the criminality of a fugitive criminal from the United States sought to be extradited. *Ibid.*

§ 3396. Copies of the original information and warrant are not admissible, under the above section, as evidence of the criminality of the fugitive criminal, upon parol testimony that they are copies of the originals; that the witness saw the original information and was present when it was made, and saw the complainant sign it in the presence of the justice; that the person before whom it was sworn is a justice, and that the signature to the copy is the signature of the justice; and also that he was present when the original warrant was signed, and that it was issued by the justice of the peace, when there is no evidence that the authentication of the copies is according to the law of the foreign country. *Ibid.*

§ 3397. Under this section, the original dispositions taken abroad may be shown by parol evidence to be authentic, and to be such as would be receivable in evidence against the accused for the same offense in the tribunals of the foreign country. *Ibid.*

§ 3398. The act of June 22, 1860 (12 Stat. at L., 84), providing for the admission of any documents in extradition cases, certified by the principal diplomatic officer of this government resident in the country from which the accused fled to be admissible in the courts of such country, was not repealed by the Revised Statutes adopted in 1874, and applies to all such depositions, documents and papers offered in extradition cases, except depositions on which the original warrant of arrest was granted in the foreign country. *In re Stupp*, §§ 3162-67.

§ 3399. A certificate of the principal diplomatic officer resident in the country demanding the extradition of an alleged fugitive from justice, that certain depositions are so authenticated as to be entitled to be "received in evidence in support of the criminal charges mentioned therein," etc., is sufficient without adding in "the courts of," etc., naming the country seeking such extradition. *Ibid.*

§ 3400. A commissioner very properly refuses a motion by the prisoner for an adjournment for a sufficient length of time to obtain evidence from the country demanding his surrender, where the motion is based on affidavits which do not show that there is any evidence, either oral or documentary, on the part of the prisoner, that exists or is accessible, or is likely to be obtained. *In re Farz*, §§ 3425-37.

§ 3401. The commissioner must exercise a just and reasonable discretion in granting adjournments, at the instance of either party. *In re Macdonnell*, §§ 3417-24.

§ 3402. The interlocutory decisions of a commissioner, upon questions of the admissibility of evidence, in extradition proceedings, cannot be reviewed on *habeas corpus*. *Ibid.*

§ 3403. The circuit court of the United States has power, through the medium of writs of *habeas corpus* and *certiorari*, to revise the action of commissioners when they commit persons for surrender under extradition treaties. It is the duty of the court in such a case to look into the evidence upon which the judgment of the commissioner is based, and to pass upon its weight as well as its competency. *In re Henrich*, §§ 3447-53.

§ 3404. Questions of fact decided by a commissioner in a proceeding for the surrender of a fugitive criminal cannot be reviewed by the circuit court on *habeas corpus*. *In re Fowler*, §§ 3457-61.

§ 3405. In an extradition case there is to be no review of the decision of the committing magistrate on the facts by any judge or court, but by the president only. *In re Stupp*, §§ 3162-67.

§ 3406. A court, upon *habeas corpus*, after commitment in an extradition case, may inquire and adjudge whether the commissioner acquired jurisdiction or exceeded it, whether he had any legal or competent evidence of the facts before him, but cannot inquire whether the legal evidence before the commissioner was sufficient to warrant his conclusion. *Ibid.*

§ 3407. The executive department, in carrying out treaty stipulations between this and foreign governments, for the apprehension and delivery up of alleged criminals, acts through the department of state. Both the final order of extradition and the preliminary mandate for the arrest of the person can be made by the executive department through the instrumentality of the department of state. *In re Farez*, §§ 3433-43.

§ 3408. The decision of a court on *habeas corpus* in an extradition case, that a prisoner is lawfully held, is not binding upon the president. *In re Stupp*, §§ 3462-67.

§ 3409. The statutory provision that in extradition cases the commissioner holding the examination should transmit to the secretary of state his certificate that he deems the evidence sufficient to sustain the charge, and to certify to the secretary of state all the evidence taken before him, indicates that the executive discretion which the president has a right to exercise as to surrendering or not surrendering the accused is to be exercised on a consideration of the testimony in the case. *Ibid.*

§ 3410. In an extradition proceeding, the prisoner has a right to call the consul of the foreign government, who is the complainant, and examine him at any stage of the case, but cannot claim a right to cross-examine him before any other evidence is offered, when it appears upon the face of the complaint that the consul does not pretend to have any personal knowledge of the matters stated in the complaint. *In re Farez*, §§ 3425-37.

§ 3411. Extradition proceedings do not, by their nature, secure to the person surrendered immunity from prosecution for offenses other than the one upon which his surrender was made. An offender against the justice of his country can acquire no rights by defrauding that justice. He remains at all times, and everywhere, liable to be called to answer to the law for his violations thereof, provided he comes within its reach. *United States v. Lawrence*, §§ 3468-74.

§ 3412. Under sections 5270 to 5277 of the Revised Statutes, persons extradited are not pre-

ted against prosecutions for other offenses than the one on which they were extradited. As the act was for the protection of such persons, and protects them from "lawless violence" simply, the implication is that no further protection was intended. *Ibid.*

§ 3413. A plea to the jurisdiction of a court, setting up that the defendant was extradited from a foreign country under an agreement between this and the foreign government that he should not be tried for any other crime than the one for which he was extradited, until after a reasonable time had elapsed for his return, and that the crime on which he is now in custody is one for which immunity was promised, is of no avail when the indictment has been found and trial is moved for by the government. The agreement is one which should be carried out by the government through its control over the prosecuting officer. *Ibid.*

§ 3414. The provisions of the British extradition act of 1870 (33 and 34 Vict., ch. 52) have no binding force upon the courts of the United States. *Ibid.*

[NOTES.— See §§ 3475-3593.]

CASE OF JOSE FERREIRA DOS SANTOS.

(Circuit Court for Virginia: 2 Marshall, 493-515. 1835.)

Opinion by BARBOUR, J.

STATEMENT OF FACTS.— Jose Ferreira dos Santos, a Portuguese subject, having been committed for trial before this court, under a charge of piracy, and the grand jury having found the indictment against him not a true bill, he would be entitled to a discharge from custody, as it regards that accusation. But an application is now made, at the instance of the chargé des affaires of Portugal, that he may be detained until the government of Portugal shall have time to make a demand on that of the United States, that he may be surrendered to the former as a fugitive from justice, to be tried there, under a charge of murder, which it is alleged that he has committed in that country. And the question is, whether it is proper or competent for this court to detain him in prison, for the purpose before stated.

§ 3415. *Extradition exists as a right only by virtue of treaty provisions. In the absence of these the sovereign is under no obligation to deliver up fugitives from justice.*

The solution of this question depends upon that of two others: 1. Has a nation, whose citizen or subject commits a crime within its own jurisdiction, and is afterwards found within that of another, a right, by the law of nations, upon its demand, to have him delivered up by that other, for the purpose of being tried where the crime was committed? 2. If such right exist, have the judicial officers of the United States, supposing the evidence to be sufficient, any authority to act in relation to it as auxiliary to the executive department?

As to the first point, as far as I am informed, the subject has not been before any of the federal courts of the Union. The case of Jonathan Robins is not an exception to this remark. He was, indeed, at the request of the then president of the United States, Mr. Adams the elder, delivered up by the district judge of South Carolina to the British consul, on a charge of murder, committed by him (Robins) on board of a British vessel on the high seas. But that case depended upon the twenty-seventh article of the treaty with Great Britain, made in the year 1794, by which it was agreed that fugitives charged with murder or forgery, committed within the jurisdiction of either, and seeking an asylum within any of the countries of the other, should be reciprocally delivered up, in the manner and upon the terms therein stated. The question then, in that case, as it relates to this point, was whether the *casus fœderis* of this article had occurred; whereas, in this case, there is no treaty stipulation, and the question must, therefore, depend upon the right of the government of Portugal to make the demand, and the consequent obligation of our government

to surrender the person charged, independently of any treaty or compact between them.

There have, however, been two decisions upon the subject, made by two distinguished jurists of our country; the one, by Judge Kent, of New York; the other, by Chief Justice Tilghman, of Pennsylvania; the first asserting the right (see the case of *In re Washburn*, 4 Johns. Ch., 106); the other, adopting a different line of reasoning, and arriving in many respects at different conclusions (see the case of *Short v. Déacon*, 10 Serg. & R., 126). It becomes necessary, then, to examine the question upon the principles laid down by the writers on public law, with reference to the application made of them in the two cases just cited, to the authoritative declarations of our own government, and generally to all the bearings and relations of the subject. Grotius asserts the right to demand, and the consequent obligation to surrender, all persons charged with crimes, who have fled to another country, whether they are citizens or subjects of that country, or foreigners, although in practice it is not insisted on, except in crimes against the state, or of a very heinous nature. As to lesser crimes, he says, they are connived at, unless otherwise agreed on, by treaty. In this doctrine he is followed by Burlamaqui, Heineccius and Wynne. Vattel asserts the right and obligation, in case of great crimes; but speaks only as to the *subjects* of the country on which the demand is made. And his reasoning applies to them only; because it is put upon the principle of the duty of the sovereign to prevent his subjects from doing mischief to other states, and the consequent duty to punish or surrender.

Puffendorf, on the contrary, holds the doctrine that the obligation to deliver up a criminal is rather in virtue of some treaty than in consequence of a common and indispensable obligation. Martens, after stating that a sovereign may punish foreigners who fly to his dominions, after having committed a crime in the dominions of another, as well as those who commit it in his, adds: "but in neither is he *perfectly obliged* to send them for punishment to their own country, not even supposing them to have been condemned before their escape." He says, also, that according to modern custom, a criminal is frequently sent back to the place where the crime is committed, on the request of a power *who offers to do the like service*, and that we often see instances of this. Ward seems strongly to countenance the idea of Puffendorf.

I have thus given an abbreviated statement of these writers on public law; more detailed views of whose reasoning may be seen by reference to the works themselves, or to quotations from them, in the two cases before cited from New York and Pennsylvania. Thus much was necessary as a basis for my future reasoning. Upon the mere authority of foreign publicists, then, it would appear to be doubtful whether there was, independently of treaty, any obligation on the part of our government to surrender to another a fugitive from justice. To decide the question, let us descend from these principles of abstract writers, and see what has been the practice of Europe in ancient and modern times. Lord Coke, in his 3 Inst., 180 (I quote now from 10 Serg. & R.), after expressing a decided opinion against delivering up fugitives, gives us three instances of a refusal to deliver up; the first, a qualified one; the two others, absolute. Henry VII. of England demanded of Ferdinand of Spain the Earl of Suffolk, attainted of high treason by parliament. Ferdinand refused to deliver him until Henry promised not to put him to death. Henry VIII. of England demanded of the king of France Cardinal Pool, being his subject and attainted of treason; the demand was not complied with. Queen Elizabeth

demand of Henry IV. of France, Morgan and others of her subjects, who had committed treason against her. He replied that all kingdoms were free to fugitives, and it was the duty of kings to defend every one, the liberties of his own kingdom; and that Elizabeth had, not long before, received Montgomery, the Prince of Condé, and other Frenchmen. Chief Justice Tilghman adds the case of Perkin Warbeck, who had fled to Scotland, and who was refused to be delivered, although demanded by Henry VII. Chancellor Kent, in the case of Washburn, cites some cases in England as settling the principle, and acting on the practice of surrendering fugitives.

As to Lundy's Case, 2 Vent., 314, that of the King v. Kimberley, Strange, 848, there cited, and The East India Co. v. Campbell, 1 Ves., 274, Chief Justice Tilghman, in my opinion, gives a satisfactory answer. It is, that the territories where the crime was committed and to which the criminal fled were parts of the same empire, and under one common sovereign. The king of England could have no privilege against the king of Ireland, being one and the same person. He states, indeed, the case of The King v. Hutchinson, 3 Keb., 785, who was committed on a charge of a crime committed in Portugal, and refused to be bailed, and who, it was said by counsel (in another case), was sent to Portugal; and he refers to another, mentioned by Heath, justice; the crew of a Dutch ship mastered the vessel, and brought her into Deal; and it was a question whether they should be seized and sent to Holland. And it was held that they might, and the same (he said) had been the law of all civilized nations.

There is no subsequent case cited, and none is known to exist, where the British government has surrendered a fugitive. On the contrary, Mr. Jefferson in his letter to President Washington of November 7, 1791, after speaking on the subject of conventions for the delivery of fugitives, says: "England has no such convention with any nation, and their laws have given no power to their executive to surrender fugitives of any description; they are, accordingly, constantly refused; and hence England has been the asylum of the Paolis, the La Mottes, the Calonnes; in short, of the most atrocious offenders, as well as of the most innocent victims, who have been able to get there." In corroboration of this, I will state that, but the other day, that is, on the 7th of November last, it was stated in the Intelligencer that application had been made to the secretary of the home department (England) for a warrant to arrest Bowen; but it was refused, on the ground that no treaty stipulation required such a course, and, without it, it was wholly inadmissible. The case is not stated with particularity. Enough, however, appears to show that it was not one of the atrocious class mentioned by Grotius; that, however, is not stated as the reason, but the want of a treaty stipulation. I am not prepared to say how far the secretary acted upon the principle stated in some of the books that governments were in the practice of conniving at the lesser offenses, or that the demand was not made by our government.

There is, indeed, a case in Canada, in 1829, where a criminal from Vermont was delivered to the authorities of that state, upon a charge of larceny committed there, upon a warrant issued by the governor of the province; he was arrested, and, on *habeas corpus* before the chief justice, it was held lawful; in his opinion he grounds himself generally upon the authorities and cases before stated, and his decision, therefore, must stand or fall with them. It is worthy of remark, however, that this was a case of simple larceny, and not one of great atrocity, as described by Grotius, and, moreover, that the arrest was grounded

upon a charge, on oath, of the felony, and not upon a demand by our government; so that it would seem that the opinion of the government at home differed from that in the province of Canada. The opinion of European nations on this subject is manifested by the numerous treaties made by them containing provision for the mutual surrender of criminals.

In 1 Kent's Comm., p. 37, we are told that treaties of this kind were made between England and Scotland in 1174, and England and France in 1303, and France and Savoy in 1378. As these were in the comparatively barbarous ages of Europe, let us come down to a period when civilization had reached a high point. In the letter of Mr. Jefferson, before referred to, dated in 1791, he says: "The delivery of fugitives from one country to another, as practiced by several nations, is in consequence of conventions settled between them, defining precisely the cases wherein such deliveries shall take place. I know (says he) that such conventions exist between France and Spain, France and Sardinia, France and Germany, France and the United Netherlands; between the several sovereigns constituting the Germanic body, and I believe very generally between co-terminous states on the continent of Europe." Why, let me ask, were all these treaties in ancient and modern times? I answer, either because the opinion of Puffendorf was considered right, that without a treaty stipulation there was no obligation to surrender, or, at least, the question was so unsettled, the respective rights and obligations of nations so indeterminate, and the refusal on the part of nations to surrender so frequent, that without treaty there was no obligation at all, or none of any sort of practical value; for, what is this imperfect obligation of which the writers speak? It is the right of one to ask, which involves the right of the other to refuse, and, as applied to this particular subject, that refusal had become so common as to be almost the habitual practice until treaties were formed concerning it. And is not the doctrine of the necessity of treaty stipulation supported, too, by the weightiest reasons?

In the first place, in this way alone can reciprocity be insured; in this way alone can it certainly be ascertained to what crimes the doctrine of surrender is to be applied. Some would apply it to all crimes, some to those against the state or of deep atrocity. Which are of that character? The New York assembly consider simple larceny, or any crime punishable in their state prison, as proper to surrender for, and have enacted accordingly. The treaty of 1794, between the United States and Great Britain, confines it to murder and forgery. Moreover, as to the expense attending the case, in the treaty just cited, it is provided that the power making the demand shall pay it. Finally, provision can be made as to the length of time for which a party is to be detained, as is provided in the act of congress in relation to fugitives from justice from the several states.

Let us now examine the views of our own government on this point. Mr. Jefferson, in the letter already referred to, in which he is writing to the president on the subject of a request from the government of South Carolina, that a demand should be made upon the governor of Florida for the delivery of some fugitives, says: "The laws of the United States, like those of England, receive every fugitive (that is, as he had just before expressed it, the most atrocious offenders, as well as the most innocent victims), and no authority has been given to our executives to deliver them up." He states further, that the French government had been anxious to make a convention with us, authorizing them to demand their subjects coming here; that in the consular convention Dr.

Franklin agreed to an article giving to their consuls a right to take and send back captains of vessels, mariners and *passengers*. Congress refused to ratify it until the word *passengers* was stricken out. He goes on to say, in fact, however desirable it be, that the perpetrators of crimes, acknowledged to be such by all mankind, should be delivered up to punishment; yet, it is extremely difficult to draw the line between those, and acts rendered criminal by tyrannical laws only; hence the first step always is a convention defining the cases where a surrender shall take place.

"If, then, the United States (he continues) could not deliver up to Governor Quesnada a fugitive from the laws of his country, we cannot claim, as a right, the delivery of fugitives from us; and it is worthy of consideration whether the demand proposed to be made in Governor Pinckney's letter, should it be complied with by the other party, might not commit us disagreeably, perhaps dishonorably, in event; for I do not think that we can take for granted that the legislature of the United States will establish a convention for the mutual delivery of fugitives; and without a reasonable certainty that they will, I think we ought not to give Governor Quesnada any grounds to expect that, in a similar case, we would redeliver fugitives from his government."

On the 12th September, 1793, Mr. Jefferson thus writes to Genet, the French minister, in answer to a demand that he had made for the delivery of fugitives: "The laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender coming within their pale is received by them as an innocent man; and they have authorized no one to seize or deliver him. The evil of protecting malefactors of every dye is sensibly felt here, as in other countries; but, until a reformation of the criminal codes of most nations, to deliver fugitives from them, would be to become their accomplices. The former, therefore, is viewed as the lesser evil." He goes on to say that, unless they come within the consular convention, no person in this country is authorized to deliver them; but, on the contrary, they are under the protection of the laws, etc. In the course of the next year (1794), the British treaty was made; the twenty-seventh article of which, already referred to, provided for this subject.

Thus, as well by the authoritative declarations, as by the acts of our government, the principle has been announced to the world that the United States acknowledge no obligation to surrender fugitives, except by virtue of some treaty stipulation. Besides the reasons common to us, with other nations which recommend the justice and utility of this doctrine, we have strong ones arising from the spirit of our institutions, and the provisions of the federal constitution. If, for example, we were to take Grotius as our rule, the offense which he emphatically considers as most requiring a surrender is treason; or, as he expresses it, offenses against the state. Now, let us see what would be the practical effect of this rule. Suppose that, during the late war with Great Britain, a British born subject, who had previously emigrated to the United States, had been found fighting in our ranks, as a soldier, in Canada, and upon his return home had been demanded by the British government; on their principle of perpetual allegiance, he was still a subject, and had committed treason; upon the principle of Grotius, we must have surrendered him, because he had committed, according to their laws, a crime against the state.

Let us put another case. Suppose that, in the struggle now going on in Texas, an American citizen (of whom we have many) should be found fighting against the authority of Santa Anna, and upon his return home should be de-

manded. Here, too, according to the rule of Grotius, we must deliver him, because he had committed a crime of state, against the present government *de facto*; and it is a settled principle with us, that we are always to take the present existing government *de facto* as the one for the time being to be respected as the government. Can any one for a moment suppose that, in either of the cases here put, our government would surrender? Surely not. In the case in Canada, the chief justice says that cases of this sort cannot be drawn into precedent, because the authority of the state to which the accused has fled may well be extended to protect rather than deliver him up to his accusers, etc.; but is it not apparent that this is a violation of Grotius' rule? For here is a crime of state committed against the government *de facto*; one which, if successful, is honored by the name of revolution; if otherwise, is degraded by the epithet of rebellion, and all engaged in it are called traitors.

An attention to some of the provisions of our constitution will, I think, fortify this doctrine. The second clause of the second section of the fourth article provides that a person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime. The subject of fugitives from justice was thus in the minds of the convention, and they provided for a delivery of fugitives from the states of the Union. It may, perhaps, be fairly said, that as the constitution was made for the states, and the people of the states, it had no relation in its nature to foreigners; be it so; but the principle assumed requires us to deliver up citizens, as well as aliens. In this aspect as to citizens, it was properly within the scope of a constitutional provision; and, according to my view, provision is made in the constitution, which, although it does not mention it by name, embraces the whole subject, both as to citizens and all others within our jurisdiction, and puts it within the control of a department of the government. It is the clause creating the treaty-making power, and the reasoning stands thus: the constitution having given to the president and senate the right to make treaties, without limitation in words, there is no other limitation but their discretion, except that the treaty shall not contravene the constitution, or invade the rights of other departments.

The various provisions securing to every person charged with crime a trial by jury, the right to be confronted by his witnesses, the privilege of not being obliged to be a witness against himself, also, in my opinion, have an important bearing upon this subject. It may be said that it was intended to apply to crimes against the United States; but, I think, the spirit of them should make the treaty-making power extremely cautious, even as to treaty stipulations, for surrendering our people to a government where these privileges do not exist; but where there is no treaty, they should, in my opinion, be decisive against a surrender, in the exercise of discretion, even if the law of nations created an imperfect obligation, without a treaty stipulation. I am of opinion, then, that the government of the United States are not under any obligation to deliver the prisoner, in the absence of any treaty stipulation.

§ 3416. *The office of the judiciary is to execute the laws of its sovereign. It has no right to retain in custody a fugitive from justice of a foreign state until demand can be made for his delivery.*

The second question is, whether the judicial officers of the United States have any authority to act in relation to it? Perhaps the conclusion at which I have arrived on the first point might render a discussion of the other unneces-

sary; but as it was argued, and has been considered, and as I may have fallen into error on the first point, I will very briefly notice it. As a general proposition, the judicial power of a government is created for the purpose of executing *its own laws*. If, in deciding upon a foreign contract, the courts of another country construe it according to the law of the place where made, and intended to be executed, as, for example, to give the interest there allowed, this is not the execution of a foreign law, but of the law of the court, which as to this case adjudges that as the intention of the parties. As to criminal laws, I believe it is settled everywhere that one country will not execute the penal laws of another; not even its revenue laws. So far is this carried in this country, that the courts of one state will not execute the penal laws, either of a sister state, or of the federal government.

The crime charged against the prisoner is one against the laws of Portugal, not against the United States. Over the crime itself, then, the judicial officers of the United States clearly have no jurisdiction. If they have no jurisdiction over the crime, whence can they derive the authority to arrest the party charged with that crime, and detain him, with a view to a trial therefor in another and foreign jurisdiction? I do not here enter into the second question discussed in Jonathan Robins' case, whether the duty to be performed there was a judicial one. That was the case of a treaty. The constitution extends the jurisdiction of its judiciary to all cases arising under treaties, etc. That, therefore, is a totally distinct question from this, where there is no treaty, and where a judicial officer is asked to arrest, or, what is the same thing, to detain a person charged with the commission of a crime, not against the government whose judicial power it is his duty to execute, nor for a trial in any of the courts of that government, but for one to be had before the tribunals of a foreign country, against whose laws the alleged crime has been committed.

Let us look, for a moment, at the legislation of congress upon the subject of arrest in criminal cases. We are authorized to arrest for any crime or offense against the United States, for what purpose? The act of congress informs us that it is for trial before such court of the United States as by that act has cognizance of the offense. Now, the crime with which this prisoner is charged is not against the United States, and the arrest or detainer is avowedly asked, not for the purpose of a trial before any court of the United States. The case of piracy is embraced by the provision of this law; for that is a crime against all nations, and, amongst others, against the United States; but, moreover, the constitution authorizes congress to define and punish piracy. Congress has defined and provided for its punishment. We are, then, executing a law, made in pursuance of the constitution, when we take jurisdiction of that offense. So strict has been the doctrine as to the judicial officers of one government executing the criminal laws of another, that, although the act of congress authorizes state magistrates to arrest for crimes against the United States, yet the general court of Virginia sustained the legality of their warrants only upon the ground that it was competent to have authorized private persons to act, and that magistrates are designated as a class of persons by their name of office.

In conclusion I will say that the counsel who made this application has presented it in the strongest light which the principles of public law or the authorities enabled him to do; yet, after the best reflection which I have been able to bestow upon the subject in the short time which I have had to consider it, I am of opinion that, without a treaty stipulation, this government is not under

any obligation to surrender a fugitive from justice to another government, for trial; and that, as a judicial officer of the United States, I have no authority whatsoever, either to arrest or detain, with a view to such surrender. It follows, as a consequence, that the prisoner is entitled to his discharge; and he is discharged accordingly.

IN RE MACDONNELL.

(Circuit Court for New York: 11 Blatchford, 80-101. 1873.)

STATEMENT OF FACTS.—Application was made for writs of *habeas corpus* and *certiorari* by Macdonnell, who was arrested on the warrant of a United States commissioner, on a charge of forgery, and held for extradition, the offense having been committed (as alleged) in the kingdom of Great Britain. The commissioner returned to the writ of *certiorari* the mandate of the president, the requisition of the British minister, the complaint of the British consul-general, and the arrest and subsequent proceedings.

Opinion by WOODRUFF, J.

In announcing my conclusion upon the application for the discharge of the prisoner, I shall not occupy time in a preliminary history of the proceedings before myself, or before the commissioner, as might be proper if I were preparing a report of the matter, or an entire record, in order to give a complete history of the case. The argument, involving a review of every step in the proceedings, and each document and process, is so recent, that counsel are quite familiar with each, and, to some extent, the statement of the reasons for my conclusions will furnish occasion to recite the substance of whatever is important to make those reasons intelligible.

§ 3417. *Quære: Whether a United States commissioner can proceed in an extradition case under the treaty with Great Britain when no mandate has issued from the president?*

It is not, in the present case, necessary that I should express an opinion upon the proposition which is at the foundation of the argument on one branch of the claim made in behalf of the prisoner, namely, that a commissioner has no jurisdiction to entertain proceedings for the apprehension of an alleged fugitive, until authority for that purpose has been granted by the executive department of the government of the United States. See the Treaty with Great Britain, of August 9, 1842 (8 U. S. Stat. at Large, 576, art. 10); Act of Congress of August 12, 1848 (9 U. S. Stat. at Large, 302). Mr. Justice Nelson, in the case of *Ex parte Kaine*, 3 Blatch., 1, affirmed the proposition, and made the absence of such authority at the time of the institution of the proceeding one of the grounds upon which he discharged the prisoner, notwithstanding the president, on the report made to him of the facts found by the commissioner, and the evidence thereof, had so far ratified what had been done as to issue his warrant for the surrender of Kaine to the authorities of the British government. In this decision he conformed to the dissenting or minority opinion expressed by him with the concurrence of Chief Justice Taney and Mr. Justice Daniel in *In re Kaine*, in the supreme court (14 How., 103). That opinion stood opposed to the opinion delivered by Mr. Justice Catron, with the concurrence of Justices McLean, Wayne and Grier, to the effect that the commissioner acts, in receiving a complaint, issuing his warrant for the arrest, and taking and certifying the proofs, by a jurisdiction expressly conferred upon him by law, by the treaty, and by the act of congress; that his power and authority, in these par-

ticulars, exist independently of any mandate or command of the president, to be obtained in advance of such proceeding; and that, whatever may be the requirement of the acts of the British parliament on that subject, the congress of the United States did not think it necessary to the dignity of the nation, the protection of the accused, or on any other ground, and especially in view of the inconvenience which it involved, and the great facility it afforded for the escape of the fugitive, and for defeating the purposes of the treaty, to require that the aid of the president should be invoked until the preliminary inquiry had been made before a magistrate. They go still further, and insist that to hold the contrary is to permit an interference by the executive with the judiciary, against the intent, principles and legal effect of our system of government, which make the action of the judiciary, in the discharge of all functions properly judicial, independent of executive interference; while, on the other hand, the act of surrender after, by a judicial inquiry, the facts are ascertained is confessedly an exercise of political power, to which the president alone is competent. The supreme court of the United States at that time consisted of eight judges. The opinion of four of the judges was not sufficient to result in authoritative adjudication. Mr. Justice Nelson's opinion was sustained on all points by Chief Justice Taney and Mr. Justice Daniel; and Mr. Justice Curtis declined expressing an opinion upon the merits, on the ground that the supreme court had no jurisdiction of the matter as it was then before them. The proposition, therefore, stood at that time as the opinion of three judges of the supreme court on the one hand, and four judges on the other, not authoritatively adjudicated. Mr. Justice Nelson, therefore, when the matter of Kaine was continued, before him, under the writ which he had originally allowed (3 Blatch., 1), felt himself at liberty to be governed by the views he had expressed in the supreme court. The cases of Veremaitre (9 N. Y. Leg. Obs., 129), Kaine (10 id., 257), and cases referred to therein, and Heilbronn (12 id., 65), and others, reported and unreported, show that the district judges in this circuit had acted upon and concurred in the views of the four judges of the supreme court, above stated; and the practice before commissioners had conformed thereto, down to the decision made by Judge Nelson.

The two cases of *In re Henrich*, 5 Blatch., 414 (§§ 3447-53, *infra*), decided by Judge Shipman, and of *In re Farez*, 7 id., 34, 345 (§§ 3438-42, *infra*), decided by Judge Blatchford, are placed distinctly on the authority of Judge Nelson's decision in the case of Kaine, so that it may properly be said that this claim on behalf of the prisoner rests on that opinion supported by the concurrence of Chief Justice Taney and Justice Daniel, and disaffirmed by Justices Catron, McLean, Wayne and Grier, and the opinions and practice of the district judges. I advert to these particulars for the purpose of bringing together, in brief, the history of the subject, and of stating the extent of the authority in this circuit, upon which the proposition urged on behalf of the prisoner rests. What has been the ruling or practice on this subject in other circuits of the United States counsel have not advised me by reference to any cases there decided.

The counsel for the British government insist that the terms of the treaty (8 U. S. Stat. at Large, 576, art. 10), and especially the act of congress of August 12, 1848 (9 id., 302), passed to carry the treaty into effect, operate to confer the jurisdiction, and that at the instance of the proper officer of the British government the designated magistrate may and must, upon compliance, issue his warrant to arrest the alleged fugitive, according to the term:

the statute, which, confessedly, does not expressly suggest that any prior action of the executive is to be invoked; and they further insist, that, in the conflict of opinion above referred to, they have a right to call on me to act upon my own opinion of the true construction of the treaty and of the act of congress, in the particular thus in contest. It is of course not doubted that, before any surrender can take place, the proceedings before the commissioner, with all the proofs taken, must be submitted to the executive, and that the final question, whether the case made is such as to require the surrender, may be considered by the president, without whose warrant no surrender of the fugitive can lawfully be made. I repeat, however, that it is not necessary for me to decide, in this case, to what extent I am bound by the decision made, or the opinion declared in Kaine's case, nor that I should express an opinion upon the question itself, for the reason, not only that the mandate of the president was procured and delivered to the commissioner before he acted in this matter at all, but also because, in my judgment, the objections here made to the actual proceedings had by or before the commissioner may be considered and decided upon a concession, for all the purposes of this case, that such mandate or other authorization by the president was necessary.

§ 3418. *A sufficient warrant for the arrest of a fugitive.*

I. I proceed, therefore, first to the inquiry: Is the warrant, in virtue whereof the respondent herein made the arrest, sufficient on its face to justify him in arresting and detaining the alleged fugitive? On that question I entertain no doubt. It may be conceded, for the purposes of this question, that the commissioner by whom it was issued acted therein in exercise of a special jurisdiction of such sort that, to justify the marshal in making the arrest, every fact necessary to the jurisdiction of the commissioner to issue such a warrant must appear upon its face. The warrant distinctly refers to the treaty between the United States and Great Britain, and the act of congress of 1848, for giving effect to that treaty, as the basis of the proceedings before the commissioner. It recites and certifies that the commissioner is specially appointed to execute the act of congress referred to. It further recites that upon the application of the envoy extraordinary and minister plenipotentiary of Great Britain, duly accredited to the government of the United States, made under the tenth article of the said treaty, for the arrest of George Macdonell, otherwise Macdonnell, charged with the crime of forgery, and with the utterance of forged paper, at the city of London, in that part of the kingdom of Great Britain and Ireland called England, between the 22d day of January and the 28th day of February, 1873 (referring, also, to the recited complaint, for further particulars of the alleged offense), a mandate was issued by the department of state on the 13th day of March, 1873, under the seal of the state department, signed by the secretary of state, and directed to any commissioner specially appointed to execute the aforesaid act of congress. It further recites, that under the said treaty, complaint has been made before him (the said commissioner) that one George Macdonell, otherwise Macdonnell, did, heretofore, between the 22d day of January and the 28th day of February, in the year 1873, at the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of her said Britannic Majesty, together with one Edwin Noyes, now in custody in the said city of London, and Frederick Albert Warren and George Bidwell (now fugitives from justice), commit the crime of forgery and the utterance of forged paper, to wit, did feloniously, in said city and at the time aforesaid, forge and utter, well knowing the same to be forged,

two several acceptances of two several bills of exchange, each for the payment of one thousand pounds sterling, lawful money of Great Britain and Ireland aforesaid, with intent thereby to defraud the Governor and Company of the Bank of England, a corporation duly created by and existing under the laws of the United Kingdom of Great Britain and Ireland aforesaid, and did conspire together to commit the said offense, with intent to defraud the said Governor and Company of the Bank of England; and that the said George Macdonell, otherwise Macdonnell, is now seeking an asylum within the territory of the United States. After these recitals the warrant proceeds to command the marshal to arrest the said George Macdonell, otherwise Macdonnell, and bring him before the commissioner in order that, pursuant to the directions of the said mandate, the evidence of criminality of the said George Macdonell, otherwise Macdonnell, may be heard and considered, and, if found sufficient to sustain the charge, that the same may be certified, together with all the proceedings, to the secretary of state, that a warrant may issue for the surrender of the said George Macdonell, otherwise Macdonnell, pursuant to the said treaty. The warrant is under the hand and seal of the commissioner, who, with his signature, certifies to his special authority to execute the act of congress mentioned.

§ 3419. *It is sufficient if the description of the offense in a warrant in extradition cases follows the language of the treaty.*

Passing, for the moment, the suggestion that neither the complaint nor warrant sufficiently describes an offense within the treaty, the warrant, in the fullest manner, meets every possible requirement of the law. It shows, on its face, every fact which is even here claimed to be requisite to the jurisdiction of the officer, that such jurisdiction has been regularly and formally invoked, for the arrest of the alleged fugitive, and it declares, in terms, the special authority upon which the proceeding is based, to wit, the treaty, the act of congress, and the appointment of the officer to execute the law. It declares the demand of the foreign government, the mandate of our own, and the offense charged. The description of the offense might, in my opinion, for all purposes of instruction in the warrant of arrest, have followed the words of the treaty. The reference to the treaty, and the act passed to carry it into effect, identifies the charge with the treaty itself, and makes a charge of the offense of forgery import, *per se*, a charge of the offense of forgery mentioned in the treaty. This is all that is essential to jurisdiction of the subject-matter. It is not necessary that the particulars required to be proved, in order to establish the offense mentioned in the treaty, should be specified in the warrant; nor is it any part of the province of the warrant to disclose the details, in order that the prisoner may be notified of those details. Forgery is the offense for which the treaty provides, that, it being charged, the magistrate shall proceed. The warrant, reciting the other jurisdictional facts, declares that, "on complaint to the officer, 'forgery' is charged," etc. If there were no other detail or specification, I should hold that, for all the purposes of the warrant of arrest, this was sufficient.

It follows that there is no defect in the warrant, and that it is sufficient, on its face, to justify the marshal in arresting and holding the prisoner. Hence, if there be any illegality in the proceeding, or want of jurisdiction in the commissioner to detain the prisoner in custody for taking of proofs, it must be sought in the proceedings brought up by the *certiorari*.

II.—The return to the *certiorari* shows that, on the 18th of March, 1873

Edward Mortimer Archibald, Esq., her Britannic Majesty's consul-general at the port of New York, presented to the commissioner the mandate issued by the department of state of the United States, annexed to the return, and, at the same time, made the complaint, upon oath, which is also annexed.

The mandate is addressed to any justice or judge of the several courts therein named, or to any commissioner specially authorized to execute the acts of congress of August 12, 1848 (9 U. S. Stat. at Large, 302), and of June 22, 1860 (12 id., 84), and recites that, pursuant to the tenth article of the treaty of the 9th of August, 1842 (8 id., 572), between the United States and Great Britain, for the mutual delivery of criminals, fugitives from justice in certain cases, Sir Edward Thornton, accredited, etc., . . . minister plenipotentiary of her Britannic Majesty, has made application to the government of the United States, for the arrest of George Macdonell, charged with the crime of forgery on the Bank of England, and alleged to be a fugitive from the justice of Great Britain, and who is believed to be within the jurisdiction of the United States, and that it appears proper that the said George Macdonell should be apprehended and the case examined in the mode provided by the acts of congress aforesaid, and declares that, to the end that the above named officers, or any of them, may cause the necessary proceedings to be had in pursuance of said acts, in order that the evidence of the criminality of the said George Macdonell may be heard and considered, and, if deemed sufficient to sustain the charge, that the same may be certified, together with a copy of all the proceedings, to the secretary of state, that a warrant may be issued for his surrender pursuant to said treaty, the secretary of state certifies the facts recited. This mandate is dated March 13, 1873, is authenticated by the seal of the department of state, and is signed by the secretary.

The mandate having recited the application of the British government for the surrender of George Macdonell for the crime of forgery, under and in pursuance of the treaty, the complaint itself begins by appropriate reference to that application, that is to say, it is entitled, "In the matter of the application for the extradition of George Macdonell, otherwise Macdonnell, under the treaty between the United States and Great Britain;" and thereupon, upon oath, the complaint charges that one George Macdonell, otherwise Macdonnell, did heretofore, between the 22d day of January and the 28th day of February, in the year 1873, at the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of her said Britannic Majesty, together with one Edwin Noyes, now in custody, in the said city of London, and Frederick Albert Warren and George Bidwell (now fugitives from justice), commit the crime of forgery and the utterance of forged paper, to wit, did feloniously, in said city and at the time aforesaid, forge and utter, well knowing the same to be forged, two several acceptances of two several bills of exchange, each for the payment of one thousand pounds sterling, lawful money of the United Kingdom of Great Britain and Ireland, aforesaid, with the intent thereby to defraud the Governor and Company of the Bank of England, a corporation duly created by and existing under the laws of the United Kingdom of Great Britain and Ireland, aforesaid, and did conspire together to commit the said offense, with the intent to defraud the said Governor and Company of the Bank of England; that the said George Macdonell, otherwise Macdonnell, is a fugitive from the justice of Great Britain, and did, on the 8th day of March, in the year 1873, sail on board the steamship Thuringia, bound for the port of New York, for the purpose of seeking an

asylum within the territory of the United States; and that the crime of which the said Macdonell, otherwise Macdonnell, has so as aforesaid been guilty, would justify his apprehension and commitment for trial for such crime, if the same had been committed within the said southern district of New York or within the jurisdiction of the district court of the United States for the southern district of New York.

The commissioner further returns, that, upon such mandate and complaint, he issued to the marshal the warrant for the apprehension of the said alleged fugitive, of which warrant he annexes a copy, the substance of which has been above stated; that on the 20th day of March, 1873, the said George Macdonnell was brought before him, in the custody of the said marshal, and that, on being advised of the charge against him, he desired an adjournment, upon which the commissioner adjourned the examination to the 25th of March, 1873, committing the prisoner, meanwhile, to the custody of the marshal; and that on the 25th of March, 1873, the said George Macdonnell was brought before the commissioner, was attended by counsel, and proceedings were had, which appear by the record thereof annexed, whereupon the proceedings were adjourned to the 8th of April, 1873, at 12 o'clock, noon, and meanwhile the prisoner was committed to the marshal, to be then produced.

The record of the proceedings shows that, on the 25th of March, the counsel for the prisoner moved to dismiss the complaint and warrant, upon grounds not materially unlike those urged on the present hearing; that three witnesses were examined, whose testimony is given; and that, in the course of the examination, a document was produced and put in evidence, against the objection of the counsel for the prisoner, which purported to be a warrant issued March 8, 1873, by the lord mayor of London, for the arrest of George Macdonnell, charged with having forged, in the month of February last, two bills of exchange for £1,000 each, which warrant the counsel for the prosecution claimed to be sufficiently proved to entitle it to be read in evidence. The record states that thereupon the counsel, "Mr. Da Costa, applies, on affidavit, for adjournment, and states that depositions duly certified are *en route*. Mr. Brooke (counsel for the prisoner) objects to adjournment, and applies for discharge of prisoner. Mr. Da Costa, stating that depositions had been received which had not been duly certified under the act, Mr. Brooke demands names of witnesses whose depositions are under way." "Adjourned, under objection, to April 8, 1873, at 12 M., and defendant remanded to the custody of the marshal." It is proper to add, that the several commitments of the prisoner to the custody of the marshal, to be produced on the days to which the examination was adjourned, appear by the marshal's return to the writ of *habeas corpus*.

Upon the papers and proceedings thus returned by the commissioner, several objections are now made, on behalf of the prisoner, which, it is claimed, go to the jurisdiction of the commissioner, and point out such defects that the whole proceeding before him is without jurisdiction and void, and, therefore, require me to discharge the prisoner from custody. Without giving the precise language of the several objections, they may be briefly stated as follows: The commissioner had no jurisdiction to issue the warrant, and has no jurisdiction to hold the prisoner for the purpose of taking proofs, because: *First*. The complaint made to the commissioner does not show that, prior to the making thereof, any requisition had been made under the authority of the British government, and that the authority of the government of the United States had

thereupon been obtained for the apprehension and committal of the relator. *Second.* Neither the complaint, nor the mandate which was presented to the commissioner, sufficiently charged the prisoner with any specific offense, within the treaty of extradition, to give to the commissioner jurisdiction.

§ 3420. *The complaint on which a warrant issues need not show that the president has issued a mandate.*

1st. The first objection, of course, assumes that the prior authority of the government of the United States was necessary before the commissioner could exercise any jurisdiction in the matter, and it pushes the doctrine of the case holding that proposition one step further, that is to say, that the complaint made to the commissioner, of the offense charged, and to be inquired of, must itself state that such mandate had issued on the application of the foreign government; and that it is not sufficient that the fact exists, that the mandate had issued to the commissioner, upon due application, and has been placed in his hands, but the complaint of the commission of the offense must state that it has issued.

Certainly, nothing in *Ex parte Kaine* warrants this claim. So far as it is supposed to be sustained by express prior adjudication, an observation of Mr. Justice Blatchford, in *In re Farez*, 7 Blatch., 46 (§§ 3438-42, *infra*), is relied upon. The observation is in these terms: "As the proceeding is a special proceeding, I think it is necessary, not only that the complaint made to the commissioner, upon which the warrant is asked, should show that such a requisition has been made upon the government of the United States, and such authority obtained from it, but that those facts should also be set forth on the face of the warrant. As the first warrant contained no such allegation, it is not valid." He was discussing the validity of the warrant, not the sufficiency of the complaint. His proposition was, that, in a special proceeding of this kind, it is necessary to the justification of the marshal that all facts essential to the jurisdiction of the commissioner should appear on the face of the warrant. If the expression used by him must be taken to import that it is equally essential that the requisition and mandate should be averred in the complaint, it was not called for by the point actually decided. I am not at all satisfied that such was the intention. The observation itself and other parts of the case indicate that all he meant was, that it is not enough that it is found in the complaint; that it must appear in the warrant that the requisition has been made and the mandate issued; and that its presence in the complaint will not cure the defect in the warrant. If the observation means more than this, I must withhold my concurrence.

The language of the learned counsel for the prisoner, in treating of the indispensable necessity of such requisition and mandate to give the commissioner jurisdiction, calls such mandate "the commission of the officer," *pro hac vice*. If that be so, then the point now taken is this: A complainant must set out in his complaint which he presents to the officer, the authority of the officer to receive it. This is not required in ordinary complaints of crimes under state laws or the laws of the United States. It is enough that the complaint avers a crime, and that such complaint is made to an officer who has legal authority to receive and act upon it. The act of 1848, to give effect to the treaty, in terms declares that the officers named are severally vested with power, jurisdiction and authority, "upon complaint made, under oath or affirmation, charging any person found within the limits of any state, district or territory, with having

committed, within the jurisdiction of such foreign government, any of the crimes enumerated or provided for by any such treaty or convention, to issue his warrant," etc. The allegations of the complaint are addressed, and may be wholly addressed, to the commission of the offense. That is all that the statute requires. It is all that the reason and good sense of the proceeding requires. The party complaining, having found a proper officer, an officer having actual and legal jurisdiction, may properly address himself to such officer, not averring, but assuming, such jurisdiction. This is in analogy to other proceedings in courts of justice. True, the complainant ought, in some form, to lay before the commissioner all facts necessary to invoke and warrant the exercise of the jurisdiction, but that is all. What the commissioner does upon complaint of those facts will depend, for its validity, upon his jurisdiction to act on those facts, and that may become the subject of objection, inquiry and proof. This was manifestly the view of Judge Nelson himself, when he decided the case of *Ex parte* Kaine, although he did not particularize the forms of procedure. On proof that authority had been given by the president for the arrest of Kaine he offered to withhold the discharge and proceed himself to take evidence which might warrant the surrender, clearly showing how that learned judge, in the administration of this law, as in other cases, while tenacious of all that he deemed material either to the right observance of law, or to the preservation of the dignity and honor of the government, or essential to the protection and safety of parties charged, did not allow himself to be carried away by undue and needless regard for the mere forms of proceeding. I infer, from what is stated at the conclusion of his decision in Kaine's case, that, had counsel been able to show that, before any proceedings were taken for the arrest of the alleged fugitive, the authority of the president had, in fact, been given, he would have taken the proceeding, as it then stood, on the arrest already made, and received proofs which might result in the surrender of the fugitive.

In the present case, moreover, the proceeding before the commissioner may properly be regarded as a single, connected proceeding, of which each of the steps forms a part, and all together constitute a complete record of jurisdiction. The mandate of the government of the United States was presented to the commissioner, showing the requisition of the British government for the extradition of George Macdonell, in pursuance of the treaty, and calling upon the commissioner to cause the necessary proceedings to be had in pursuance of the acts of congress referred to, in order that the "evidence of the criminality of the said George Macdonell may be heard and considered, and, if deemed sufficient, may be certified, . . . and that a warrant may issue for his surrender, pursuant to said treaty." This (if, as here claimed, essential to the jurisdiction of the commissioner) was the very first step in the proceeding, and became a part of the record thereof. The complaint then follows, entitled in the very matter of the requisition and mandate, that is to say, "In the matter of the application for the extradition of George Macdonell, otherwise Macdonnell, under the treaty between the United States and Great Britain." This appropriately connects the complaint with the requisition already shown by the mandate, establishes complete identification, and becomes the next step in the record. The two papers together establish complete jurisdiction.* I do not mean to be understood that this reference, in the complaint, in terms, to the requisition and mandate, was indispensable. I have above said the contrary; but it was appropriate and is quite sufficient.

§ 3421. *What is necessary to constitute a sufficient complaint on which a warrant may issue in extradition cases.*

2d. The second objection, as argued, embraces several particulars: (1) That the mandate does not describe, with sufficient particularity, an offense within the treaty; (2) That the complaint, on which the warrant of arrest was issued, does not sufficiently describe such offense; (3) That the descriptions of the offense, as contained in the mandate and complaint, do not, on their face, sufficiently appear to be identical; and (4) That there is a variance between the requisition and mandate, on the one hand, and the complaint and warrant, on the other, in this, that the requisition and mandate describe the offender as "George Macdonell," while the complaint and the warrant described the offender as "George Macdonell, otherwise Macdonnell," so that, by reason of the variance in this respect, *non constat* that the prisoner is the person for whom requisition was made, or to whom the mandate relates.

(1) There is no especial form prescribed by law, in which the government of the United States shall (assuming it to be necessary) give its authority to the commissioner to proceed in the matter. It is enough that the government recognizes the application of the foreign government, and gives authority for the institution of proceedings for the ascertainment of the facts alleged to bring the case within the treaty. It is enough that the authority, when given, describes the particular charge to be investigated, in the very terms of the treaty, in aid of the execution whereof the proceeding is directed. Hence, if the government sees fit to describe the subject-matter in general terms, as a charge of "murder," or a charge of "forgery," that is sufficient, designating, of course, the alleged offender and fugitive to be proceeded against. Such language in a mandate which is, in terms, issued in pursuance of the treaty, imports that it is a charge of murder within the treaty, or a charge of forgery within the treaty. The authority it confers is for the investigation of the charge of an offense within the treaty. That the mandate authorizes, and not the investigation of any other or different offense. Whether the proofs, when given, to establish such an offense within the meaning of the treaty, sufficiently warrant a commitment, it is for the commissioner to consider and report to the executive.

(2) The sufficiency of the complaint was discussed on the argument very much as if it were a question of its sufficiency as a pleading; and the reasons assigned for the objection were, mainly, such as are apt to require definiteness, particularity, and the absence of all variance, upon the most technical rules of pleading. Such technical precision is not required in a complaint, for the mere purpose of jurisdiction to proceed thereon. For, be it remembered, that the point under consideration is, that the commissioner had not jurisdiction to proceed, on such a complaint, to the issuing of a warrant; and it is argued that the present complaint fails to give such jurisdiction, because it does not describe the alleged forged instruments with sufficient particularity as to date, names of the persons whose acceptances were forged, and the times of payment thereof. The complaint does state that the alleged offender "did, heretofore, between the 22d day of January and the 28th day of February, in the year 1873, at the city of London, . . . within the jurisdiction of her said Britannic Majesty, . . . commit the crime of forgery and the utterance of forged paper, to wit, did feloniously, in the said city, and at the time aforesaid, forge and utter, well knowing the same to be forged, two several acceptances of two several bills of exchange, each for the payment of one thousand pounds sterling, lawful money

of the United Kingdom of Great Britain and Ireland, . . . with intent thereby to defraud the Governor and Company of the Bank of England, a corporation duly created by and existing under the laws of the United Kingdom of Great Britain and Ireland aforesaid." What follows in regard to conspiracy, I regard as of no importance to the present question. If it does not strengthen the case made against the accused, it may be regarded as surplusage, and certainly does not change or alter the meaning or effect of what I have cited from the complaint. The question is, does what I have thus cited show a case of forgery, within the treaty? Not whether it would constitute an indictment free from special exception. I have no hesitation in saying that it does charge the crime of forgery at the common law, however it may fail to describe it with the particularity required in a formal indictment for the offense.

I do not deem it necessary to question what is said touching the requisites of the complaint in this respect, in *In re Henrich*, 5 Blatch., 414 (§§ 3447-53, *infra*), or in *In re Farez*, 7 id., 34 (§§ 3438-42, *infra*); but I am of the opinion that the description of the offense here does satisfy the requirement of the act of 1848, which authorizes the officer to issue his warrant "upon a complaint charging any person . . . with having committed . . . any of the crimes enumerated or provided for by such treaty."

To the suggestion that it may be true, and may appear when the specific instrument is produced, that the prisoner had authority to sign the name or names alleged to be forged, it must suffice to say — that is matter of defense — the subject of proof. Enough for the complaint that it shows a *prima facie* case of forgery. So, to the suggestion that, between the days named there may be a large number of acceptances, each of which would answer the description in this complaint — every possible conjecture on the subject need not be excluded by the terms of the complaint. It would be possible to suggest the same thing, if the complaint named a precise date, with names, and when payable, etc., or even gave a copy of the bills of exchange. Enough, as already said, that the complaint makes a *prima facie* case; that is to say, this is enough to give jurisdiction to the commissioner. It is in that aspect alone that I am considering it.

That the party should be fairly apprised of the charge made, and with such fullness as is reasonably necessary to enable him to meet the investigation, may be conceded; but that appertains, after jurisdiction is acquired, to the conduct of the proceeding, and there is no danger that, for all the purposes of the inquiry, whether he ought, upon the proofs, to be committed, the investigation will not furnish him with that information, in respect to any detail not contained in the complaint as it now reads. It is the duty of the commissioner to proceed with entire fairness towards the prisoner, in every respect. The presumption is that he will do so. It is sufficient for the question before me that he has jurisdiction for that purpose.

(3) The mandate and the complaint are in perfect harmony. I have already said that I deem the mandate sufficient. It is no ground of objection that the complaint is more specific than the mandate. Upon the assumption that the mandate was necessary, and required the officer to receive the complaint, there arises the legal inference that the complaint made refers to and charges the same offense. Upon the argument submitted, whenever the complaint embodied more details than were given in the mandate, it could be successfully insisted that they did not appear to be identical, and, therefore, jurisdiction did not appear by the complaint.

§ 3422. *Identity of name raises a presumption of identity of person.*

(4) As to variance between the mandate and the complaint and warrant, because in the former the alleged offender is called "George Macdonell," and in the latter "George Macdonell, otherwise Macdonnell," I think there is nothing in the objection. The warrant, as already seen, recites the requisition and mandate, and shows unequivocally that the warrant is issued in pursuance thereof, and that it directs the arrest of the alleged offender named therein. The suggestion in the nature of an *alias*, contained therein, does not describe a different person, but seeks to aid in his complete identification. I do not doubt that the *alias* designation might, if it were of any importance, be regarded as surplusage; but it cannot properly be construed as indicating another person. Identity of name raises the presumption of identity of person. Like observations are pertinent to the supposed variance in this respect between the mandate and the complaint, which, as already suggested, form parts of the same record.

§ 3423. *Upon habeas corpus the court cannot review decisions of the commissioner on questions of the competency of evidence in extradition cases.*

Finally, I must decline considering the matter not alleged by way of plea or traverse to the return of the marshal, but urged on the argument, namely, that the commissioner has already, in the progress of his proceeding, received in evidence a document which was not legally admissible. If that suggestion were well founded, it would not defeat his jurisdiction. What may be the effect of the reception of the evidence, if it were deemed inadmissible, even whether, in case the facts were otherwise clearly proved, it would have any effect to avoid the finding of the commissioner, it is unnecessary now to say. The decision in *In re Farez*, 7 Blatch., 491, is to the effect that an error of that description does not defeat the jurisdiction of the commissioner, or invalidate the arrest upon the warrant, or entitle the prisoner to be discharged. Besides it is in no case proper to resort to the writ of *habeas corpus*, or to a succession of such writs, from day to day, for the purpose of reviewing the interlocutory decisions of the commissioner upon questions of that nature.

§ 3424. *Commissioner has judicial discretion in the matter of granting adjournments.*

To the suggestion that the commissioner had, when the writ was in this case applied for, granted an adjournment to enable the counsel for the foreign government to produce testimony, and that the commissioner was thus unjustly and unreasonably protracting the investigation, when, in fact, up to that time, there had, as claimed, been no legal evidence produced, I must say that the conduct of the inquiry is committed to a sworn public officer, and his power to grant adjournments, at the instance of either party, is unquestionable. Often it is indispensable to a just inquiry, and may often be necessary for the protection of the accused from an unfounded charge. The commissioner must exercise a just and reasonable discretion on that subject. The ends of justice, on the one hand, and the rights of the accused, on the other, cannot otherwise be preserved. Should that discretion be abused, the prisoner can doubtless have relief, but no such abuse at present appears. The practice in analogous cases, in the state wherein the proceedings are conducted, is said in one of the cases referred to, to be a guide to the commissioner in the conduct of the investigation. If this be so, then it is quite pertinent to refer to a familiar practice, sanctioned by the courts of this state, where persons charged as fugitives from justice are sought to be returned to another state. Not only is the arrest made, and the accused

held for examination, and time allowed for the purpose, but they are even held for a reasonable time to enable the complaining parties to procure the necessary requisition for their delivery to the executive of the state from which they have fled; and the practice is also familiar, where persons are charged with crime within the state jurisdiction, and the examination is pending, to adjourn the same from time to time, and when such persons have been brought up on *habeas corpus*, they have been remanded, to the end that such examination may be continued to a conclusion. It will also be found that the practice of granting reasonable adjournments has obtained heretofore in all extradition cases; and there is no reason, either of favor to the prisoner, jealousy of the foreign government, or otherwise, why it should not prevail in those cases as well as in cases of crime alleged to have been committed in violation of our own laws.

What I have said seems to me to embrace, either expressly or by implication, all the grounds upon which the discharge of the prisoner is claimed, and I cannot regard them as sufficient. Let the prisoner be remanded to the custody of the marshal, to be held under the warrant of arrest and the commitments of the commissioner, that the proceedings on the inquiry into the criminality of the prisoner may be continued, and let the writs of *habeas corpus* and *certiorari* be discharged.

IN RE FAREZ.

(Circuit Court for New York: 7 Blatchford, 345-360; 2 Abbott, 346-364. 1870.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—In this case a writ of *habeas corpus* and writ of *certiorari* have been issued to review the proceedings which have taken place before Kenneth G. White, Esq., a United States commissioner, in reference to the application of the authorities of the Swiss confederation for the extradition of the petitioner, Francois Farez. The proceedings which took place before the commissioner have been brought before me, and the questions involved have been fully discussed by the respective counsel. It appears by the record that the proceedings went on before Commissioner White by consent, he not having been the commissioner who issued the warrant of arrest, and that before the matter was proceeded with at all before Commissioner White on the part of prosecuting party, a motion was made before the said commissioner by the accused, to dismiss the complaint and warrant on several grounds.

§ 3425. *What averments are sufficient in a complaint for extradition made by a foreign consul.*

The first ground was, that the complaint was insufficient, because it did not contain anything more than an official statement on the part of the deponent, as consul, etc., that the prisoner was charged with the crimes stated, and did not contain the express personal averment to that effect, required by law. I do not think there is anything in that objection. Necessarily, in carrying out the provisions of extradition treaties, the complaint must, in many cases, be made by the representative of the foreign government; and all that can be required is that it shall be sufficiently specific, clear and distinct in its averments to enable the party accused to understand precisely what it is he is charged with. The complaint made in this case by the Swiss consul in his official capacity, he not pretending to any personal knowledge of the matters set forth in the complaint, contains all the necessary and proper averments to

enable the party accused to understand what offenses he is charged with having committed; and there is no force in the objection that it does not contain anything but an official statement.

§ 3426. — *it need not contain an averment by what magistrate abroad the warrant against the prisoner was issued; it need not aver that any warrant was issued.*

The second objection was, that it did not appear by the complaint by what magistrate abroad the warrant against the prisoner had been issued, so as to enable the commissioner to decide whether such magistrate had authority in the premises. The complaint states that a warrant of arrest against the prisoner, on account of the crimes specified in the complaint, has been issued by the competent and proper judicial authority for the purpose, in the jurisdiction of the Swiss confederation. If the averment in question were a material averment, undoubtedly the one found in this complaint would be insufficient. But it is not a necessary preliminary step to an investigation under an extradition treaty, that a warrant shall have been issued abroad. Therefore, the averment in question is surplusage.

§ 3427. *The warrant need not show that the commissioner issuing it was appointed by the circuit court for that purpose.*

The third objection was, that it did not appear by the warrant that the commissioner was appointed by the circuit court of the United States for the purpose of issuing the same. That objection was not urged on the hearing before me. The point involved in the objection is, that the warrant does not show that the commissioner was appointed by the circuit court to issue this particular warrant. That is true; but it is not necessary that it should so appear. It does appear on the face of the warrant that he was appointed to issue warrants in all cases of extradition falling under the provisions of the acts of congress of August 12, 1848, and June 12, 1860. The act of 1848 (9 Stat. at L., 302) applies to any treaty or convention for extradition between the government of the United States and any foreign government, and gives the power to issue a warrant to any commissioner authorized so to do by any of the courts of the United States. This warrant avers that the commissioner who issues it is a commissioner appointed by the circuit court of the United States for the southern district of New York, and is a magistrate, and is a commissioner specially appointed to execute the act of August 12, 1848, and the act of June 22, 1860. That is sufficient.

§ 3428. *Under our treaty with Switzerland (11 Stat. at L., 593), it is sufficient that the crime charged be subject to infamous punishment in Switzerland.*

The fourth objection was, that the complaint did not allege that the crime in question was punishable by infamous punishment in the United States, and that it was necessary that the crime should be so punishable to bring it under the treaty. The averment of the complaint in that respect is, that the crimes alleged are contrary to the laws of the Swiss confederation, and are by such laws subject to infamous punishment, and to punishment by imprisonment in the state prison. There is no averment that they are subject to infamous punishment by the laws of the United States. The convention for extradition between the United States and Switzerland (11 Stat. at L., 593) says that persons shall be delivered up according to the provisions of the convention, who shall be charged with the crimes therein specified, "when those crimes are subject to infamous punishment." My interpretation of this provision is, that when one of the specified crimes has been committed, and the extradition of

the person who has committed it is demanded, it is sufficient if such crime is subject to infamous punishment in the country where it was committed, without its being necessary that it should be also subject to infamous punishment in the country from which the extradition of such person is demanded. The complaint is, therefore, sufficient in this respect, without regard to the question whether it is necessary to make any averment of the kind in the complaint, which perhaps may be doubtful.

§ 3429. *An objection that there is no evidence of a demand by a foreign power for the extradition of a criminal is cured by the mandate of the president showing that a demand had been made.*

The fifth objection was, that there was no evidence that the supreme power of the Swiss confederation had made a demand on the government of the United States for the extradition of the prisoner. That objection was cured by the production afterwards of the mandate from the president of the United States, which sufficiently showed that a demand for the extradition of the prisoner had been made by the only authority which the government of the United States is called upon to recognize as representing the Swiss confederation.

§ 3430. *In an extradition case the accused has no right to cross-examine the complainant before any evidence has been offered for the prosecution.*

The objections referred to were all of them properly overruled by the commissioner. He also properly overruled a motion, based upon those objections, to dismiss the proceedings. Then the case on the part of the prosecution was commenced, and the counsel for the prisoner claimed the right to cross-examine the complainant before any other evidence should be offered on the part of the prosecution. That claim was overruled by the commissioner, and an exception to such ruling was taken. I see no objection whatever to that ruling. The prisoner had the right to call the Swiss consul, who was the complainant, as a witness, and examine him at any stage of the case, but he could not properly claim the right to cross-examine him before any other evidence was offered, when it appeared on the face of the complaint that the consul did not pretend to have any personal knowledge of the matters stated in the complaint.

Then the complaint, and the sworn depositions attached thereto, made before the judicial authorities in Switzerland, were offered in evidence before the commissioner. The counsel for the prisoner objected to their admission in evidence on several grounds. The first was, that the mandate issued from the state department had not been produced and put in evidence. The mandate was then produced by the counsel for the prosecution, and given to the commissioner, and it is now before me. The return of the commissioner to the writ of *certiorari* does not state that the mandate was put in evidence, but as the objection taken was that it had not been put in evidence, and as it was produced and given to the commissioner, it must be intended that it was put in evidence for all practical purposes. The record does not show that any objection was taken to the competency of the mandate as evidence, after it had so been given to the commissioner; and I regard the mandate as sufficient in form.

§ 3431. *In foreign extradition cases depositions taken abroad are admissible in evidence, when properly authenticated under the act of June 22, 1860.*

The second objection taken to the admissibility of the papers from Switzerland was that, the charge being forgery, the alleged forged papers ought to be produced before any other evidence could be introduced. The objection is

not well taken. The evident intention of congress in the act of June 22, 1860 (12 Stat. at L., 84), as was held by Mr. Justice Nelson, Judge Shipman and myself, in the case of *In re Henrich*, 5 Blatch., 414 (§§ 3417-53, *infra*), was to enlarge the field of evidence in these cases. As was stated by Judge Shipman in his opinion in that case: "The act of June 22, 1860, enlarges the class of documentary evidence which may be adduced in support of the charge of criminality." He further said that, "in regard to the depositions upon which the foreign warrant of arrest may have issued, embraced in section 2 of the act of August, 1848, it provides for the admission of *any* depositions, warrants, or other papers, or copies of the same, which are so authenticated that the tribunals of the country where the offense was committed would receive them for the same purpose." It is also quite apparent that when these depositions, authenticated in such a manner as to entitle them to be received for similar purposes by the tribunals of Switzerland, are received in evidence here on the question of the criminality of the prisoner, as they are entitled to be, under the act of 1860, the judicial authorities here are bound to give to them the same effect as if the witnesses themselves were personally present, testifying here. In the present case it appears, by the papers from Switzerland, that, on the occasion of the giving of testimony by the witnesses whose depositions were taken, copies of which are produced as evidence, the alleged forged instruments were produced and shown to them, and they examined them, and examined their signatures to them, and stated that they did not know such signatures. On this state of facts, it is quite clear that there is nothing in the objection taken, because the depositions produced are the depositions of witnesses who had the alleged forged papers before them at the time of giving such depositions. The case stands now precisely as if the witnesses had been examined in person before the commissioner, and the alleged forged papers had been produced to them before him.

§ 3432. — *in such cases the court cannot pass upon the discharge of the executive functions by the president; it cannot determine as to the sufficiency of the evidence upon which the president acted.*

The third objection was, that the charge set forth in the complaint was subsequent in date to that set forth in the mandate of the president, and that therefore the charge before the commissioner was another and a different one from that set forth in such mandate. There is no force in this objection. The mandate was issued on December 9, 1869. It alleges that the political agent and consul-general of Switzerland has made application to the government of the United States, for the arrest of Francois Farez, charged with the crime of forgery and embezzlement, and alleged to be a fugitive from the justice of Switzerland, and believed to be within the jurisdiction of the United States. All that this language implies is that, before December 9, 1869, Farez had committed the crime of forgery and embezzlement in Switzerland, and had fled from there to the United States. The evidence that was placed before the president is something with which this court has nothing to do. This court cannot pass, in any manner whatever, upon the discharge of the executive functions of the president. It is sufficient that the president, as is evidenced by a paper coming through the recognized authority of the government, the secretary of state, has come to the conclusion that satisfactory evidence has been produced to him that Farez is charged with this crime. This court can in no manner examine into the question as to the evidence on which the president came to that conclusion. The papers put in evidence before the commis-

sioner show that, although the complaints of the persons who made the charge before the magistrate in Switzerland were made on December 14, 1869, and the magistrate proceeded to make further investigations in regard to the matter on January 21, 1870, yet the offenses to which all the papers relate were committed, if at all, when the forged instruments were passed away by Farez, namely, in August, 1869. Therefore, in no proper sense does the complaint set forth offenses subsequent in the date of their commission to those set forth in the mandate. The complaint sets forth offenses committed at some time in August, 1869, and the mandate of December 9, 1869, only refers to an offense previously committed. The mandate is, indeed, very general, but the complaint which was immediately put before the officer who issued the warrant is specific and clear, and there is nothing to show that the mandate and the complaint refer to different offenses. The mandate authorizes an arrest for forgery, and the offense of forgery is the offense set forth in the complaint and in the warrant of arrest.

§ 3433. *As to the proper authentication of papers in foreign extradition cases under the act of 1860.*

The fourth objection to the documents was that they were not properly legalized. The objection is very general. It does not properly state wherein the legalization was imperfect; but I have considered every question raised upon the legality of the papers. It was held in the case of *In re Henrich* that papers of the character of those here presented are admissible under the act of 1860, when properly authenticated, and that the act intends to enlarge the class of documentary evidence which may be adduced in support of the charge of criminality, and, in addition to the depositions on which a foreign warrant of arrest may have issued, provides for the admission of any depositions, warrant or other papers, or copies of the same, which are authenticated in a certain manner. Therefore, it is no objection to these papers that they do not appear to have been papers on which a warrant of arrest was issued abroad against the prisoner. The only question is, as to whether the papers are properly authenticated.

The act of 1860 provides that the certificate of the principal diplomatic or consular officer of the United States resident in Switzerland shall be proof that any paper or other document offered in evidence is authenticated in the manner required by that act. The diplomatic or consular officer must state that the papers are authenticated so as to entitle them to be received for similar purposes by the tribunals of Switzerland; that is, entitled to be received by the tribunals of Switzerland for similar purposes for which the papers mentioned in section 2 of the act of 1848 are to be received, namely, for the purpose of being evidence of the criminality of the person apprehended.

The certificate in this case of the minister resident of the United States in Switzerland, Mr. Rublee, dated February 5, 1870, certifies that "the foregoing copies of the warrant, depositions and other papers are legally and properly authenticated so as to entitle them to be received for similar purposes by the tribunals of the Swiss confederation, and to be received by the said tribunals for the purposes and similar purposes mentioned in section 2 of the act of congress, entitled 'An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivering up of certain offenders,' approved August 12, 1848."

This certificate follows the language of the act of 1860. The same objection that is made to this mode of certification was made to the certificate in the cas

of *In re* Henrich. The objection was there taken that the certificate of the minister did not state explicitly that the paper was admissible by the tribunals of the foreign country in support of the charge of criminality, or as evidence of the criminality of the prisoner. From the report of that case, it appears that the certificate stated, as this one does, that the paper was receivable for "similar purposes." On that subject the court, in that case, after referring to the act of 1848 as stating that the purposes for which the documentary evidence is made admissible are to support the charge of criminality, says that the act of 1860 declares that the documentary evidence which it makes admissible is to be received for the same purposes mentioned in section 2 of the act of 1848 — that is, in evidence of the criminality of the prisoner. It further says: "The meaning of the certificate is perfectly obvious, when considered in reference to its object, and in connection with the certificates of the Prussian officials. The latter declare it to be a valid piece of evidence touching the charge of criminality, which it embraces and sets forth with particularity." In the present case, the certificate of the minister refers to the papers as being legally and properly authenticated, so as to entitle them to be received for similar purposes by the tribunals of the Swiss confederation. The authentication which is thus referred to by the minister is a certificate made by the chancellor of the Swiss confederation. He certifies to the signature of the chief of the state chancery of the canton of Berne, in Switzerland, and to the authenticity of the seal of such state chancery. He adds: "I moreover certify that Mr. Justin Brossard, president of the tribunal of the district of the Franches Montagnes, Canton Berne, Switzerland, is, according to the conditions of the actual legislation of that canton of Switzerland, competent to institute penal examinations of the nature of the one which, conformably with the foregoing papers, was opened and carried on agreeably with the forms of legislation adopted in the Canton Berne, against Francois Farez, blacksmith, burgher of Epiquevez, Canton Berne, and latterly established at Les Bois, as an inn-keeper, in said canton of Berne, for forgery, and the uttering of papers forged by him; that, in particular, the aforesaid Mr. Justin Brossard, in his said capacity of president of the tribunal of the district of the Franches Montagnes, is legally authorized, and, in said district, the only judge competent to admit complaints against crimes of the nature of those which Farez has committed, to issue warrants of arrest and to cause them to be executed, to hear witnesses, appoint experts, and receive legal oaths; that further, the interrogatories and opinions of experts, here above reported by said Justin Brossard, would be amply sufficient to warrant the arrest of Francois Farez, and his committal for trial and judgment before the tribunals of the canton of Berne, if he were in Switzerland, for the crime of forgery and uttering forged papers, of which he is accused." That is a certificate, in substance, that the interrogatories and opinions of experts contained in these papers are receivable before the tribunals of the canton of Berne, in Switzerland, as evidence of the criminality of Farez, because it expressly states that they would be sufficient to warrant his arrest and committal for trial. If they are sufficient for that purpose, it necessarily follows that they must be receivable in evidence on the question of his criminality.

Taking the certificate of the minister and the chancellor together, there is a substantial compliance with the act of 1860. And even if the certificate of the chancellor is to be regarded as speaking only of the interrogatories and the opinions of experts as being sufficient to warrant the arrest of Farez and his committal for trial, and as not referring to the complaints and the depositions

(which form part of the papers) of the parties whose names were forged, still the certificate of the minister, which covers by name "the warrant, depositions and other papers," covers complaints, the depositions, the interrogatories, the opinions of the experts and their report, and all other documents. Therefore, on the certificate of the minister by itself, there is a sufficient compliance with the act of 1860, irrespective of anything that is found in the certificate of the chancellor.

The further objection was taken that each one of these papers ought to have been certified by itself. But I think that these papers form substantially one proceeding and one document. Each paper refers to the papers which precede it, and they are all as much connected together as are the papers which form the record in a suit in a court of the United States. All of them are proceedings before the same magistrate, in the same tribunal, and relate to the same transaction, and I think they are properly certified as one paper, and were properly admitted in evidence. The warrant of arrest issued against the prisoner in Switzerland, and translations of the foreign documents, and the statutes of the state of New York, were then put in evidence without objection. It was then admitted by the counsel for the prisoner that the prisoner was Francois Farez, and that he was a farrier and hotel-keeper at Les Bois, Switzerland.

§ 3434. *Where persons are to be extradited for infamous crimes, it must be proved that the crime charged is infamous.*

The prosecution then rested, and the counsel for the prisoner moved to discharge the prisoner on several grounds. The first was that it ought to be shown that the punishment for the offense charged was infamous, and that that had not been shown. I think that the proper construction of article 14 of the convention with the Swiss confederation is, that there can be no extradition of a person charged with any of the crimes enumerated in that article, unless such crime is subject to infamous punishment in the country where the crime is committed. It was, therefore, necessary to show, in this case, that the crime with which Farez was charged was subject to infamous punishment in Switzerland. That was, in my judgment, sufficiently shown. The offense charged was clearly, according to the papers, an offense against the laws of the canton of Berne, just as here it would have been an offense against the laws of the state of New York. The complaint and the warrant issued against the prisoner in Switzerland sufficiently show that the crimes charged are punishable there by imprisonment in the state prison, which must be held to be an infamous punishment.

The second ground was that the charge before the commissioner was not the same as that set forth in the mandate. This objection has been already disposed of. The third ground was that the notes alleged to have been forged had not been produced. That objection, also, has been already passed upon. The fourth ground was that the evidence contained in the documents produced was not sufficient to warrant the holding of the accused. I think that it was sufficient.

§ 3435. *In foreign extradition cases, the accused is entitled to be examined as a witness, if he would be a competent witness under the laws of the state in which he is examined when charged with a criminal offense.*

The motion to discharge the prisoner was denied by the commissioner in respect to each of the grounds stated. The counsel for the defense then called the prisoner as a witness, and the counsel for the prosecution objected to his

being sworn and examined, on the ground that he was incompetent as a witness. The commissioner sustained the objection, and in that respect, I think, he erred. He ought to have permitted the prisoner to be examined. The proceedings before a magistrate, in this district, in a case of extradition, must be conducted according to the laws of the state of New York in the particulars in which such proceedings are not specially regulated by a statute of the United States. By an act of the legislature of the state of New York, passed May 7, 1869 (N. Y. Sess. Laws of 1869, ch. 678), it is provided that in all proceedings in the nature of criminal proceedings, in any and all courts, and before any and all officers and persons acting judicially, a person charged with the commission of a crime shall at his own request, but not otherwise, be deemed a competent witness. In this case, the counsel for the defense called the prisoner himself as a witness. It must be intended that this was done at the request of the prisoner, acting through his counsel. I think the prisoner had a right to make his statement as a witness. Article 13 of the convention in question provides that the person charged with the crime shall be delivered up only when the fact of the commission of the crime shall be so established as to justify his apprehension and commitment for trial, if the crime had been committed in the country where such person shall be found. Applied to this case, this provision requires that, in order to warrant the commitment of the party for trial, the same evidence shall be required of the fact of the commission of the crime in Switzerland as would be required of the fact of the commission of the like crime, if it had been committed here. The good sense of this provision requires that the fact of the commission of the crime shall be established in such a manner and according to such forms of proceeding as would be required if the crime had been committed in the country where the person shall be found. The word "country" necessarily, under our form of government, in carrying out the provisions of the convention, means the special political jurisdiction that has cognizance of the crime. In this case, the forms of proceeding that must be observed are those of the state of New York; and the prisoner must have an opportunity, if he desires, of making his own statement on oath. This view is confirmed by the analogous course of proceeding which exists in respect to the examination of offenders charged with crimes against the United States. It is provided by section 33 of the judiciary act of 1789, that, for any crime or offense against the United States, the offender may, agreeably to the usual mode of process, that is, mode of procedure, against offenders in the state where such offender may be found, be arrested and imprisoned or bailed, as the case may be, for trial before the proper court of the United States.

§ 3436. *To justify the holding of a person for extradition, it is enough that the evidence is sufficient to commit him for trial.*

It was urged on the hearing, on the strength of an observation made by Mr. Justice Nelson in the case of *Ex parte Kaine*, 3 Blatch., 1, 10, that the evidence before the commissioner must be so full as, in his judgment, if he were sitting on the final trial of the case, to warrant a conviction of the prisoner. While I always hesitate to differ with Mr. Justice Nelson in opinion, I am not prepared to adopt this view. It seems to me to be in conflict with the decision in the case of *Burr*. In that case Chief Justice Marshall sat as a committing magistrate on the question as to whether Burr should be committed for trial for the crime of setting on foot an expedition against the territories of a nation at peace with the United States. The chief justice said (1 Burr's Trial, 11): "On

an application of this kind I certainly should not require that proof which would be necessary to convict the person to be committed on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused; but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof, furnishing good reason to believe that the crime alleged had been committed by the person charged with having committed it." The chief justice acted upon that view, and committed Colonel Burr for trial. The convention, in the present case, says that the fact of the commission of the crime must be so established as to justify the commitment of the accused for trial, if the crime had been committed here. The question before Chief Justice Marshall, in the case of Burr, was merely the question whether Burr should be committed for trial, and the question as to the extent to which the fact of the commission of the crime must be established. To say that the evidence must be such as to require the conviction of the prisoner if he were on trial before a petit jury would, if applied to cases of extradition, be likely to work great injustice. The theory on which treaties for extradition are made is that the place where a crime was committed is the proper place in which to try the person charged with having committed it; and nothing is required to warrant extradition except that sufficient evidence of the fact of the commission of the crime shall be produced to justify a commitment for trial for the crime. In acting under section 33 of the judiciary act of 1789 in regard to offenses against the United States, a committing magistrate acts on the principle that, in substance, after an examination into the matter, and proper opportunity for the giving of testimony on both sides, there is reasonable ground to hold the accused for trial. The contrary view would lead to the conclusion that the accused should not be given up to be tried in the country in which the offense was committed, the country where the witnesses on both sides are presumptively to be found, but should be tried in the country in which he may happen to be found. Such a result would entirely destroy the object of such treaties.

The record shows that a motion was made to the commissioner, on the part of the prisoner, to adjourn the further hearing of the case for a sufficient length of time to allow the prisoner to send for and obtain evidence from Switzerland, to be used on the examination, and that the prisoner be admitted to bail. This motion was denied, and properly; for no sufficient foundation had been laid for it at that time. Afterwards, the counsel for the prisoner renewed the motion for an adjournment for a sufficient length of time to allow the prisoner to send for and obtain evidence from Switzerland, and, in support of such motion, read the affidavits of the prisoner and of another person. The motion was denied, and properly; for the affidavits do not show that there is any evidence, either oral or documentary, on the part of the prisoner, that exists or is accessible, or is likely to be obtained. No magistrate would, on such affidavits, have been justified in granting the motion. At the same time, if the prisoner desires to be examined himself, or to have any witnesses examined whom he shall produce, he ought to have the opportunity to examine them. The counsel for the prisoner having stated that he had no other evidence to offer on the part of the defense, the commissioner held that the evidence produced was sufficient to sustain the charge made, and that the prisoner should stand committed to await the order of the proper executive authority of the United States. Under such commitment he is now held by the marshal.

§ 3437. *Where a commissioner in an extradition case improperly rejected the testimony of the accused, the commitment was set aside, and a hearing de novo ordered.*

I believe I have considered every question which has been raised in the case. I think that the only error which the commissioner made was the one which I have pointed out, of not permitting the prisoner to be examined as a witness for himself. Although, under the laws of the United States, a person on trial for a crime before a petit jury cannot be a witness for himself, yet the preliminary examination of an offender against the laws of the United States must be conducted according to the mode of procedure which prevails in the state where such offender is found; and a like rule is to be observed under a treaty of extradition like the one now under consideration.

The prisoner must be discharged from custody under the final commitment by the commissioner; but he is properly held under the warrant of arrest, and must be remanded to the custody of the marshal thereunder. The proper course will be to proceed with the examination before the commissioner *de novo*. Ordered accordingly.

IN RE FAREZ.

(Circuit Court for New York: 7 Blatchford, 34-50. 1869.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—On the 6th of November, 1869, a writ of *habeas corpus* was allowed by me, directed to the marshal of the United States for this district, and returnable before this court on the 10th of November, 1869, at 11 o'clock A. M., commanding the marshal to produce the body of Francois Farez at that time before this court, together with the time and cause of his imprisonment and detention. This writ was issued on a petition, signed and verified by Farez, which sets forth that he has been, since the 15th of October, 1869, detained, and imprisoned, and restrained of his liberty by the said marshal, on a warrant, a copy of which is annexed to the petition, issued by Charles W. Newton, Esq., described in said warrant as "a commissioner appointed by the circuit court of the United States for the southern district of New York, being a magistrate," under pretext of the provisions of the general convention of friendship, reciprocal establishments, commerce, and for the surrender of fugitive criminals, between the United States of America and the Swiss confederation, concluded and signed at the city of Berne, on the 25th of November, 1850, against the petitioner, as a person charged with one or more of the offenses named in the provisions of the said convention, having fled from the jurisdiction of the Swiss confederation. The petition alleges that the imprisonment is illegal for want of jurisdiction in the said commissioner over the person of the petitioner, or the subject-matter aforesaid.

The warrant referred to is dated on the 8th of October, 1869. It does not describe the official position of the commissioner issuing it, except as before stated, nor does it contain any statement that any requisition has been made, under the authority of the Swiss confederation, upon the government of the United States, for the apprehension and committal of Farez, or that any authority has been given by the government of the United States for that purpose. The warrant recites that, in accordance with the said convention, complaint has been made, under oath, by the Honorable Louis Philippe de Luze,

consul of the Swiss confederation at New York, before the said commissioner, and by him, the said consul, presented to the said commissioner, charging Farez with having, in the course of the year 1869, or heretofore, and after the date of the said convention, committed, within the jurisdiction of the Swiss confederation, the crimes of forgery, the emission of forged papers, and the utterance thereof; that said crimes, and each and every of them, are contrary to the laws of the said Swiss confederation, and by such laws subject to infamous punishment, and to punishment by imprisonment in the state prison; that the said Farez has, since the commission of the said crimes, fled from the jurisdiction of the Swiss confederation; that he is now within, and will be found within, the territories or limits of the United States of America; and that the said crimes, and each and every of them, are enumerated and provided for in the said convention. The warrant is directed to the marshals of the United States, respectively, for any district, and to their deputies, or to the deputies of any of said marshals, or to any of said deputies, and commands them, and each and every of them, in the name of the president of the United States, to apprehend the said Farez, and bring him forthwith before the said commissioner, at the city of New York, or before some other magistrate, to the end that the evidence of the criminality of the said Farez may be heard and considered, pursuant to the said convention, and the acts of congress in such case made and provided.

The marshal made a written return to the said writ at the time appointed, as follows: "In return to the within writ, I hereby produce the within named Francois Farez, and I hereby certify that he is in my custody and detention by virtue of the two warrants issued by the commissioner, Charles W. Newton, and which are herewith also produced; and that the said Farez was arrested by me under one of the said warrants, dated October 8, 1869, on the 15th of said October, and on the other warrant, dated November 9, 1869, on the 10th of said November. November 10, 1869, S. R. Harlow, U. S. Marshal."

The warrant dated November 9, 1869, is issued, like the first one, in the name of the president, and is addressed in the same manner. It differs from the first warrant, in describing the commissioner issuing it as "a commissioner appointed by the circuit court of the United States for the southern district of New York, being a magistrate and a commissioner specially appointed to execute the act of congress entitled 'An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivery up of certain offenders,' approved August 12, 1848, and the act entitled 'An act to amend an act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivery up of certain offenders,' approved June 22, 1860." It also recites that the complaint made by the consul to the commissioner charges Farez with having committed the crimes in question, with intent to obtain gain for himself, and also with the intent to cheat, injure and defraud the Swiss confederation, and some person and persons to him, the said consul, unknown; that the forged papers emitted were forged commercial papers, and were to the amount of thirty thousand francs, or thereabouts; and that, heretofore, pursuant to the thirteenth and fourteenth articles of the said convention, John Hitz, Esq., political agent and consul-general of Switzerland, the Swiss confederation, appointed and accredited to the government of the United States, made application to the said government for the arrest of said Farez, charged with the said crimes of forgery, the emission of forged commercial papers and the utterance thereof, committed within the

jurisdiction of the Swiss confederation, and an alleged fugitive from the justice of said confederation, and who is believed to be within the jurisdiction of the United States, and that, upon the said application, the government of the United States did, on the 28th of October, 1869, issue under the hand of the secretary of state of the United States, and under the seal of the department of state affixed, a mandate directed to any justice of the supreme court of the United States, any judge of the district court of the United States in any district, any judge of the supreme or superior court in any state, or to any commissioner specially appointed to execute the acts of congress aforesaid, reciting that it appears proper that the said Farez should be apprehended and the case examined in the mode provided by the acts of congress aforesaid, and authorizing the said officers, or any of them, to whom the same is directed, of whom the said commissioner is one, to cause the necessary proceedings to be had in pursuance of the said acts of congress, in order that the evidence of the criminality of the said Farez may be heard and considered, and, if deemed sufficient to sustain the charge, that the same may be certified, together with a copy of all the proceedings, to the secretary of state, that a warrant may issue for his surrender, pursuant to the said convention. In all other respects the second warrant recites the complaint made before the commissioner, and the proceedings preliminary to the issuing of such warrant, in the same terms in which they are recited in the first warrant. The mandatory part of the second warrant is substantially the same as that of the first warrant.

The return of the marshal was traversed by the petitioner. The traverse avers that the warrant of November 9, 1869, was served on the petitioner while he was in custody under this writ of *habeas corpus*, and that such service was, therefore, void and of no effect. It also avers that the said last-named warrant is void for the following reasons: (1) The magistrate had no jurisdiction to issue the warrant, because no sufficient complaint had been presented to him at the time the warrant was issued. (2) The complaint does not make out a case against Farez, giving jurisdiction to the commissioner. (3) The complaint is based entirely on a warrant, or pretended warrant, of arrest, issued by one Brossard, which last-named warrant is entirely insufficient in law to authorize any proceedings against Farez. (4) The said warrant of said Brossard shows that Farez has not been charged with any of the offenses enumerated in the convention, and it appears on the face of the said last-named warrant that there was no charge made against him of having committed forgery, or any other offense for which he could be extradited. (5) There being no warrant of arrest issued against Farez in the country where the alleged crimes were committed, there was and is no jurisdiction on the part of the commissioner to issue the said warrants, or either of them, issued by him. The traverse further avers that the only warrant issued against Farez in such country is the said warrant of said Brossard, and is the same warrant referred to by the Swiss consul in his complaint, and is now in the possession of the said consul, and is referred to as a part of the traverse, and the consul is called upon to produce the said warrant, and also the complaint on which the commissioner issued his two warrants.

To this traverse the Swiss consul made a written reply, denying: (1) That the warrant of November 9th was served on Farez while he was in custody under the writ of *habeas corpus*, or that the service of said warrant was void, or that the said warrant is void for any of the reasons averred in the traverse, or that the magistrate had no jurisdiction to issue the said warrant. (2) That

the complaint does not make out a case against Farez, giving jurisdiction to the commissioner. (3) That the complaint is based entirely on a warrant of arrest issued by one Brossard, or that said warrant is insufficient in law to authorize any proceedings against Farez. (4) That the said warrant of said Brossard shows that Farez has not been charged with any of the offenses enumerated in the treaty, or that it appears on the face of the warrant that there was no charge made against Farez of having committed forgery, or any other offense for which he could be extradited. (5) That there was no warrant of arrest issued against Farez in the country where the alleged crimes were committed, or that there was or is on that account no jurisdiction on the part of the commissioner to issue the two warrants issued by him, or either of them, or that the only order or warrant issued against Farez in said country is the said warrant of said Brossard. The reply avers that a sufficient complaint was presented to the magistrate at the time the warrant of November 9th was issued; that one of the warrants issued against Farez is a warrant of said Brossard; and that said last-mentioned warrant is the warrant of arrest, or a warrant of arrest, referred to by the Swiss consul in his complaint, and is now in his possession.

Upon the issues thus raised testimony was taken before the court. The original warrant issued by the commissioner on the 8th of October, 1869, was put in evidence. By indorsements made on it by the commissioner, it appears that, on the 18th of October, 1869, Farez appeared before him, and the examination of the matter was adjourned to the 1st of November, 1869, and Farez was remanded in the mean time to the custody of the marshal; that Farez was again produced before the commissioner on the 1st of November, 1869, and the examination was adjourned until the 4th of November, 1869, and Farez was remanded in the mean time to the custody of the marshal; and that, on the 8th of November, 1869, the examination in the matter was adjourned to the 4th of December, 1869. No proceeding took place under the second warrant, except the arrest of Farez under it. The writ of *habeas corpus* was served upon the marshal before he arrested Farez under the second warrant. The warrant of arrest referred to in the traverse and the reply, as issued by one Brossard, was put in evidence. It is in French, and purports to have been issued by Justin Brossard, president of the tribunal of the district of Franches Montagnes, examining magistrate, on the 3d of October, 1869. It is headed: "Order of arrest, and demand of extradition." It orders and requires all public officers to arrest and take to some prison in said district Francois Farez, farrier and hotel keeper, residing at Bois, whence he lately clandestinely departed, taking with him securities to a considerable amount, and then started for America, with the intention of going to New York by the vessel *Atalanta*, from Havre, on the 28th of September, 1869. It then avers that the said Farez is accused of fraudulent bankruptcy, "*et de plusieurs faux en écriture de commerce*," and has been declared bankrupt by decree of the tribunal of commerce of the 1st of October, 1869. It then says: "By virtue of the treaty of extradition between Switzerland and the United States of America, dated the 25th of November, 1850, and the 7th of January, 1856, we request the competent authorities to take the most urgent steps to arrest the accused Farez, who is accompanied by his wife and two children, before he sets foot on American territory, and, after his arrest, to safely keep all the securities which shall have been found in his possession, or in the possession of any one accompanying him. It is of great importance, in the interest of public policy, to have the accused brought

before the undersigned judge, a great number of creditors claiming his immediate extradition." Considerable testimony was given before the court as to the meaning of the French words "*faux en écriture de commerce*." The counsel for the Swiss consul contended that the words mean forgery of commercial writings, including bills of exchange, promissory notes, bills of lading, and other written commercial instruments, as well as entries in books of account, in which records of commercial transactions are kept. The counsel for Farez contended that the words "*faux en écriture de commerce*" mean only falsifications of commercial writings, that is, falsifications of entries in books in which records of commercial transactions are kept; and that a forgery of a bill of exchange, or a promissory note, or other written commercial instrument, is not a "*faux en écriture de commerce*," but comes under the head, in the Code Napoleon, which is the Swiss law, of a "*faux en écriture privée*." The complaint on which the second warrant was issued by the commissioner was also put in evidence. It is made by Mr. de Luze, consul of the Swiss confederation at New York, and states that Farez is charged with having, in the course of the year 1869, or heretofore, and after the date of the said convention, committed, within the jurisdiction of the Swiss confederation, "the crimes of forgery, the emission of forged commercial papers, and the utterance thereof, to the amount of thirty thousand francs, or thereabouts." It also states that the complainant, as such consul, charges Farez with having committed, within the jurisdiction of the Swiss confederation, those crimes to that amount; that those crimes, and each and every of them, are contrary to the laws of the Swiss confederation, and by such laws subject to infamous punishment, and punishment by imprisonment in the state prison, and are enumerated and provided for in the said convention; that a warrant of arrest against the said Farez, on account of the said crimes, has been issued by the proper and competent judicial authority for the purpose, in the jurisdiction of the Swiss confederation; and that said Farez has, since the commission of the said crimes, fled from the Swiss confederation to the United States, and is within, and is to be found within, the territories or limits of the United States. It then sets forth the application made to the government of the United States by the political agent and consul-general of the Swiss confederation, for the arrest of Farez, and the issuing by the government of the United States, on the 28th of October, 1869, of the mandate before referred to. It then states that the complainant, as such consul, applies for the extradition of the said Farez, in pursuance of the said convention, and that a warrant issue for his apprehension according to the said convention and the acts of congress in said case made and provided.

The convention in question, which bears date on the 25th of November, 1850, and the ratifications of which were exchanged on the 8th of November, 1855, provides as follows (11 U. S. Stat. at Large, 593): "Article 13. The United States of America and the Swiss confederation, on requisitions made in their name through the agency of their respective diplomatic or consular agents, shall deliver up to justice persons who, being charged with the crimes enumerated in the following article, committed within the jurisdiction of the requiring party, shall seek asylum or shall be found within the territories of the other: *Provided*, that this shall be done only when the fact of the commission of the crime shall be so established as to justify their apprehension and commitment for trial if the crime had been committed in the country where the persons so accused shall be found." The fourteenth article provides that forgery, or the emission of forged papers (in the French version of the treaty, "*le faux, y*

compris l'émission de faux papiers), shall be among the crimes for which, when such crimes are subject to infamous punishment, a person who is charged with any of them shall be delivered up according to the provisions of the convention. The fifteenth article provides that, on the part of the United States, the surrender shall be made only by the authority of the executive thereof.

The act of August 12, 1848, section 1 (9 U. S. Stat. at Large, 302), provides "that, in all cases in which there now exists, or hereafter may exist, any treaty or convention for extradition between the government of the United States and any foreign government, it shall and may be lawful for any of the justices of the supreme court, or judges of the several district courts of the United States, and the judges of the several state courts, and the commissioners authorized so to do by any of the courts of the United States, are hereby severally vested with power, jurisdiction and authority, upon complaint made under oath or affirmation, charging any person found within the limits of any state, district or territory, with having committed, within the jurisdiction of any such foreign government, any of the crimes enumerated or provided for by any such treaty or convention, to issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or commissioner, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge, under the provisions of the proper treaty or convention, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue, upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of said treaty or convention; and it shall be the duty of said judge or commissioner to issue his warrant for the commitment of the person so charged, to the proper gaol, there to remain until such surrender shall be made."

It was contended on the hearing, by the counsel for Farez:

(1) That the first warrant issued by the commissioner is void, because it does not show on its face, that the commissioner is an officer authorized to act as a commissioner under the act of August 12, 1848;

(2) That the first warrant is void because it does not show that a requisition has been made in the name of the Swiss confederation, through the medium of its proper diplomatic or consular agent, upon the United States, for the arrest or delivery up of Farez, or that any authority has been given by the government of the United States for the apprehension or arrest of Farez;

(3) That the second warrant is void on its face, because it does not show that a mandate for the apprehension of Farez has been issued by the president of the United States, under the great seal of the United States, but only shows that the same has been issued by the government under the hand of the secretary of state and under the seal of the department of state;

(4) That the arrest of Farez by the marshal under the second warrant is void, and the second warrant is no authority for holding Farez under arrest, because it appears that he was arrested by the marshal under the second warrant after this writ of *habeas corpus* was served upon the marshal;

(5) That the complaint upon which the second warrant was issued does not contain sufficient facts to authorize the issuing of such warrant;

(6) That there is no sufficient description of any offense specified in the convention, in the warrant of arrest issued against Farez in the jurisdiction of the Swiss confederation.

§ 3438. *The warrant must show that the commissioner was authorized to issue it.*

The first warrant issued against Farez is, in my judgment, void, because it does not show on its face that the commissioner issuing it is a commissioner authorized by a court of the United States to issue such warrant. The proceeding is a special proceeding, instituted under the convention and the act of August 12, 1848, and the fact that the commissioner who issues the warrant is, within the said act, a commissioner authorized so to do by a court of the United States, is a jurisdictional fact, and should be set forth on the face of the warrant.

§ 3439. *The judiciary cannot act without a previous requisition upon our government. The facts must appear in the warrant.*

It is the law of this circuit that the judiciary possess no jurisdiction to entertain proceedings, under any treaty or convention between the United States and a foreign government, for the apprehension and committal of any alleged fugitive from justice, whose extradition is demanded by such foreign government, without a previous requisition having been made under the authority of the foreign government, upon the government of the United States, and the authority of the latter government obtained, to apprehend such fugitive. *Ex parte Kaine*, 3 Blatch., 1; *In re Henrich*, 5 Blatch., 414, 425 (§§ 3447-53, *infra*). In the latter case it is said: "It would seem indispensable that a demand for the surrender of the fugitive should be first made upon the executive authorities of the government, and a mandate of the president be obtained, before the judiciary is called upon to act." As the proceeding is a special proceeding, I think it is necessary, not only that the complaint made to the commissioner, upon which the warrant is asked, should show that such a requisition has been made upon the government of the United States and such authority obtained from it, but that those facts should also be set forth on the face of the warrant. As the first warrant contained no such allegation it is not valid.

§ 3440. *The mandate in extradition cases may be made by the president through the medium of the state department.*

The mandate recited in the second warrant and in the complaint upon which the second warrant issued, as the authority from the government of the United States for the arrest of Farez, upon the application therefor made to it by the Swiss confederation, is a sufficient mandate. The objection taken is, that the mandate is stated in the complaint and the warrant to have been issued by the government of the United States under the hand of the secretary of state and the seal of the department of state, and not under the hand of the president and the great seal of the United States. The executive authority of the United States, particularly in its intercourse with foreign powers and in matters which concern foreign relations, acts through the medium of the secretary of state and the seal of that department; and the allegation, in the complaint and the warrant, that the government of the United States issued the mandate, under the hand of the secretary of state and the seal of the department of state, is a sufficient allegation that the mandate was issued by the executive authority. The point taken in the case of *Ex parte Kaine* was, that the proceedings for the apprehension of the fugitive could not be initiated by the judicial department of the government, or by any department of the government except the executive. A mandate issued by the government under the hand of the secretary of state and the seal of the department of state is issued by the executive department of the government. The practice of the executive department to act through

the department of state in performing executive acts of the character of that in question, has been recognized throughout the history of the government from the earliest time. The fifteenth article of the convention in question provides that the surrender of a fugitive on the part of the United States shall be made only by the authority of the executive thereof; and yet the act of August 12, 1848, provides that, if the magistrate who issues the warrant deems the evidence which he takes under it sufficient to sustain the charge under the provisions of the proper convention, it shall be his duty to certify the same to the secretary of state, that a warrant may issue; and the third section of the same act provides that it shall be lawful for the secretary of state, under his hand and seal of office, to order the fugitive to be delivered to the person authorized by the foreign government to receive him. This clearly shows the understanding of congress that the executive department, in carrying out treaty stipulations between this government and foreign governments for the apprehension and delivery up of alleged criminals, is to act through the instrumentality of the department of state; and if the final order for extradition, upon which the party is to be taken out of the United States into the territories of the foreign government, can be made by the executive authority of the United States through the instrumentality of the department of state, *a fortiori*, a preliminary mandate for the arrest of the party can be made by the executive authority of the United States through the medium of the same department.

§ 3441. *The marshal has no right during the pendency of a writ of habeas corpus to arrest a party upon any warrant not in his hands at the time the writ was served upon him.*

The writ of *habeas corpus* having been issued on the 6th of November, commanding the marshal to produce the body of Farez on the 10th of November, at 11 o'clock A. M., Farez must be considered as being, under said writ, in the custody of the court, at least from the time the writ was served on the marshal, and the marshal had no right, after that time, during the pendency of the writ, to arrest Farez upon any new warrant, or upon any warrant not in his hands at the time the writ was served upon him. The return by the marshal, at the day and hour specified in the writ as the time for the return thereof, states that he arrested Farez on the 10th of November, under the warrant dated on the 9th of November. It appears in evidence that the writ was served on the marshal prior to the time when he arrested Farez under the warrant of the 9th of November. Such arrest on the second warrant was, therefore, illegal. Farez was entitled to have the question determined as to the lawfulness of his imprisonment and detention by virtue of the process on which he was claimed to be held at the time the writ of *habeas corpus* was served on the marshal. The proceedings under the writ had relation to at least as early a period as that. When the question of the lawfulness of the detention under the first warrant should have been disposed of, then the marshal could properly proceed to execute the second warrant, but not before.

§ 3442. *What a sufficient allegation of the offense in the complaint.*

The complaint upon which the second warrant was issued is defective in its charge of crime against Farez; and the second warrant itself is equally defective in that particular. It is not enough, in the complaint, merely to charge the party with the crime named in the convention, that is, forgery. The complaint in this case contains nothing more than a naked general charge of forgery, without any sufficient specification of time or place, or of the nature of

the forgery, or of the forged instrument or document. It merely alleges that Farez, in the year 1869, or after the 25th of November, 1850, with the intent to obtain gain for himself, and to cheat and defraud the Swiss confederation and some person unknown, committed, within the jurisdiction of the Swiss confederation, the crimes of forgery, the emission of forged commercial paper, and the utterance thereof, to the amount of thirty thousand francs, or thereabouts. This is, under any system of criminal jurisprudence, a defective complaint.

In the case of *In re Henrich*, 5 Blatch., 414, 426 (§§ 3447-53, *infra*), this court say: "The complaint upon which a warrant of arrest is asked should set forth clearly, but briefly, the substance of the offense charged, so that the court can see that one or more of the particular crimes enumerated in the treaty is alleged to have been committed. The complaint need not be drawn with the formal precision and nicety of an indictment for final trial, but should set forth the substantial, material features of the offense." No sufficient probable cause of arrest is shown by the complaint in this case. The consul of the Swiss confederation, in the discharge of his duty, makes the charge against Farez in the complaint, but does not pretend that he has any personal knowledge in the premises, and does not specify the particulars of the crime to an extent sufficient to authorize any warrant of arrest to be issued. No citizen of the United States could be arrested or held upon a complaint so vague and general in its specifications, or rather so utterly devoid of specifications, as the complaint in this case; and it certainly never could have been intended, by the treaty-making power, that an alleged fugitive should be arrested upon a complaint less specific than such as would be required in the case of an offense committed in the United States. The act of 1848, in saying that the magistrates named in it are vested with power, upon complaint made under oath or affirmation, charging a person with having committed, within the jurisdiction of a foreign government, a crime provided for by a treaty for extradition, to issue a warrant for the apprehension of such person, intends that the warrant shall be issued upon such complaint under oath as is generally recognized in criminal law as a proper and adequate complaint. The convention with the Swiss confederation, in saying, in the thirteenth article, that the delivery up to justice of persons charged with the crimes enumerated in the fourteenth article, shall be done only when the fact of the commission of the crime shall be so established as to justify their apprehension and commitment for trial, if the crime had been committed in the country where the persons so accused shall be found, intends to say, not only that the person arrested in the United States shall not be delivered up, except on such evidence as would authorize his commitment for trial in the United States, if the crime charged had been committed in the United States, but, also, that he shall not be apprehended or arrested except upon such *prima facie* evidence as would justify his apprehension and arrest, if the crime charged had been committed in the United States. It never was intended that it should be sufficient, in order to authorize the arrest of a fugitive from justice, to state merely that the representative of the foreign government charges the party with having committed the crime named in the treaty. I must, therefore, hold the second warrant, and the complaint on which it was issued, insufficient, in their specifications of the crime charged, to justify the holding of Farez under the second warrant.

The warrant of arrest named in the complaint as having been issued against Farez in the jurisdiction of the Swiss confederation was the only document presented to the commissioner in support of the complaint made to him, and

is, for the purposes of this case, considered as a part of such complaint. Such warrant commands the arrest of Farez as being accused of fraudulent bankruptcy, and of "*plusieurs faux en écriture de commerce*." It is defective in not specifying the time and place of the commission of the alleged offenses, and the character of the forgeries, or of the instruments or documents in respect of which the forgeries were committed; and, therefore, the complaint can derive no support from such document. Whether the offense of "*faux en écriture de commerce*," charged in such foreign warrant, is a crime embraced within the fourteenth article of the convention, is a question not necessary to be considered in this case.

It results, therefore, that Farez must be discharged from custody upon both of the warrants named in the return of the marshal.

IN RE DUGAU.

(District Court for Massachusetts: 2 Lowell, 367-370. 1874.)

§ 3443. *Proceedings in extradition cases and rights of accused. Judge to act when complaint is made.*

Opinion by LOWELL, J.

The judge has nothing to do with the question whether the government of the foreign country has duly authorized an application for the extradition to be made. The law is, that, when complaint is made on oath, the judge is to examine the evidence of criminality; and, if he deems it sufficient to sustain the charge, shall certify the same to the secretary of state, that a warrant may issue upon the requisition of the proper authorities of the foreign governments. The requisition is to be made to the executive department, and, in the natural order of things, would be made after the evidence is taken and certified. If the authorities of the foreign government should find, on the examination of the evidence, that it does not make out a case which they choose to press, they will make no requisition. And the statute gives them two months in which to complete their action upon the matter.

§ 3444. *Admission of depositions taken ex parte.*

A complaint was duly made to me, on oath, against the prisoner; charging him with having committed the crime of murder on one Charles Robinson, at Clare, in Nova Scotia, in October last. At the hearing, depositions taken before the coroner in the county where the offense is said to have been committed were given in evidence, with a certificate by the vice-consul of the United States at Halifax that they are duly and legally authenticated, so as to entitle them to be received in evidence to support the charge of murder, and for similar purposes, by the tribunals of Great Britain and its dependencies.

It is objected that the prisoner has the right to be confronted with the witnesses against him. I understand this objection to be founded in part upon the language of the treaty, which says that the offender shall be delivered up, only "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed." This refers to what may be called the degree of proof, and not to the mode and form in which it shall be given. The statutes of 1848 and 1860 take this view of the matter, and require us to admit depositions and other papers, or copies thereof, duly authenticated, if they would be received for similar purposes in the tribunals of the country where the crime was committed.

This is a reasonable and almost necessary arrangement. The evidence may be in form what the law of the country from which it comes authorizes, and in substance enough to warrant action in the country whose action is invoked. If this were not so, still a law of congress, constitutionally valid, must govern the courts of the United States, whether it conforms to the treaty or not.

The objection rests in part upon the language of the act of 1860 (12 Stats., 84), which authorizes the use of depositions and other papers, if they could be received for similar purposes by the tribunals of the foreign country from which the accused shall have escaped. It was argued that, by the English law, depositions taken *ex parte* could not be received on a trial for murder. I have not undertaken to examine the English law on this subject with care; but my impression is, that there are many authorities which hold that such depositions, taken before the coroner at an inquest, are admissible on the trial, though those taken before a justice are not. But I know that some of the best writers on the subject condemn the practice, and I do not rest my decision upon it. The statute does not refer to evidence admissible at the final trial of the cause, but to such as would be received on a preliminary examination; and the consul has certified that these papers are so admissible, and I know of no reason to doubt it.

§ 3445. *Depositions sufficiently authenticated.*

It is further objected that the certificate of the consul is too general; not designating the papers, excepting that they are annexed, which leaves open the question whether all these papers were annexed when the certificate was attached. The depositions purport to be the original evidence given before the coroner and his jury, and taken down by him; and, besides the general certificate of the consul, he gives another, that C. H. Oakes was and is a coroner, and that the annexed verdict and depositions are the originals, etc. On examination of the two certificates and the annexed papers, I think they are sufficiently authenticated. It is a question chiefly of fact, in each case, whether the authentication is regular; but I may observe that it was held in *Farez's Case*, 7 Blatch., 345 (§§ 3425-37, *supra*), not to be essential that each deposition should be separately certified, if the court could ascertain with reasonable certainty what papers were referred to in the certificate.

§ 3446. *Right of accused to be examined as a witness.*

The defendant's counsel intimated that he might desire to examine his client as a witness, if his evidence were admissible. In *Farez's Case*, 7 Blatch., 345, the learned judge held that a prisoner whose extradition was demanded under the convention with Switzerland might be examined in his own behalf, because that convention referred the courts to the laws of the country where the examination was had for their guide in conducting it, and by this reference it incorporated the criminal law of the state of New York into its mode of proceeding. No doubt the prisoner is entitled to be heard, and to produce such evidence as would be admissible here; but the admissibility of the evidence must be governed, as it seems to me, not by the laws of the state where the magistrate happens to sit, unless he is a magistrate of the state, but by those which govern his conduct in all other criminal cases. As my powers are derived from the United States, and my action is governed by acts of congress, so far as they apply, I do not feel at liberty to adopt any other rule than that which governs the courts and magistrates of the United States. I should be glad to receive this evidence, which one branch of congress has, twice at least, expressed itself in favor of admitting, but cannot find it in my power to admit it. I do not understand, however, that I am shutting out evidence of any

special importance in this case. I do not wish it to be understood that I should not likewise feel bound to admit for the defendant any evidence, whether certified by the consul or not, if it were sufficiently authenticated, which, by the laws of the place where the evidence against him was taken, would be admitted for similar purposes.

It only remains to say that I deem the evidence of the defendant's criminality to be sufficient to require me to certify the same to the secretary of state. I decided in *Kelley's Case*, 2 Low., 339, that the crime of manslaughter is not within the treaty, and there is some slight evidence tending to show that this may turn out to be such a case; but I think that the whole evidence taken together is clearly such as would require, in a domestic case, that the prisoner should be committed on the higher charge. Indeed, I do not understand that any serious question is made on this point by the learned counsel for the defense.

Certificate accordingly.

IN RE HENRICH.

(Circuit Court for New York: 5 Blatchford, 414-427. 1867.)

STATEMENT OF FACTS.—The president, on the application of the Prussian minister, on December 6, 1866, issued his mandate directing the proper magistrates to cause Henrich to be arrested, looking to his surrender pursuant to the treaty of 1852. The Prussian consul-general, on December 12, 1866, made complaint before a United States commissioner (White) for the arrest and surrender of Henrich, the application being accompanied by a copy of the warrant of arrest issued by the Prussian authorities, duly authenticated and certified by the United States minister at Berlin. On the day the application was made to the commissioner Mr. Justice Nelson issued a warrant, directed to the marshals of the United States or to any of their deputies, commanding them to arrest Henrich and bring him before the said commissioner or said justice, or some other magistrate, etc. Henrich was accordingly arrested and brought before the commissioner, who, on a hearing, adjudged the evidence sufficient, and committed Henrich with a view to his surrender. Afterwards a *habeas corpus* issued commanding the marshal to produce the body of Henrich before the court; also a writ of *certiorari*, directing the commissioner to send up the papers.

§ 3447. *Power of the court to revise the action of the commissioner in extradition proceedings.*

Opinion by SHIPMAN, J. :

I now proceed to dispose of the material questions which have been raised in this case. But, before enumerating and disposing of the precise points raised by the prisoner's counsel against the proceedings and the judgment of the commissioner thereon, it is proper that I should make some observations on the power of the courts of the United States and the justices and judges thereof, through the medium of the writs of *habeas corpus* and *certiorari*, to revise the action of commissioners, when they commit persons for surrender under extradition treaties. A correct understanding of this subject is important, in view of the fact that this power is so often and so persistently contested. The decisions on this subject have not always been uniform. In the case of *Nicholas Veremaitre* and others, fugitives from the French republic (9 N. Y. Leg. Obs., 137), Judge Judson, sitting in the district court of the United

States for the southern district of New York, held that he had no power to revise the judgment of the commissioner on the question of fact; and, on inspecting the papers and finding them sufficient on their face, he declined to review the proofs, and remanded the prisoners, to be held subject to the warrant of the commissioner, and the action of the executive authorities of the United States. In *Ex parte Kaine*, 10 N. Y. Leg. Obs., 257, Judge Betts, in the circuit court for this district, delivered an elaborate opinion covering various questions, and substantially affirming the rule laid down by Judge Judson. The same doctrine was laid down by Judge Ingersoll in the district court for this district in the case of *In re Heilbronn*, 12 N. Y. Leg. Obs., 65. In the case last cited the judge remarks: "Where there is any legal evidence before the commissioner to establish the charge, and that legal evidence is deemed by him sufficient, no matter how many others may deem it insufficient, and he grants a warrant of commitment, that commitment must stand, and no judge has a right to disregard it or to render it ineffectual, at least not till the expiration of two calendar months after it shall have been issued. In such a case no one can revise the opinion of the commissioner but the president. The president has that power. If he should be of opinion that the evidence taken before the commissioner on the hearing was not sufficient to sustain the charge, then it would be his duty to withhold a warrant of extradition. If it should be his opinion that it was sufficient, then it would be his duty to grant such warrant. The necessities of the case, therefore, do not require that I should express an opinion upon the sufficiency of the evidence upon the hearing before the commissioner." At a still later date, in the case of *Ex parte Van Aernam*, 3 Blatch., 160, Judge Betts said: "In my view of the subject, this court, on return before it of a writ of *habeas corpus*, has no further power than to ascertain and determine whether the prisoner stands charged with a criminal offense subjecting him to imprisonment, and whether the commissioner possessed competent authority to inquire into and adjudge upon that complaint. I find affirmatively, in this case, on both those inquiries, and, therefore, decide that I have no authority, under this writ, to review the justness of the decision of the commissioner."

The case of *Kaine*, which I have already cited, deserves a further notice. The controversy touching his extradition went through various phases, with different results in different courts. He was first arrested and brought before a commissioner, upon the complaint and requisition of the British consul for the port of New York, and, after a hearing, the commissioner adjudged the evidence produced sufficient to justify his commitment for surrender, under the charge made against him. He was subsequently brought before the circuit court on a writ of *habeas corpus*, and remanded, upon grounds fully set forth in the opinion of Judge Betts, above cited. After this, and after the acting secretary of state had issued a warrant, directing the marshal to deliver up *Kaine* to the British consul, the matter was brought before the supreme court of the United States. That tribunal was divided in opinion upon several questions involved in the case, and authoritatively decided only one point, and that was, that it had no jurisdiction of the controversy. 14 How., 103; 3 Blatch., 1; 6 Op. Att'y Gen'l, 93. Subsequently, Mr. Justice Nelson, sitting at chambers, issued a writ of *habeas corpus*, and brought the prisoner before him. Upon the return to the writ, it was objected that the decision of Judge Betts, sitting in the circuit court, upon the return to the writ of *habeas corpus* before that court, it being a court of competent jurisdiction to hear and determine the question

whether the commitment under the commissioner's order or warrant was legal or not, was conclusive, and a bar to any subsequent inquiry into the same matters by virtue of that writ. But Mr. Justice Nelson overruled this objection, for reasons stated in his opinion. 3 Blatch., 4, 5, 6. He then proceeded to examine the case on the evidence which the commissioner had received in support of the charge, and decided that the same was not competent, and therefore did not justify the conclusion of guilt at which the commissioner had arrived. There were other points decided and enforced in the same opinion, which it is unnecessary to mention in this place, as they have no bearing on the case now before the court. It is true that Mr. Justice Nelson, in the case of *Kaine*, decided that the commissioner had no competent evidence before him. He therefore did not directly determine the precise question whether, if the commissioner had had competent evidence presented to him, tending to prove the charge of criminality, it would have been within the rightful power of the court, or of the judge at chambers, to review that evidence, and, if he thought it failed to support the charge against the prisoner, to discharge him from custody, under the commissioner's warrant. But the whole spirit and scope of his reasoning, in the opinion delivered by him in the supreme court, as well as in the one delivered by him at chambers, tend toward the assertion and vindication of this power. To set the matter at rest, however, I am authorized by him, after full consultation on the point, to state that such is his judgment of the law. It is, then, the law of this court, and it is, therefore, the duty of the court, in the present case, to look into the evidence upon which the judgment of the commissioner rested, and which he has certified up to this tribunal, in compliance with the writ directed to him, and to pass upon its weight as well as upon its competency. Some practical considerations touching the course which should be pursued in the performance of this duty, in this case and similar cases, will be referred to in another part of this opinion. I have dwelt at length on this branch of the case, in order, if possible, to prevent misconstruction hereafter, in controversies of this character. I now proceed to the examination of this case on its merits, and to apply the legal rules which must govern it.

§ 3448. *The operation of a warrant of arrest is not limited in its effect to any particular judicial district.*

The first two objections to the action of the commissioner, raised by the prisoner's counsel, rest upon the fact that he was arrested in Wisconsin, by a special deputy of the marshal of the southern district of New York. It is insisted that this deputy had no legal authority to execute the warrant of Mr. Justice Nelson, out of the limits of this district, and the twenty-seventh section of the judiciary act of September 24, 1789 (1 U. S. Stat. at Large, 87), is referred to as conclusive on this point. This section gives the marshal no authority to execute precepts beyond the limits of his district, and it is therefore argued that the deputy in this case could not lawfully execute this warrant in another district. The warrant in question was issued by Mr. Justice Nelson and addressed to the marshals of the United States for any district respectively, and to their deputies, or the deputies of any of them, or to any of said deputies. The precept is to each and every of them, in the name of the president of the United States, to apprehend the said Phillip Henrich, and forthwith bring him before the said justice, or before the commissioner named, or some other magistrate, at New York, etc. The operation of the warrant is not limited in terms to any judicial district. The fugitive was not to be apprehended for any crime committed against the United States, for which he was amenab

to trial in any particular district. His extradition was not sought from any district as such, but from the United States. He was to be arrested in order that he might be delivered, on good cause being shown, to the agents of the government from which he had fled. The section of the judiciary act referred to has no application to an arrest under an extradition treaty. No such treaty was in existence when the act was passed, and no proceedings under such a treaty could have been contemplated by its framers. Indeed, an application of the implied restrictions of that act relating to marshals, to warrants for the arrest of fugitives from foreign states, would make the execution of these treaties depend wholly upon the magistrates of the district in which such fugitives might be arrested. Under such a construction, the hearing and delivery must be in the district where the arrest is made, as no judge or marshal could remove him to another district.

The thirty-third section of the judiciary act, authorizing and regulating the removal of parties arrested in one district, to be held for trial in another, clearly has no application to such a case as the present. It is claimed that the marshal of Wisconsin should have arrested Henrich under this warrant. But he could not have performed the duty required by the warrant, under the construction of the law urged; for, if his powers under it are to be confined to his own district, then he could not have executed that part of the precept which required him to bring the accused before Mr. Justice Nelson, or Commissioner White, at New York. Considering the object of the treaty, the provisions of the statute for carrying it into effect, by authorizing the arrest of the fugitive in any state or territory of the United States, and the scope of Mr. Justice Nelson's warrant, I am satisfied that the arrest was legal, and that the commissioner had jurisdiction.

§ 3449. *It is no objection that the warrant under which an alleged forger is arrested contains charges of more than one forgery.*

The third objection to the proceedings is, that the complaint upon which the warrant is founded contains charges of a large number of offenses. The claim is, that only one crime should be charged in the same complaint. No argument is necessary to refute such an objection. If a fugitive can be surrendered for the commission of one forgery, he certainly can for the commission of fourteen, the number charged in this complaint. These offenses are distinctly alleged in the complaint, and their joinder in the same instrument is no more objectionable than it would be in an indictment. This not only might be, but is required to be, done by the laws of the United States. The complaint is specific and full, and the crimes charged are set forth with all the particularity necessary in a proceeding of this character.

The fourth objection is founded upon the admission by the commissioner of certain declarations of the prisoner after his arrest, sworn to by the special deputy who had him in custody. They were of so trifling and unimportant a character that I should not be justified in dwelling upon them. I think they were admissible, but they are of little weight on a question of guilt.

§ 3450. *Under the acts of 1848 and 1860, certain documentary evidence, if properly authenticated, is admissible to support charges of criminality.*

The fifth objection is, that the documentary evidence received by the commissioner in support of the charge of criminality was inadmissible, because not authenticated according to law. This objection must be tested by a reference to the acts of congress regulating the admission of evidence in extradition cases. The second section of the act of August 12, 1848 (9 U. S. Stat. at Large,

302), provides that, at the hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in such foreign country may have been granted, certified under the hand of the person or persons issuing such warrant, and attested, upon the oath of the party producing them, to be true copies of the original depositions, may be received in evidence of the criminality of the persons so apprehended. This provision was altered and enlarged by the act of June 22, 1860 (12 U. S. Stat. at Large, 84), which provides that, in all cases where any depositions, warrants or other papers, or copies thereof, shall be offered in evidence, under the above section of the act of August 12, 1848, such depositions, warrants and other papers, or copies thereof, shall be admitted and received for the purposes mentioned in said section, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and that the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by such act of 1860. It will be seen, by comparing the acts above cited, that the one of June 22, 1860, enlarges the class of documentary evidence which may be adduced in support of the charge of criminality. In addition to the depositions upon which the foreign warrant of arrest may have issued, embraced in the second section of the act of August, 1848, it provides for the admission of *any* depositions, warrants or other papers, or copies of the same, which are so authenticated that the tribunals of the country where the offense was committed would receive them for the same purpose. Whether they are so authenticated is to be determined by the certificate of our own principal diplomatic or consular officer resident in the foreign country.

§ 3451. — *the proper authentication of such documents considered.*

The papers offered in evidence are numerous, but I shall notice only a few of them. The first to which I will refer is a complaint or information of the directors of the Rhenish Railroad Company, dated at Cologne, January 13, 1866, addressed to the royal chief procurator. This is not a merely formal accusation, containing only technical allegations of the forgeries in question, but an elaborate statement of facts and circumstances in support of the charge. A further complaint and statement of the same character is appended to this, dated five days later. The two form one document. This paper is properly attested as a true copy, by the secretary of the county court, under seal. The secretary's signature is attested by the president of the court, under seal, and the latter adds a certificate that the document is a valid piece of evidence by the laws of Prussia. The signature of the president is then attested, and the same certificate, as to the validity of the document as evidence, is given, under seal, by the first president of the royal Rhenish court of appeals. The signature of the latter is then attested by the minister for foreign affairs. The document is then authenticated by our late minister at Berlin, Mr. Wright, with his certificate that the paper is legally authenticated, so as to be entitled to be received for similar purposes by the tribunals of the kingdom of Prussia. This certificate is under the seal of the United States legation.

Some criticism has been made upon the certificate of Mr. Wright on the ground that it does not state explicitly that this paper is admissible by the tribunals of Prussia in support of the charge of criminality. It is urged that the words "similar purposes," in the certificate, are not definite enough. By reference to the second section of the act of August 12, 1848, it will be seen

that the purposes for which certain documentary evidence was made admissible were to support the charge of criminality. The documentary evidence made admissible by the act of June 22, 1860, is declared to be for the same purposes mentioned in the second section of the act of 1848, and includes all papers which are received by the foreign tribunals for "similar purposes." The meaning of the certificate is perfectly obvious, when considered in reference to its object, and in connection with the certificates of the Prussian officials. The latter declare it to be a valid piece of evidence touching the charge of criminality, which it embraces and sets forth with particularity. This paper is authenticated by our minister, is made admissible by our statute, and was, therefore, properly received by the commissioner. The same remarks apply to the depositions, twelve in number, which are also fully attested by various Prussian officials, and to which a similar certificate of our minister is attached.

By these documents, to say nothing of others in the case, it appears that the prisoner was the secretary of the Rhenish Railroad Company at Cologne; that that company purchased lands of various parties; and that he obtained and applied to his own use the purchase money in a number of instances by forging the names of the vendors to receipts, or by the use of such receipts, knowing them to be forged. The evidence of forgery is very strong, and, so far as its weight is concerned, is, in the language of the treaty, "such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed." There is other evidence in the case, which I have not deemed it necessary to comment upon. I am satisfied that the commissioner came to a correct conclusion, and shall, therefore, dismiss the writ, and remand the prisoner to the custody of the marshal, to be held by him under the commissioner's warrant, to await the final action of the executive authorities at Washington.

§ 3452. *Rules governing proceedings under United States extradition treaties.*

Before finally dismissing this case, I will endeavor to make some suggestions which may tend to prevent some of that uncertainty, confusion and prolixity which have so often characterized these proceedings under our extradition treaties.

1. It would seem indispensable that a demand for the surrender of the fugitive should be first made upon the executive authorities of the government, and a mandate of the president be obtained, before the judiciary is called upon to act. See Mr. Justice Nelson's opinion, *Ex parte Kaine*, 3 Blatch., 9. At all events, this would be the better practice, and one in keeping with the dignity to be observed between nations, in such delicate and important transactions.

2. Where the warrant of arrest is returnable before a commissioner for hearing, it should be one who has been previously designated by the circuit court under which he holds his office, as a commissioner for that purpose. *In re Kaine*, 14 How., 142, 143.

3. Each piece of the documentary evidence offered by the agents of the foreign government, in support of the charge of criminality, should be accompanied by a certificate of the principal diplomatic or consular officer of the United States, resident in the foreign country from which the fugitive shall have escaped, stating clearly that it is properly and legally authenticated, so as to entitle it to be received in evidence in support of the same criminal charge by the tribunals of such foreign country.

4. The commissioner before whom an alleged fugitive is brought for hearing should keep a record of all the oral evidence taken before him, taken in narrative form, and not by question and answer, together with the objections made to the admissibility of any portion of it, or to any part of the documentary evidence, briefly stating the grounds of such objections, but he should exclude from the record the arguments and disputes of counsel.

5. The parties seeking the extradition of the fugitive should be required by the commissioner to furnish an accurate translation of every document offered in evidence which is in a foreign language, accompanied by an affidavit of the translator, made before him or some other United States commissioner or judge of the United States, that the same is correct.

6. The complaint upon which a warrant of arrest is asked should set forth clearly, but briefly, the substance of the offense charged, so that the court can see that one or more of the particular crimes enumerated in the treaty is alleged to have been committed. This complaint need not be drawn with the formal precision and nicety of an indictment for final trial, but should set forth the substantial and material features of the offense.

§ 3453. *Decision of commissioner will not be reversed upon trifling grounds or errors of form.*

It should be understood that, in the exercise of this power of revising, on *habeas corpus*, the judgment of the commissioner, this court will not reverse his action upon trifling grounds, or for mere errors in form. When designated by the court, he is fully empowered to hear and decide the questions of criminality, and, where he has legal evidence before him, this court will not reverse his judgment except for substantial error in law, or for such manifest error in fact as would warrant a court in granting a new trial for a verdict against evidence.

I have had a full consultation with my brethren, Mr. Justice Nelson and Judge Blatchford, in reference to this case, and I am authorized to state that they concur with me in the views expressed in this opinion.

Let an order be entered dismissing the writ of *habeas corpus* in this case, and remanding the prisoner to the custody of the marshal, under the commissioner's warrant.

(An application for an appeal from the foregoing decision was refused.)

EX PARTE VAN HOVEN.

(Circuit Court for Minnesota: 4 Dillon, 411-415. 1873.)

Opinion by NELSON, J.

STATEMENT OF FACTS.—The counsel for the petitioner, upon the argument of the demurrer, has presented and urged with great ability objections to the proceedings instituted by the Belgian government to obtain the extradition, which may be reduced to two in number: 1. That the commissioner had no jurisdiction, under the treaty stipulations between the two countries, to issue any warrant for the arrest and examination of persons charged with the commission of forgery, with a view to their extradition. 2. That the complaint upon which the warrant was issued by the commissioner does not make out a case or contain such a statement of the offense as would justify a warrant of arrest.

§ 3454. *Arrest not authorized without a requisition.*

I shall take up the first objection, and, with a view of stripping the case of

some questions that were presented on the argument, state that in my opinion the judicial arm of the government is powerless to arrest any alleged fugitive from justice whose extradition is demanded by a foreign government under any treaty with the United States, without a requisition having been previously made by the foreign government upon the United States, and its authority obtained to apprehend such fugitive. The sixth article of the treaty proclaimed May 1, 1874, between the United States and Belgium, provides expressly for such requisition and consent to the arrest on the part of the government applied to. Has such requisition been made and consent been obtained? The mandate or warrant issued by the department of state recites the fact that such requisition was made by the proper officers of the Belgian government in pursuance of the treaty, and this mandate is the only evidence that the president of the United States initiated the proceedings or authorized the apprehension of the prisoner.

§ 3455. *It is sufficient that an extradition warrant issue from the office of the secretary of state.*

The objection that such warrant is not issued by the president of the United States, because it emanates from the state department, and is signed by the secretary of state and under his official seal, in my opinion is not tenable. The history of the government shows that, in all our foreign relations, the president, in performing executive acts imposed by treaty stipulations or otherwise, acts through the department of state, and under its official seal. And when, as in this case, a warrant or mandate is signed by the secretary of state, it is the act of the president through the proper executive department of the government. Thus, upon the face of the papers, which are admitted by the demurrer to be true, the requisition has been properly made by the Belgian government, and a proper warrant has been issued by the president of the United States to authorize the commissioners to act. I have no authority to go behind the warrant which has been issued by the president through the state department, and it must be taken as a fact that the president discharged his executive functions in accordance with the terms of the sixth article of the treaty.

The act of congress in relation to "extradition" (title 66, R. S. U. S., p. 1026) authorizes certain judicial officers, "whenever a treaty for extradition exists between the government of the United States and any foreign government; upon complaint being made, under oath, charging any person found within the limits of any state, district or territory, who, having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, to issue his warrant for the apprehension of the person so charged, that he may be brought before such commissioner, to the end that the evidence of criminality may be heard and considered." And in case such commissioner deems the evidence sufficient to sustain the charge made, he certifies the same, together with all the testimony, to the secretary of state, that a warrant may issue for his surrender.

This act of congress applies to all treaties made before or after its passage, and was necessary, in order to give the judicial department of the government jurisdiction to investigate the charge of crime alleged to have been committed within the limits of a foreign government. The commissioner of the circuit court of the United States for the southern district of New York, in obedience to the warrant of the president, and upon complaint made by the consul-general of Belgium, resident in the city of New York, has issued his warrant of

arrest for the purpose of investigating the charges made against the prisoner, and he had authority so to do, provided the complaint by the consul-general made out a proper case.

§ 3456. *What is not a sufficient description of an offense in an extradition warrant.*

And this brings me to a consideration of the next and last objection. The complaint charges that Van Hoven committed, within the jurisdiction of the kingdom of Belgium, the crime of forgery, as it is specifically mentioned in the treaty of 1874, to wit: "With having, within the jurisdiction of the kingdom of Belgium, and in violation of the laws thereof, and for his own benefit, and on or about the 21st day of December, 1875, wilfully and knowingly and maliciously uttered and put in circulation forged papers, or counterfeit papers, or counterfeit obligations, or other titles, or instruments of credits." This is the charge *in hæc verba* without specifying the kind of obligations forged, or the character of the papers, or the nature of the titles, or instruments of credits forged.

Is such a complaint sufficiently definite for the purpose of jurisdiction? It is not necessary that a complaint should be drawn with the formal precision of an indictment, but the accused should be fairly informed of the charge made, so that he may be able to meet the investigation.

In the case of *In re Henrich*, 5 Blatch., 414 (§§ 3447-53, *supra*), the court says: "The complaint upon which the warrant of arrest is asked should set forth clearly, but briefly, the substance of the offense charged, and the substantial material features thereof." I think, tested by the above decision, the complaint does not show probable cause for the arrest, and, at common law, is defective. The consul does not pretend to be familiar with the particulars of the alleged crime, and he has no personal knowledge of any of the facts, and states that he makes the complaint by virtue of his office, and for the purpose of giving effect to the treaty. Clearly under our system of criminal jurisprudence, such a complaint would not authorize the arrest of one of our citizens, and it cannot have been the intention of the treaty-making power, or the congress of the United States, to have permitted the arrest of an alleged fugitive upon a complaint which would be defective in the former case. The petitioner, therefore, must be discharged from custody.

Ordered accordingly.

IN RE FOWLER.

(Circuit Court for New York: 18 Blatchford, 430-443. 1880.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—This case is before this court on a *habeas corpus*, in proceedings for extradition brought before this court by a *certiorari*. On a complaint made before Commissioner Osborn by the consul-general of Great Britain, at New York, that the relator, George Fowler, *alias* R. Gray, had, on the 18th of September, 1880, at Bradford, in England, committed the crimes of forgery and the utterance of forged paper, by feloniously forging and uttering, knowing the same to be forged, a check or bank-draft, dated at Bradford, on that day, for £10, payable to the order of W. Jowett and purporting to be drawn by said Jowett on the Bradford Banking Company, limited, and indorsed by said Jowett, with intent thereby to defraud said Jowett, or said company, and that said Fowler had, on said day, at Bradford, feloniously forged, and

afterwards feloniously uttered, knowing the same to be forged, a check or bank-draft dated Bradford, September 18, 1880, for £50, payable to the order of W. Jowett, and purporting to be drawn by said Jowett on said company, and indorsed by said Jowett, with intent thereby to defraud said Jowett or said company, and which complaint set forth the other necessary matters, the said commissioner issued the proper warrant for the arrest of said Fowler, with a view to his extradition under article 10 of the treaty of August 9, 1842, between the United States and Great Britain (8 U. S. Stat. at Large, 576). The relator was arrested and brought before the commissioner, and, as the result of the hearing, the commissioner decided that the evidence was sufficient to sustain the charge, and he committed the relator to the custody of the marshal, to await a warrant of surrender.

In the course of the hearing before the commissioner, certain documentary evidence was offered by the prosecution, and admitted under the objection of the relator. There is a copy of an information and complaint sworn to by Jowett, September 21, 1880, at Bradford, before a justice of the peace there, charging Fowler with having feloniously forged and uttered the bankers' checks for £60, with intent to defraud. Such copy is certified by Angus Holden, a justice of the peace at Bradford, to be a true copy of the original information. On the back of the copy is a certificate by Godfrey Lushington, assistant under-secretary of state for the home department, certifying that the signature of Holden is the signature of a magistrate in England having authority to take the information, and that the information, "so verified by a magistrate where the same was taken and authenticated by a minister of state, and sealed with his official seal, would be received as evidence of the criminality of a fugitive criminal from the United States charged before a tribunal in Great Britain with an extradition crime under the extradition treaty as existing between that country and the United States." Under said certificate is a certificate by T. V. Lister, assistant under-secretary of state, sealed with the seal of the foreign office, certifying that Lushington's said signature is the handwriting of Godfrey Lushington, assistant under-secretary of state for the home department. Under said two certificates is a certificate by J. R. Lowell, envoy extraordinary and minister plenipotentiary of the United States of America, made at the legation of the United States, London, under the seal of the legation of the United States of America to Great Britain, certifying that Lister's said signature is the handwriting of G. V. Lister, "one of the assistant under-secretaries of state for foreign affairs, and that the annexed documents are authenticated in the manner required by the statutes of the United States." There is also a copy of a warrant issued at Bradford, September 21, 1880, by a justice of the peace there, reciting said information, and commanding the constables of Bradford to arrest Fowler, and bring him before a justice of the peace, to answer said information. This copy is certified by Angus Holden, a justice of the peace at Bradford, to be a true copy of the original warrant. On the back of the copy is a certificate by said Lushington, of the same tenor, *mutatis mutandis*, as his certificate on the back of the copy of the information. Under said certificate is a certificate by Julian Pauncefote, assistant under-secretary of state for foreign affairs, sealed with the seal of the foreign office, of the same tenor as the said certificate of said Lister. Under said two certificates is a certificate by Mr. Lowell, made at the legation of the United States, London, under the seal of the legation of the United States to Great Britain, certifying that Pauncefote's said signature is the handwriting of Sir Julian

Pauncefote, "one of the assistant under-secretaries of state for foreign affairs, and that the annexed documents are authenticated in the manner required by the statutes of the United States." There are, also, an original deposition of William Jowett, and an original deposition of Edwin I. Hustler, signed by them respectively, and sworn to at Bradford, September 30, 1880, before W. Pollard, a justice of the peace there, in reference to said forgeries. These depositions bear certificates of the same character, from the home department and the foreign office and the United States legation, as those certifying the copies of the information and the warrant.

§ 3457. *Acts of 1848 and 1860, as amended by the act of 1876, in respect to evidence in extradition cases, set forth and considered.*

The second section of the act of August 12, 1848 (9 U. S. Stat. at Large, 302), provided as follows: "In every case of complaint as aforesaid, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any such foreign country may have been granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended." This was a narrow provision. It allowed in evidence here, not any original depositions on which a warrant abroad issued, not any original depositions used abroad on the hearing of the charge after an arrest under the warrant, not any copies of the latter depositions, not such original warrant, not a copy of it, not any other original paper or a copy thereof, but only copies of the depositions abroad on which the warrant abroad issued, and then it required such copies to be certified in a particular way and to be attested by a particular oath. Then followed the act of June 22, 1860 (12 U. S. Stat. at Large, 84), which provided as follows: "In all cases where any depositions, warrants or other papers, or copies thereof, shall be offered in evidence upon the hearing of an extradition case," under the second section of the act of 1848, "such depositions, warrants and other papers, or copies thereof, shall be admitted and received for the purposes mentioned in the said section, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by this act." It was held by this court, in *In re Henrich*, 5 Blatch., 414 (§§ 3447-53, *supra*), that the act of 1860 enlarged the class of documentary evidence which might be adduced in support of the charge of criminality, by providing for the admission of *any* depositions, warrants or other papers, or copies of the same, authenticated as specified in the act of 1860. Then came the Revised Statutes, section 5271 of which, as it stood until 1876, provided as follows: "In every case of complaint and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any foreign country may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended, if they are authenticated in such manner as would entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party escaped. The certificate of the principal diplomatic or consular officer

of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by this section." In *In re Stupp*, 12 Blatch., 501 (§§ 3462-67, *infra*), before this court, in 1875, it was held that section 5271 was in force in lieu of the act of 1848, in regard to copies of the depositions on which an original warrant of arrest was granted abroad, but that the act of 1860 was still in force, after the enactment of the Revised Statutes, in regard to the admission in evidence of all depositions, warrants and other papers, or copies thereof, except the copies mentioned in section 5271. In consequence of a suggestion made in the decision in the case of *Stupp*, that section 5271 had changed the law in regard to copies of the depositions on which an original warrant was issued abroad, instead of re-enacting it, and that the act of 1860 had not been re-enacted in the Revised Statutes, the act of June 19, 1876 (19 U. S. Stat. at Large, 59), was passed. That act amends section 5271 so as to read as follows: "In every case of complaint, and of a hearing upon the return of the warrant of arrest, any depositions, warrants or other papers offered in evidence shall be admitted and received for the purpose of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants or other papers shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section."

§ 3458. *Section 5271, Revised Statutes, as amended by act of 1876, in respect to documentary evidence in extradition causes, set forth and defined.*

The provisions of section 5271, as thus amended, do not appear to have been construed in any adjudged case. The section provides for two classes of documentary evidence, (1) "depositions, warrants or other papers," which means original depositions, original warrants and original other papers — the depositions, warrants and papers themselves, and not copies of them; (2) copies of "any such depositions, warrants or other papers." The first class, the originals, must be documents which would be entitled to be received in the tribunals of the foreign country as evidence of the criminality of the person in respect to the offense charged against him, as committed there, if the inquiry as to his criminality in respect to such offense were being had in such foreign tribunals, and such originals must be authenticated in such a proper and legal manner as would entitle them to be received as such evidence in such foreign tribunals.

§ 3459. *The copies of documentary evidence, when offered, should be properly authenticated according to the laws of the country from whence they issue.*

The second class, the copies, must be copies of original documents, which originals would be entitled to be received in the tribunals of the foreign country as evidence of the criminality of the person in respect to the offense charged against him, as committed there, if the inquiry as to his criminality in respect of said offense were being had in such foreign tribunals, and such copies must be "authenticated according to the law of such foreign country," that is, authenticated as true copies of such originals, the authentication being made according to the law of the foreign country. When originals are offered, they must be satisfactorily identified, and it must appear that they would be entitled

to be received in the tribunals of the foreign country, as evidence of such criminality, if the inquiry as to such criminality were being had in such foreign tribunals. When copies are offered, it must appear that the originals of them would be entitled to be received in the tribunals of the foreign country as evidence of such criminality, if the inquiry as to such criminality were being had in such foreign tribunals, and it must appear that the copies are true copies of such originals, and the authentication that the copies are true copies must be made according to the law of the foreign country. There would seem to be a distinction industriously made in the section between originals and copies. If copies had been intended to be placed in the same category with originals, the words "or copies of any such depositions, warrants or other papers" would naturally have been inserted after the words "or other papers," where the latter words first occur, and the portion of the section after the word "escaped" to and including the word "evidence" would have been omitted. The inference is, that a different meaning may be looked for in the expression "properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped," from that which is to be looked for in the expression "authenticated according to the law of such foreign country." In Webster's dictionary, "Authenticate" is defined thus: "To render authentic; to give authority to, by the proof, attestation or formalities required by law or sufficient to entitle to credit." In Worcester's dictionary, "Authenticate" is defined thus: "To prove authentic." In Bouvier's Law Dictionary, "Authentication" is defined thus: "A proper or legal attestation. Acts done with the view of causing an instrument to be known and identified." In Burrill's Law Dictionary, "Authentication" is defined thus: "The act or mode of giving legal authority to a statute, record or other written instrument, or a certified copy thereof, so as to render it legally admissible in evidence." There does not appear to be any necessary or inherent meaning in the word "authenticated," as used in the section, which requires the authentication to be in writing. The connection in which the word "authenticated" is used in this or any other statute may require the authentication to be in writing, and it may, in one place, mean only a written authentication, while in another place it may admit of an authentication not in writing. The words, "properly and legally authenticated so as to entitle them to be received as evidence," etc., are properly to be construed as if the expression were, "so properly and legally authenticated as to entitle them," etc., that is, "so properly and legally authenticated that they would be entitled to be," etc. This authentication, in regard to original papers, may be made by oral proof given here. A witness may swear here to the verity and identity of the originals, and, also, from his knowledge and experience, that they would be received in the tribunals of the foreign country as evidence of the criminality of the person in respect to the offense charged against him, as committed there, if the inquiry as to such criminality were being had in such foreign tribunals. This will be sufficient, under the statute, when originals are offered. When copies are offered, they must be authenticated according to the law of the foreign country. The provision, that "the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section," provides for a mode of proof, in regard to both originals and copies, and in regard to both

of the authentications mentioned in the section. Such certificate, if in proper form, is absolute proof, whatever may be the tenor of the certificates of foreign officials to the same documents. Practically, there may, ordinarily, be no adequate attainable means, other than such certificate, of proving that the authentication of the copies is according to the law of the foreign country. But there is nothing in the statute which necessarily excludes oral proof authenticating the copies, or oral proof as to what the law of the foreign country is as to such authentication, or oral proof that such oral authentication is according to the law of the foreign country. There is nothing in the statute which makes such certificate of the United States' diplomatic or consular officer the only competent proof that either the originals or the copies are authenticated in the manner required by the statute. Whether the originals are offered, or copies are offered, it must appear that the originals would be received in the tribunals of the foreign country as evidence of the criminality of the person in respect of the offense charged against him, as committed there, if the inquiry as to such criminality were being had in such foreign tribunals. Not only is the provision to that effect specific as to the originals, but the provision in regard to copies is, twice, that they are to be copies of "such" originals, that is, copies of originals which would be received in the tribunals of the foreign country as such evidence.

The certificate of Mr. Lowell in this case cannot be held to be in compliance with the statute. It certifies that the documents "are authenticated in the manner required by the statute of the United States." It ought to certify, in respect to the original depositions offered, that they are properly and legally authenticated, so as to entitle them to be received as evidence of the criminality of the person apprehended, by the tribunals of Great Britain; and it ought to certify, in respect to the copies offered, that the originals of which they are copies would be received as such evidence, and that such copies are authenticated according to the law of Great Britain. Not only is the certificate of Mr. Lowell thus defective, but it clearly appears, from the authentications to which his certificates are appended, that the documents are not authenticated in the manner required by the statute of the United States. In each of the three certificates of Mr. Lushington, he certifies that the document "would be received as evidence of the criminality of a fugitive criminal from the United States, charged before a tribunal in Great Britain with an extradition crime under the extradition treaty as existing between that country and the United States." The document must appear to be one which would be received as evidence of the criminality of Fowler in respect to this offense, by the tribunals of Great Britain, if the inquiry were going on there, in respect to the offense as committed there, and not a document which would be received by the tribunals of Great Britain as evidence of the criminality of a fugitive criminal from the United States, charged before one of such tribunals with an extradition crime committed in the United States.

The original depositions of Jowett and Hustler purport to have been severally taken and sworn to at Bradford, before W. Pollard, a justice of the peace. Under the foregoing views, the certificates to such depositions ought to be in, or amount in substance to, the following forms: "I hereby certify that the signature of W. Pollard to the foregoing deposition is, to the best of my knowledge and belief, his signature and the signature of a magistrate in England having authority to take the same, and that said deposition, certified as within, by said Pollard, to the taking thereof before him, and authenticated by a minister

of state, and sealed with his official seal, would be received in the tribunal of Great Britain, as evidence of the criminality of George Fowler, *alias* R. Gray, named in said deposition, in respect of the offense charged against him as committed in Great Britain, namely, that he feloniously did forge, utter and put off certain orders purporting to be orders by William Jowett, for the payment of money, to wit, bankers' checks for the payment of the sum of £60, with intent thereby then and there to defraud, if the inquiry as to such criminality were being had in the tribunals of Great Britain. Godfrey Lushington, assistant under-secretary of state for the home department. Whitehall, 2d October, 1880. Seal." "I certify that I believe the above signature, 'Godfrey Lushington,' to be the handwriting of Godfrey Lushington, Esqre., D. C. L., assistant under-secretary of state for the home department. Julian Pauncefote, assistant under-secretary of state for foreign affairs. Foreign office, 7th October, 1880. Seal." "I certify that I believe the above signature, 'Julian Pauncefote,' to be the handwriting of Sir Julian Pauncefote, one of the assistant under-secretaries of state for foreign affairs, and that the foregoing documents are properly and legally authenticated so as to entitle them to be received in the tribunals of Great Britain, as evidence of criminality of George Fowler, *alias* R. Gray, named therein, in respect of the offense named therein, charged against him as committed in Great Britain, if the inquiry as to such criminality were being had in the tribunals of Great Britain. In witness whereof, I have subscribed my name and caused the seal of this legation to be affixed, this 8th day of October, 1880. J. R. Lowell, envoy extraordinary and minister plenipotentiary of the United States of America. Legation of the United States, London, October 8, 1880. Seal."

In regard to the copy of the information, in addition to the certificate of Angus Holden, justice of the peace, that it is a true copy of the original information, the certificates to such copy ought to be in, or amount in substance to, the following forms: "I hereby certify that the signature of Angus Holden to the foregoing copy information, is, to the best of my knowledge and belief, his signature and the signature of a magistrate in England having authority to take said information, and that the original of said information would be received in the tribunals of Great Britain, as evidence of the criminality of George Fowler, *alias* R. Gray, named therein, in respect of the offense charged against him as committed in Great Britain, namely, that he feloniously did forge, utter and put off certain orders purporting to be orders by William Jowett for the payment of money, to wit, bankers' checks for the payment of the sum of £60, with intent thereby then and there to defraud, if the inquiry as to such criminality were being had in the tribunals of Great Britain, and that said copy information is authenticated according to the law of Great Britain. Godfrey Lushington, assistant under-secretary of state for the home department. Whitehall, 2d October, 1880. Seal." "I certify that I believe the above signature, 'Godfrey Lushington,' to be the handwriting of Godfrey Lushington, Esq., assistant under-secretary of state for the home department. T. V. Lister, assistant under-secretary of state. Foreign office, 2d October, 1880. Seal." "I certify that I believe the above signature, 'T. V. Lister,' to be the handwriting of T. V. Lister, Esquire, one of the assistant under-secretaries of state for foreign affairs, and that the original of the foregoing copy information would be received in the tribunals of Great Britain, as evidence of the criminality of George Fowler, *alias* R. Gray, named therein, in respect of the offense charged against him as committed in Great Britain, namely,

that he feloniously did forge, utter and put off certain orders purporting to be orders by William Jowett for the payment of money, to wit, bankers' checks for the payment of the sum of £60, with intent thereby then and there to defraud, if the inquiry as to such criminality were being had in the tribunals of Great Britain, and that the foregoing documents are authenticated according to the law of Great Britain. In witness whereof I have subscribed my name, and caused the seal of this legation to be affixed hereto, this 7th day of October, 1880. J. R. Lowell, envoy extraordinary and minister plenipotentiary of the United States of America. Legation of the United States, London, October 7, 1880. Seal." The certificates to the copy warrant should be in like form *mutatis mutandis*.

It follows, from the foregoing considerations, that neither the depositions nor the copies of the information or of the warrant were admissible in evidence by virtue of the certificates accompanying them. In regard to the copy information, Mr. Dobson, a detective officer attached to the Bradford police, who came to the United States to take Fowler back to England, testifies that such copy is a copy of the original information; that he saw the original and was present when it was made, and saw Jowett sign it in the presence of Holden; that Holden is a justice of the peace at Bradford, and acting as such, and that the signature to the copy is the signature of Holden. Mr. Dobson also testifies that the copy warrant is a copy of the original warrant; that he was present when the original was signed; that it was issued by a justice of the peace at Bradford, and that he has the original in his possession. But there is no evidence that the authentication of the copies is according to the law of Great Britain. The relator objected before the commissioner to the admission in evidence of the copies, but they were admitted, on the evidence of Mr. Dobson. They were not competent evidence.

§ 3460. *Original depositions, taken and receivable abroad as competent evidence, may be so authenticated orally as to be admissible under section 5271.*

A different case exists as to the depositions of Jowett and Hustler. The originals were offered. Mr. Dobson testifies that W. Pollard, before whom they were sworn and taken, is a justice of the peace for Bradford; that he, Dobson, was present when the depositions were taken; that they are the originals; that they were sworn to by Jowett and Hustler severally; that two checks were produced to Jowett at the time, to which he referred in his deposition, as originals (the witness producing copies of them, compared by himself, which are part of the case), and that the indorsements were on the checks when they were presented to Jowett in court. Mr. Dobson also testifies that he has been attached for twelve years to the police force of Bradford; that he is familiar with the ordinary course of criminal procedure in England for the apprehension of offenders; that the said depositions would be used and received in evidence before the magistrates at Bradford, the same as they are sought to be introduced here, after the arrest; that the magistrate in England takes a written deposition of the complainant and witnesses in the presence of the accused, without counsel for the accused, the accused being allowed to question the witnesses if he feels disposed, if he has no counsel; that such depositions are taken in writing and admitted and made part of the procedure; that he, Dobson, has often conducted criminal prosecutions himself, acting in the place of the chief constable, who is the chief prosecutor; that he considers himself perfectly familiar with the course of criminal procedure in England; and that these proceedings are according to the practice there, and these depositions

would be received in England. On this evidence, the original depositions were properly admissible in evidence.

§ 3461. *The decision of the commissioner with regard to the prisoner's criminality cannot be reviewed by this court on habeas corpus:*

Upon the contents of said depositions, and on the oral testimony given here before the commissioner, there was legal and competent evidence of facts before him, for him to consider in making up his decision as to the criminality of the accused. On all the points bearing on the criminality of the relator, testimony legally admissible contains materials for a decision by the commissioner on the question of fact, as to whether there was before him such evidence of criminality as the treaty requires. The commissioner having decided such question of fact his decision cannot be reviewed by this court on *habeas corpus*. *In re Stupp*, 12 Blatch., 501 (§§ 3462-67, *infra*); *In re Vandervelpen*, 14 id., 137; *In re Wiegand*, id., 370; *In re Wahl*, 15 id., 334.

The writs must be discharged and the relator be remanded to the custody of the marshal.

IN RE STUPP.

(Circuit Court for New York: 12 Blatchford, 501-529. 1875.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—The prisoner has been committed to the custody of the marshal of the United States for this district, by a United States commissioner, to await the issuing by the president of a warrant for his surrender to the authorities of Belgium, under the treaty of extradition with that country, concluded March 19, 1874, on a charge of having committed the crimes of murder and arson, at Brussels, in Belgium, on the night of the 1st, or the morning of the 2d, of October, 1871. He has been brought before this court on a writ of *habeas corpus*, and the proceedings which took place before the commissioner have been brought before this court on a writ of *certiorari*.

§ 3462. *The federal courts have the power to issue writs of habeas corpus and certiorari.*

The power to issue writs of *habeas corpus* is given to this court and its judges by section 751 of the Revised Statutes. Section 752 enacts that such writs are to be granted "for the purpose of an inquiry into the cause of restraint of liberty." Section 757 provides that the person to whom the writ is directed shall certify the true cause of the detention of the person detained. Section 760 provides that the person detained "may deny any of the facts set forth in the return, or may allege any other fact that may be material in the case." Section 761 provides that the court or judge "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice may require." Section 716 provides that this court shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law.

As the prisoner in this case was in custody under the authority of the United States, within section 753 of the Revised Statutes, the power and duty of issuing the writ of *habeas corpus* existed; and, as the petition for such writ showed that the prisoner was held under a commitment made by a United States commissioner, as the result of proceedings under a treaty for extradition, it was proper to issue the writ of *certiorari* to the commissioner, to bring such pro-

ceedings before the court. This was necessary, in order to ascertain whether the commissioner had jurisdiction of the case. How far the court will revise the proceedings before the commissioner is another question.

§ 3463. *The court does not retry the case on habeas corpus, but will inquire into jurisdiction and the regularity of the proceedings.*

It is contended, for the prisoner, that whatever may have been the law or the practice prior to the enactment of the Revised Statutes of the United States, it is now the duty of the court, and it has the power, to examine into the merits of this case, on the returns to the writs it has issued. Section 722 of the Revised Statutes provides that the jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of title 13 of the statutes (and which title embraces the jurisdiction in regard to the writs issued in this case), and of title "Civil Rights," and of title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Section 760 of the Revised Statutes, in addition to the provision before cited from it, enacts that the return to the writ of *habeas corpus*, and all suggestions made against it, may be amended, before or after the same are filed, "so that thereby the material facts may be ascertained." It is urged that the intention of the enactments cited in regard to the proceedings on the writ of *habeas corpus* is, that the court shall ascertain the facts on which the party is claimed to be held in custody, and shall then decide, as an original question, whether he ought to be held in custody thereon, without reference to the decision of the commissioner.

The language used in sections 760 and 761 of the Revised Statutes is substantially borrowed from the first section of the act of February 5, 1867 (14 U. S. Stat. at Large, 385). That act was passed to extend the power of the courts and judges of the United States, in granting writs of *habeas corpus*, to cases not provided for by previous legislation. The fourteenth section of the judiciary act of September 24, 1789 (1 U. S. Stat. at Large, 81), restricted the power of the courts of the United States to issue writs of *habeas corpus*, in cases of prisoners in jail, to such as were in custody under or by color of the authority of the United States, or were committed for trial before some court of the same, or were necessary to be brought into court to testify. The act of March 2, 1833 (4 id., 634, § 7), extended the power to prisoners committed for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof. The act of August 29, 1842 (5 id., 539), extended the power to subjects or citizens of a foreign state, domiciled therein, confined under any authority or law, or process founded thereon, of the United States, or of any one of them, for any act done or omitted under any alleged authority claimed under the order of any foreign state, the validity and effect whereof depend upon the law of nations.

The act of 1867 provided that the several courts and judges of the United States, within their respective jurisdictions, in addition to the authority already conferred by law, should have power to grant writs of *habeas corpus* in all cases where any person might be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. It further used this language: "The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States, which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby the material facts may be ascertained. The said court or judge shall proceed, in a summary way, to determine the facts of the case, by hearing testimony and the argument of the parties interested, and, if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty." The various cases enumerated in the said acts of 1789, 1833, 1842 and 1867, as cases in which writs of *habeas corpus* may be issued, are specified in section 753 of the Revised Statutes. It is thus seen that sections 760 and 761 of the Revised Statutes borrow from the act of 1867 what they contain as to denying the facts set forth in the return, and as to alleging other material facts, and as to amending the return and the suggestions made against it, so that thereby the material facts may be ascertained, and as to the proceeding in a summary way to determine the facts of the case, by hearing the testimony and arguments, and make such provisions applicable to all cases of *habeas corpus*, as well as to those enumerated in the act of 1867. The provision, that the court is "thereupon to dispose of the party as law and justice require," is not found, in those words, in the act of 1867, or in any enactment in regard to writs of *habeas corpus*, prior to the Revised Statutes. But neither those words, nor any other language in the sections of the Revised Statutes relating to the writ of *habeas corpus*, can, when properly construed, be regarded as intended to have the effect, or as having the effect, of prescribing to the court any different rules of decision, in disposing of a case on *habeas corpus*, from those which were the proper rules of decision in disposing of such case prior to the enactment of the Revised Statutes.

The provision of section 757 is, that, as a return to the writ of *habeas corpus*, the true cause of the detention of the person detained shall be certified. Wherever the person is detained by virtue of process, the cause of his detention is the process. In the present case, it is the commitment by the commissioner, which carries with it the warrant of arrest; and the *certiorari* introduces the documents and papers put in evidence, and the oral testimony. The "facts" set forth in the return to the *habeas corpus* are not the particulars of the evidence on which the commitment was granted. Those "facts" are the statement that there was a warrant of arrest issued by the commissioner in a case of extradition, and an examination into evidence of criminality, and a decision and a commitment to surrender. When the various sections of the Revised Statutes speak of denying the "facts" set forth in the return, and of alleging any other material "fact," and of ascertaining the material "facts," and of determining the "facts" of the case, they have no reference to the merits of the evidence which was put in before the commissioner, as tending to the conclusion of criminality. Where a person is held on process on a final judgment after conviction, on a trial on an indictment, and a *habeas corpus* is issued, the

return to the writ states, as the cause of his detention, the process, and either on such return alone, or by the aid of a *certiorari*, the final judgment, the conviction, the fact of a trial and the indictment, are brought before the court. These are the "facts" of the case on the *habeas corpus*. The particulars of the evidence which led to the conviction are no part of such facts. In determining, on *habeas corpus*, the "facts" of the case, the court does not determine what were the facts of the transaction which constituted the crime of which the party was convicted. It only determines whether there was an indictment, a trial, a conviction, a final judgment, a sentence and process of execution, and jurisdiction of such proceedings. It does not retry the case. So, in the present matter, to determine the "facts" of the case is not to retry the matter on the evidence, and determine what were the facts and particulars of the transactions constituting the alleged crimes.

The most recent case on the subject of *habeas corpus*, in the supreme court of the United States, is that of *Ex parte Lange*, 18 Wall., 163 (§§ 1767-74, *supra*), at the October term, 1873. In that case that court issued to a circuit court of the United States a writ of *certiorari* to bring before it the proceedings in the circuit court under which the petitioner was restrained of his liberty, and at the same time it issued a writ of *habeas corpus* to the marshal to produce the body of the petitioner. In the opinion delivered by the supreme court, care is taken to say that the supreme court has authority to issue the writ and to examine the proceedings of the circuit court, so far as may be necessary to ascertain whether the latter court has exceeded its authority, but that the supreme court disclaims any assertion of a general power of review over the judgments of the inferior courts in criminal cases, by the use of the writ of *habeas corpus* or otherwise. What is meant by ascertaining whether the circuit court has exceeded its authority is shown by the fact that the opinion states that the supreme court proceeds to examine the case as disclosed by the returns to the two writs, to ascertain whether it appears that the court below had any power to render the judgment under which the petitioner was held, which was a final judgment on a conviction on an indictment. Certainly, it cannot be successfully contended that these provisions of the Revised Statutes, in regard to *habeas corpus*, have the effect to authorize a court of the United States which has no direct power given to it to review the final judgment of another court of the United States in a given case, to review such judgment on the merits, under the indirect authority of a *habeas corpus*. Yet, the general language of the Revised Statutes in regard to the proceedings on a *habeas corpus*, that authority is given to inquire into the cause of restraint of liberty, and to ascertain the material facts, and to determine the facts by hearing the testimony and arguments, and thereupon dispose of the party as law and justice require, is as applicable to a case where a party is in custody under process issued on the final judgment of a court of the United States, on a conviction on an indictment, as it is to a case where a party is in custody under any other process.

Nor is there anything in the provisions of section 722 of the Revised Statutes which requires any different rule to be applied to the decision of the present case from that which would have been applicable in the absence of that enactment. Under that section, the jurisdiction conferred on this court, in this case, by the provisions of the Revised Statutes in regard to *habeas corpus*, is required to be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect. Such

jurisdiction is to be exercised in conformity with the laws in regard to proceedings in extradition cases, and in conformity with the laws in regard to the appellate jurisdiction of this court as well as in conformity with the laws in regard to writs of *habeas corpus*. But section 722 manifestly has reference not to the extent or scope of jurisdiction, or to the rules of decision, but to the forms of process and remedy. The laws of the United States are fully suitable to carry into effect the jurisdiction of this court in this case, and they are adapted to the object of such jurisdiction, and they are not deficient in any provision necessary to furnish suitable remedies to exercise and enforce such jurisdiction.

§ 3464. — *cases reviewed.*

In the case of *In re Henrich*, 5 Blatch., 414 (§§ 3447-53, *supra*), it was held, by this court, that if a commissioner, sitting in an extradition case, assumes, on evidence which he regards as proving the charge of criminality, to commit the accused person for surrender, a court of the United States, or a judge thereof can, on writs of *habeas corpus* and *certiorari*, review such evidence, and come to the conclusion that the evidence fails to support the charge, and thereupon discharge the accused from custody. In the opinion delivered in that case it was stated, in substance, that such was held to be the law of this court, because it was the judgment of the distinguished justice of the supreme court (Mr Justice Nelson), who was then the presiding justice of this court; and, therefore, it was held that the court would look into the evidence upon which the judgment of the commissioner rested, and would pass upon its weight as well as its competency. But the court proceeded to say: "It should be understood that, in the exercise of this power of revising, on *habeas corpus*, the judgment of the commissioner, this court will not reverse his action upon trifling grounds or for mere errors in form. When designated by the court, he is fully empowered to hear and decide the questions of criminality, and where he has legal evidence before him, this court will not reverse his judgment except for substantial error in law or for such manifest error in fact as would warrant a court in granting a new trial for a verdict against evidence." In the opinion in that case, various earlier extradition cases, arising in this district, are cited, wherein it was distinctly held by various judges that, on *habeas corpus*, the decision of the commissioner on the question of fact could not be reviewed. Those cases were *In re Veremaitre*, before Judge Judson, in the district court (9 N. Y. Leg. Obs., 137); *In re Kaine*, before Judge Betts, in the circuit court (10 id., 257); *In re Heilbronn*, before Judge Ingersoll, in the district court (12 id., 65); and *Ex parte Van Aernam*, before Judge Betts, in the circuit court (3 Blatch., 160). In the case last cited, the view was held that the circuit court could not sit in review on the merits of the decision made by the commissioner, either on the facts or the law. The crime charged was uttering and publishing in Canada a forged draft, knowing it to be forged, with intent to defraud the party from whom the accused obtained money on the draft. The point taken on the *habeas corpus* was that the false making of the draft was not a forgery but was only a fraud, and therefore that the draft was not a forged draft. The court say: "If the commissioner had no legal jurisdiction over the case, or if the mandate of the president under which the prisoner is more immediately confined was issued without warrant of law, it is the duty of the court to discharge him. It is not disputed that the commissioner was empowered to inquire whether the crime of which the prisoner was accused had been committed by him, nor is it disputed

that legal evidence was laid before him tending to prove the accusation, nor is it disputed that the commissioner, on the facts so placed before him, found that the prisoner had committed the offense. The exception to his action is, that he misjudged in point of law, and that the crime was not established by the evidence. If so, this manifestly was an error of judgment on the part of the commissioner, but it does not show that he had no jurisdiction. And, if the case were now before the court on writ of error or appeal, the decision of the commissioner would be a legitimate subject for its investigation. . . . In my view of the subject, this court, on the return before it of a writ of *habeas corpus*, has no further power than to ascertain and determine whether the prisoner stands charged with a criminal offense subjecting him to imprisonment; and whether the commissioner possessed competent authority to inquire into and adjudge upon that complaint. I find affirmatively in this case on both those inquiries, and, therefore, decide that I have no authority, under this writ, to review the justness of the decision of the commissioner. The president, therefore, had due authority for the warrant issued by him for the extradition of the prisoner. The court, if acting as the committing magistrate, in this instance, might have doubted whether the law, properly interpreted, would support a charge of forgery for the fabrication of the draft in question, and might have declined to commit the prisoner on the charge; but it possesses no authority to rejudge that point on this writ. The farthest the court could go, under this writ of *habeas corpus*, after ascertaining that there was legal proof before the magistrate tending to support the accusation, would be to bail the prisoner, if this particular case were bailable." The clear purport of these views is that the court may inquire whether the commissioner had jurisdiction over the case, whether he was authorized to institute an inquiry into the crime, and whether he had before him legal evidence tending to prove the accusation, but that it can go no farther, and act as a court of review, as if it had before it a writ of error or an appeal, under an affirmative jurisdiction to review the case by such means. This was also the view of Judge Ingersoll in *In re Heilbronn*, where he says. "Where there is any legal evidence before the commissioner to establish the charge, and that legal evidence is deemed by him sufficient, no matter how many others may deem it insufficient, and he grants a warrant of commitment, that commitment must stand, and no judge has a right to disregard it or to render it ineffectual, at least not till the expiration of two calendar months after it shall have been issued. In such a case no one can revise the opinion of the commissioner but the president. The president has that power. If he should be of opinion that the evidence taken before the commissioner on the hearing was not sufficient to sustain the charge, then it would be his duty to withhold a warrant of extradition. If he should be of opinion that it was sufficient, then it would be his duty to grant such warrant. The necessities of the case, therefore, do not require that I should express an opinion upon the sufficiency of the evidence upon the hearing before the commissioner."

The opinion delivered by Mr. Justice Nelson in *In re Kaine*, 14 How., 147, shows that the grounds upon which he proceeded in holding that Kaine ought to be discharged were that the commissioner had no jurisdiction of the case, because there had been no preliminary mandate from the president, and because the commissioner was not an officer authorized to hear the case, and because there was no competent evidence, that is, no legal evidence, before the commis-

sioner, the only evidence being depositions which Mr. Justice Nelson regarded as not having been properly authenticated. These grounds are repeated by him in *Ex parte Kaine*, 3 Blatch., 6, 10. He went, in that case, no farther.

The view thus taken was extended by the remarks made in *In re Henrich*, as before cited. But, in that case, the court did not discharge the prisoner.

In the case of *In re Farez*, 7 Blatch., 34 (§§ 3438-42, *supra*), the question was wholly one as to the jurisdiction of the commissioner, and the prisoner was discharged on the ground that the warrants which he originally issued for the arrest of the prisoner were void. Subsequently, in regard to the same person, in *Farez's Case*, id., 345 (§§ 3425-37, *supra*), this court, held by myself, discharged him after he had been finally committed for extradition by a commissioner on the sole ground that the commissioner, in the proceedings before him, had erred in excluding the testimony of the prisoner, when offered in his own behalf; but the discharge was only from the final commitment, and he was held under the original warrant of arrest, in order that the examination might be proceeded with *de novo* before the commissioner. This ruling was in accordance with the view held in *In re Henrich*. The court not only examined the question of the jurisdiction of the commissioner, and the question whether he had before him legal and competent evidence, but it went farther. Afterwards, in *In re Farez*, id., 491, on a *habeas corpus* before the circuit judge, in this court, in the case of the same prisoner, his discharge was sought on the ground that, in pursuance of the previous decision in the case, he ought to have been wholly discharged and ought not to be held on the original warrant of arrest, and farther, that there were other errors for which he ought to be discharged. The court examined the grounds alleged against the jurisdiction of the commissioner, and held that he had jurisdiction, and that the prisoner was properly held under the warrant, and that the examination, which was in progress, must proceed. But the judge intimated a doubt as to whether the prior decision, discharging the prisoner from final commitment because of the error in excluding his testimony, was correct. He says: "If, on the examination, error occurs, by the exclusion of testimony which was admissible, it may be that the proceeding in that respect can be reviewed on *habeas corpus*. Such was Judge Blatchford's opinion. . . . I find nothing in the acts of congress, or in any rule of law with which I am familiar, which made it necessary that Judge Blatchford should go one step further than he did, if, indeed, it be true that a *habeas corpus* can be issued at all for any such purpose."

It thus appears that the only case in which the rule announced in the case of *In re Henrich* as the proper one has had any operative effect for the benefit of a prisoner was that of *Farez*; and that the propriety of the rule, and of its application to that case, was doubted at the time by the circuit judge.

The case of *In re Macdonnell*, 11 Blatch., 79 (§§ 3417-24, *supra*), came before the circuit judge subsequently, on writs of *habeas corpus* and *certiorari*. The prisoner was under arrest, in proceedings for extradition, on a warrant issued by a commissioner, and the examination was in progress. The questions examined by the court went solely to the jurisdiction of the commissioner, on the ground of alleged defects on the face of the warrant of arrest and of the complaint on which it was issued, and on the face of the preliminary mandate issued by the president. It was urged that the commissioner had received in evidence a document which was not legally admissible, but the court declined to consider that question at that time, and said: "If that suggestion were well founded, it would not defeat his jurisdiction." The proceedings in the case of

Macdonnell resulted in his final commitment by the commissioner to await his surrender by the president. The case then came before this court, held by the circuit judge and myself (*In re Macdonnell*, 11 Blatch., 170), upon writs of *habeas corpus* and *certiorari*. In disposing of the case, the court first examined questions which went to the jurisdiction of the commissioner, and then proceeded to consider the allegation that the commissioner had received certain incompetent evidence, consisting of depositions. It held that such depositions were admissible, as being properly certified under the acts of congress on the subject, and as being made, by such acts, admissible in evidence. Those were depositions taken abroad before a warrant of arrest was issued abroad, and were depositions upon which such warrant of arrest abroad was issued. Supplemental depositions, taken abroad after the warrant of arrest abroad was issued, had been received in evidence by the commissioner. It was contended that there was error in admitting them in evidence, but the court held that, even though they were inadmissible, their reception furnished no ground for the discharge of the prisoner. In the opinion of the court, delivered by the circuit judge, these observations are made on this subject: "The arguments urged upon our attention proceed very much upon the assumption, which is entirely erroneous, to wit, that, in this proceeding, under the writ of *habeas corpus*, we are sitting as an appellate tribunal. That is not our relation to the commissioner. A judge issuing a writ of *habeas corpus*, or a court issuing a writ of *habeas corpus*, in these cases, is exercising an independent and original jurisdiction, with the right to inquire, doubtless, whether the prisoner is legally held. What shall be the scope and extent of that inquiry has been very much controverted in the courts of this circuit. We say, on that subject, first, that we are not sitting as an appellate tribunal, for the purpose of reviewing the proceedings before the commissioner, as upon allegation of error. . . . The question to be determined upon *habeas corpus*, in these cases, is, as we apprehend — is the prisoner rightly held, or is he to be discharged? If the commissioner, having acquired jurisdiction of the subject-matter, and of the prisoner, commits an error in the reception of evidence, it does not follow, by any legal rule, that his proceedings are to be held for naught and void for error. The prisoner may, nevertheless, be legally held." The opinion then proceeds to recite the foregoing adjudications in this circuit as to the power and duty of the court, on *habeas corpus* and *certiorari*, to entertain the question of the sufficiency of the evidence before the commissioner to warrant the commitment for surrender, and arrives at the conclusion that, notwithstanding what was said in the *Henrich* case, and what was done in the *Farez* case, the question whether, in an extradition case, the court is at liberty, on *habeas corpus*, to weigh the evidence before the commissioner and inquire whether it would have reached the same conclusion, and, if it would not, to discharge the prisoner, is still open for consideration. The question was not, then, definitely passed upon, but assuming that an inquiry into the evidence could be made by the court, the court held, on the evidence in that case, that the commitment of the prisoner for extradition was justified.

The question thus referred to is presented in this case, and is now to be decided. It is contended, for the prisoner, that this court, on these writs is to examine into the merits of this case, as fully as if the proceedings had originally been instituted before it.

The treaty with Belgium provides (article 6) that a preliminary warrant shall be issued by the president, for the apprehension of the fugitive. "in order

that he may be brought before the proper judicial authority for examination," and that, "if it should then be decided that, according to the law and the evidence, the extradition is due, pursuant to the treaty, the fugitive may be given up, according to the forms prescribed in such cases." In the treaty with Prussia of June 16, 1852 (10 U. S. Stat. at Large, 965), the language of article 1 is, that "the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered, and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive." The language of this treaty with Prussia implies that, if the examining magistrate deems the evidence sufficient to sustain the charge, and so certifies to the president, a warrant of surrender must issue, much more strongly than does the language of the treaty with Belgium. Yet, in the case of this very prisoner, when his surrender was asked under the treaty with Prussia, for the same alleged offenses of murder and arson that are involved in the present case, after the examining commissioner had committed him for extradition, and this court had, on writs of *habeas corpus* and *certiorari*, held the commitment to be legal, and the proceedings had been certified to the president, the president refused to issue a warrant of surrender. *In re Stupp*, 11 Blatch., 124. In that case, his refusal was based upon the construction of the treaty. It is not to be doubted that he might, under like circumstances, properly base his refusal upon want of sufficient evidence of criminality. His refusal was in the exercise of an undoubted right. Whether he would have authority to order and enforce the surrender of a fugitive, after his discharge on *habeas corpus* subsequently to his commitment by a magistrate for surrender, it is not necessary now to consider.

§ 3465. *The decision of a court on habeas corpus in an extradition case, that the prisoner is lawfully held, is not binding on the executive.*

Action, such as was lawfully had in the case of *Stupp*, shows that the decision of a court on *habeas corpus* in an extradition case, that the prisoner is lawfully held, is not binding on the executive in reference to the same question of law. Nor could it be binding on the executive if, on the writ, the prisoner were declared to be lawfully held on the facts and merits of the case. The first section of the act of August 12, 1848 (9 U. S. Stat. at Large, 302), which is re-enacted as section 5270 of the Revised Statutes, provides, in substance, that if, on the hearing before the magistrate who issues the warrant of arrest, he deems the evidence sufficient to sustain the charge under the provisions of the treaty, he shall certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue, upon the requisition of the proper authorities of the foreign government, for the surrender of the accused, according to the stipulations of the treaty, and he shall issue his warrant for the commitment of the accused to the proper jail, there to remain until such surrender shall be made. The third section of said act, which is re-enacted as section 5272 of the Revised Statutes, provides, in substance, that it shall be lawful for the secretary of state to order the person so committed to be delivered to the foreign government, to be tried for the crime in question. Under these provisions of law, the president has undoubtedly

the right to refuse to surrender the accused, even though a warrant of commitment for his surrender is issued by the examining magistrate, and his certificate that the evidence is sufficient to sustain the charge is laid before the president, although the president would have no right to surrender the accused, in the absence of such certificate. The provision of the statute, that, with the certificate that the magistrate deems the evidence sufficient to sustain the charge, he is also to certify to the secretary of state a copy of all the testimony taken before him, indicates that the executive discretion which the president has a right to exercise as to surrendering or not surrendering the accused is to be exercised on a consideration of the testimony in the case.

The statute gives no right of appeal or review to be exercised by any court or judicial officer. The finding of the magistrate and the testimony are not to be certified to any court or judge, but are to be certified to the secretary of state, as an executive officer representing the president in respect to extradition matters and intercourse with foreign governments. After such certificate, finding the evidence sufficient and reporting the testimony, is made, the president may or may not order the surrender. In practice, the executive has claimed and exercised the right, under such circumstances as has been shown, to refuse a surrender, even on a point as to which, on *habeas corpus*, it was judicially held, in the particular case, that a surrender was proper. Everything in the statute indicates that no review of the decision of the committing magistrate on the facts was contemplated, other than a review by the executive. The chief justice of the supreme court of the United States may be the examining and committing magistrate. It could never have been intended that, under a writ of *habeas corpus*, any judge of the United States, or even one judge after another, as long as the prisoner should remain in custody, should re-examine the facts in the case, until, in the end, some one of them should differ in opinion with the chief justice as to the force of the testimony, and should discharge the prisoner. As was said in *In re Macdonnell*, 11 Blatch., 189: "If the judge, or the court, in these cases where extradition is sought is at liberty, on *habeas corpus*, to weigh the evidence before the commissioner, and inquire whether they would have reached the same conclusion, the result is, that the finding of the commissioner, and the finding of successive courts and judges issuing successive writs of *habeas corpus*, so long as judges can be found, instead of having any force or effect, can be assailed, and assailed again, until at last, perhaps, some doubting mind may be found, who will say, 'I would have reached a different conclusion upon the evidence,' and thereupon discharge the prisoner. To that view of the duty of the court, touching the weight of evidence before the commissioner, we cannot subscribe."

§ 3466. *The extent of the inquiry of the court on habeas corpus considered.*

In full conformity with these views, the great purposes of the writ of *habeas corpus* can be maintained, as they must be. The court issuing the writ must inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute: whether he exceeded his jurisdiction; and whether he had any legal and competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusions. Nor, if there was legal and competent evidence of facts before the commissioner, for him to consider in making up his decision as to the criminality of the accused, is the court, on *habeas corpus*, to hold the pro-

ceedings illegal and to discharge the prisoner because some other evidence was introduced which was not legal or competent, but was held to be so by the commissioner, and was considered by him on the question of fact, or because the court, on a consideration of all the evidence which the commissioner considered, would have come to a different conclusion, or because the court, on an exclusion of such of the evidence as it may think was not legal or competent, would come, on the rest of the evidence to a different conclusion of fact from that at which the commissioner arrived. In other words, the proper inquiry is to be limited to ascertaining whether the commissioner had jurisdiction, and did not exceed his jurisdiction, and had before him legal and competent evidence of facts whereon to pass judgment as to the fact of criminality, and did not arbitrarily commit the accused for surrender, without any legal evidence.

These principles we regard as in harmony with the current of decisions made by the supreme court, as cited in the case of *Ex parte Lange*, 18 Wall., 166 (§§ 1767-74, *supra*), and with the doctrine laid down in that case, and as drawing the proper line of distinction between what can and what cannot be reviewed on *habeas corpus*, in a case where no affirmative direct power of review is given to the court issuing the writ, other than what is implied in the power to issue such writ, and where a power of review is substantially given by statute to, and in practice exists in, the executive department of the government. Under these principles, the proceedings before the commissioner in this case must be examined.

§ 3467. *Sufficiency of evidence and authentication of documents.*

It is contended, for the prisoner, that there was no legal evidence before the commissioner of the commission of either of the crimes charged, on the ground that none of the documents or papers produced from Belgium were proved in such manner as to be admissible in evidence.

The second section of the act of August 12, 1848 (9 U. S. Stat. at Large, 302), which was entitled, "An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivering up of certain offenders," was in these words: "In every case of complaint as aforesaid, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any such foreign country may have been granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended." The act of June 22, 1860 (12 id., 84), provided as follows: "In all cases where any depositions, warrants or other papers, or copies thereof, shall be offered in evidence upon the hearing of an extradition case under the second section of the act entitled 'An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery up of certain offenders,' approved August 12, 1848, such depositions, warrants and other papers, or copies thereof, shall be admitted and received for the purposes mentioned in the said second section, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by this act." It was held by this court in *In re Henrich*, 5 Blatch., 414 (§§ 3447-53, *supra*), that the effect of this act of

1860 was to enlarge the class of documentary evidence which might be adduced in support of the charge of criminality, beyond that authorized by the second section of the act of 1848, so as to admit *any* depositions, warrants, or other papers which were so authenticated that the tribunals of the country where the offense was committed would receive them for the same purpose. The second section of the act of 1848 provided for the admission in evidence only of copies of the depositions on which an original warrant of arrest in the foreign country was granted, and required that such copies should be certified under the hand of the person issuing such warrant, and should be attested upon the oath of the party producing them to be true copies of such original depositions, and then allowed such copies to be received in evidence of the criminality of the accused. The act of 1860 provided for the admission in evidence of *any* depositions, warrants, or other papers, or copies thereof, on the hearing of an extradition case under the second section of the act of 1848, and enacted that they should be received in evidence for the purposes mentioned in said second section, that is, to show the criminality of the accused, if they should be legally and properly authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused should have escaped; and further enacted that the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country should be proof that any paper or other document so offered was authenticated in the manner required by the act of 1860. Such being the state of the statute law, the Revised Statutes of the United States, approved June 22, 1874, enact, in section 5271, as follows: "In every case of complaint, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any foreign country may have been granted, certified under the hand of the person issuing such warrant, and attested, upon the oath of the party producing them, to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended, if they are authenticated in such manner as would entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party escaped. The certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by this section." Section 5271 is the only section of the Revised Statutes which relates to the subject of evidence in extradition cases. By section 5596 it is provided that all acts of congress passed prior to the 1st of December, 1873, any portion of which is embraced in any section of the Revised Statutes, are repealed. Some portion of the second section of the act of 1848 is embraced in section 5271 of the Revised Statutes. The subject-matter of both sections is the same, namely, the admissibility in evidence of copies of the depositions on which an original warrant of arrest was granted in the foreign country. That is the subject-matter of both sections, and the only subject-matter of either. The second section of the act of 1848 prescribed two requisites in respect to the copies of such depositions, and only two, to wit, that they should be certified under the hand of the person or persons issuing such warrant, and should be attested upon the oath of the party producing them to be true copies of the original depositions. Section 5271 prescribes a third and additional requisite, besides prescribing the two above named, to wit, that the copies shall be authenticated in such manner as would entitle them to be received for sim-

ilar purposes by the tribunals of the foreign country from which the accused party escaped, and also provides a mode of proof in regard to such authentication. But if we turn to the act of 1860, we find that its subject-matter is not, nor is any portion of it, embraced in section 5271 of the Revised Statutes. The entire subject-matter of section 5271 is taken from the second section of the act of 1848, and no part of it is taken from the act of 1860. It is true that the third and additional requisite, before referred to as found in section 5271, appended to the two requisites found in the second section of the act of 1848, is a requisite the language of which is borrowed from the act of 1860, and is there found appended to a different subject-matter. But, in no proper sense, is any portion of the act of 1860, that is, any portion of its subject-matter, embraced in section 5271. Consequently, by virtue of section 5596, section 5271 is not in force in lieu of the act of 1860, although it is in force in lieu of the second section of the act of 1848. Moreover, section 5596 refers to "all parts of such acts not contained in such revision," as "having been repealed or superseded by subsequent acts, or not being general or permanent in their nature." The expression, "all parts of such acts," means all parts of acts passed prior to December 1, 1873, any portion of which is embraced in any section of the revision; and the purport of the provision is, that, if any portion of a particular act is embraced in any section of the revision, the parts of the same act which are not contained in the revision have been repealed or superseded by subsequent acts, or were not general and permanent in their nature. But this leaves unaffected the acts no portion of which is embraced in any section of the revision; and, in a subsequent part of section 5596, it is expressly enacted that all acts passed prior to December 1, 1873, "no parts of which are embraced in said revision, shall not be affected or changed by its enactment." These provisions of section 5596 qualify the general language of section 5595, to the effect that the preceding ninety-three titles embrace the general and permanent statutes of the United States in force on the 1st of December, 1873, as revised and consolidated. If there be a general and permanent statute which was in force on the 1st of December, 1873, and no part of it is to be found in the Revised Statutes, it is to be regarded as still in force. There is nothing inconsistent with the provisions of section 5271 in regarding the act of 1860 as still in force. The act of 1860 applies to all depositions, documents and papers, except those referred to in section 5271, namely, depositions on which an original warrant in the foreign country was granted, and section 5271 applies solely to the latter depositions. It cannot be said that section 5271 embraces the entire subject of the documentary evidence to which the statutes in force when the Revised Statutes were enacted related, because the subject of the second section of the act of 1848 is transferred bodily to section 5271, while nothing of the subject of the act of 1860 is transferred to that section. Therefore, it cannot be said that the act of 1860 is repealed by implication, especially as the declaration, in section 5596, as to what is repealed, does not include the act of 1860. It may very well have been true that the designation of *any* depositions, in the act of 1860, had the effect to make admissible, under that act, depositions on which an original warrant of arrest was granted abroad, on a compliance only with the requisites prescribed in the act of 1860, and without a compliance with the requisites which had been prescribed in the second section of the act of 1848. But, congress have now provided, by section 5271, that the depositions on which an original warrant of arrest was granted abroad shall be admissible only on a compliance with

the terms of that section, while it has left the act of 1860 to be in force, and to apply to all the subject-matter covered by it, except the depositions mentioned in section 5271. The court has no right, in view of the precise terms of the statute law, to read section 5271 as if all there is in it that is taken from the second section of the act of 1848 were out of it, and as if, in the place of that, there were inserted in it the subject-matter of the act of 1860.

The verified complaint in this case, made by the consul of Belgium, at New York, has annexed to it an original warrant for the arrest of the accused, issued by M. Giron, examining judge of the tribunal of first instance at Brussels, on the 27th of April, 1872. It purports, on its face, to be issued "upon the documents in the case, and on motion of the king's attorney, bearing date the 14th of October, 1871." It does not specify what the documents referred to are, nor are there any documents annexed to the complaint or referred to in it as being the documents referred to in the warrant.

There is, also, in evidence a copy of what may be called an indictment or accusation of the accused by the court of appeals at Brussels. This paper is in the form of a decree dated June 6, 1872, which states that the court has "seen the documents of the proceedings instituted by the examining judge of the court of the first instance, of Brussels," but it does not state what those documents are. It also states that the court has heard the report made on the subject to the court of indictments by the deputy attorney-general, to the purport that the attorney-general of the court of appeals of Brussels "has seen the documents in the case, and the order of arrest issued the 31st of May, 1872, by the council chamber of the tribunal of the first instance, of Brussels," against the accused, but what those documents are is not stated. The order of arrest is afterwards set forth, and is not the same order of arrest first above referred to. The decree goes on to state that the attorney-general states that there exist against the accused charges sufficient to justify his indictment, for having committed the crimes charged in this proceeding, that those crimes are provided for and made punishable according to the provisions of certain specified articles of the Penal Code, and that the attorney-general prays the confirmation of such order of arrest, and the commitment of the accused for trial. The decree then states that the clerk has read to the court "all the documents in the case," but what they are is not stated. The decree then goes on to confirm the order of arrest of May 31, 1872, and to commit the accused for trial, and to direct an indictment to be drawn up.

There are also put in evidence eighty-six documents, all of which purport to be copies taken from the records of the clerk's office of the tribunal of first instance at Brussels. All of them bear the attestation of the deputy clerk of such tribunal, and his signature is verified by M. Giron, the judge who issued the warrant of arrest of April 27, 1872. The signature of M. Giron is verified by that of M. Pulzeys, the general secretary of the ministry of justice at Brussels; and the signature of M. Pulzeys is verified by that of Leopold Orban, a councilor in the ministry of foreign affairs of Belgium. Of these eighty-six documents fifty-five are of dates from October 14, 1871, to April 26, 1872, that is, prior to the date of the order of arrest of April 27, 1872; seven others are of dates from April 29, 1872, to May 30, 1872, that is, prior to the order of arrest of May 31, 1872, and twenty-four others are of dates subsequent to June 6, 1872. A large portion of these eighty-six documents are copies of depositions. None of them were specifically offered in evidence as copies of the depositions on which either of the orders of arrest before referred to

to was granted. They are not certified under the hand of any person to be such copies, nor are they tested upon the oath of any person to be such copies. There is, therefore, not a full compliance with the requirements of section 5271 in respect to any of them. But, if it be proper to hold, in respect to such of them as bear dates anterior to the issuing of the warrant of arrest of April 27, 1872, that those depositions must be regarded as the depositions on which that warrant was issued, so that they were not properly receivable in evidence, because of a non-compliance with the requirements of section 5271 in regard to the certificate and the oath therein required, there remain the thirty-one documents and depositions which bear date on and after April 29, 1872, and the indictment or accusation, before mentioned. These papers must all of them be regarded as papers offered and receivable in evidence under the act of 1860, and as not falling under section 5271. Each of them has appended to it a certificate in this form, made by the minister resident of the United States to Belgium: "I, John Russell Jones, minister resident of the United States to Belgium, do hereby certify that Leopold Orban, whose signature is subscribed to the foregoing paper, is, and was at the date of the same, a counselor in the ministry of foreign affairs of Belgium, and to any documents by him so signed and sealed, full faith and credit is and ought to be given; and I do hereby certify that the foregoing document is legally and properly authenticated, so as to entitle it to be received in evidence in support of the criminal charges mentioned therein, and for similar purposes mentioned in the second section of the act of congress entitled 'An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivery up of certain offenders.'" Each of the certificates bears the signature of the minister resident of the United States to Belgium, and the seal of the legation of the United States, and each is dated October 9, 1874.

It is objected to this certificate that it is defective in omitting to say that the document to which it refers is authenticated so as to entitle it to be received in evidence by the tribunals of Belgium. The certificate does substantially so say. The officer certifying is a local officer, accredited as minister resident to Belgium. It is only as the principal diplomatic officer of the United States resident in Belgium that he is authorized in this case to make any certificate, inasmuch as the accused escaped from Belgium. The papers certified came from the records of the tribunals of Belgium, and are authenticated by functionaries of Belgium, and the plain intendment of the certificate, in saying that the document is authenticated so as to entitle it to be received in evidence in support of the criminal charges mentioned therein, is that it is authenticated so as to entitle it to be received in evidence by the tribunals of Belgium in support of the criminal charges mentioned therein. It is only in respect of evidence entitled to be received by those tribunals that the minister resident to Belgium has any power to make a certificate of authenticity, and the criminal charges mentioned in the documents, and in support of which it is certified that the documents are entitled to be received in evidence, are charges of crimes against the laws of Belgium, and are charges cognizable by those laws.

The Revised Statutes were approved by the president and became a law on the 22d of June, 1874, but they were not accessible in a printed form until early in March, 1875. The certificates to the documents from abroad in this case were obtained in October, 1874, and the papers were put in evidence in December, 1874, and January, 1875. The proceedings took place with refer-

ence to the statutes as they were before the Revised Statutes were enacted, and were entirely regular in that view. It is satisfactory to be able to conclude that there is nothing in the Revised Statutes which affects the operation of the act of 1860, except in respect to the particular depositions named in section 5271; for it cannot be supposed that if the attention of congress be now directed specially to the legislation on the subject it will repeal the act of 1860, or will allow section 5271 to continue to have the operation which it must have in respect to depositions on which an original warrant abroad was granted, when the second section of the act of 1848 had no such operation after the enactment of the act of 1860. On the contrary, as the act of 1860 was intended to enlarge the class of documentary evidence which might be adduced in support of the charge of criminality, and as it is not known that any reason existed for legislation to afford less facilities for the admission of documentary evidence, and as a review of the legislation leads properly to the inference that although section 5271 of the Revised Statutes is plain as to its meaning as it stands, the putting it into such form as makes it apply solely to the subject-matter of the second section of the act of 1848, and throw greater restrictions around the admission of the depositions named in that section, was an inadvertence, it is presumed that the inclination of congress will be so to amend section 5271 as to restore the law to the condition in which it was before that section was enacted.

Besides the documents thus properly received in evidence, there was considerable oral testimony taken before the commissioner. He had, therefore, legal testimony before him, other than the depositions taken prior to the issuing of the first warrant, on which to pass judgment in respect to the criminality of the accused. Such evidence contains testimony tending to prove the death of the deceased, his death by violence, the simultaneous burning of articles in the room where he died, the simultaneous stealing from the safe in the same room of securities to a large amount in value, the flight of the accused to England the same night, the previous poverty of the accused, his possession of money in England, his previous acquaintance with the deceased and familiarity with the premises, a previous quarrel of his with the deceased, the flight of the accused to this country, and the tracing to his possession, while here, of securities shown to have been in the safe of the deceased at the time of his death. On these points and others bearing upon the question of criminality, testimony legally admitted contains materials for a decision of the commissioner on the question of fact, as to whether there was before him such evidence of criminality, as, according to the laws of this place, would justify the apprehension of the accused and his commitment for trial, if the crimes charged had been committed in this place. The commissioner having decided such question of fact, his decision cannot, on the principles before stated, be reviewed by this court, on *habeas corpus*. The writ must, therefore, be discharged, and the prisoner be remanded to the custody of the marshal.

WOODRUFF, J., concurred.

UNITED STATES v. LAWRENCE.

(Circuit Court for New York: 13 Blatchford, 295-307. 1876.)

Opinion by BENEDICT, J.

STATEMENT OF FACTS.—This case comes before the court upon a demurrer interposed by the United States to a rejoinder filed by the defendant. The

proceedings commence with an indictment charging the accused with several offenses, all being forgeries, alleged to have been committed within the jurisdiction of this court, and all, by statute, offenses against the United States. The accused was arrested within this district, by virtue of a bench warrant issued out of this court upon the indictment found, and thereupon, and on being required to plead, interposed a special plea to the jurisdiction of the court, in which he sets up that he was born a citizen of Great Britain, but had resided within the United States from the year 1847 to the year 1875, when he departed from the United States with intent to take up his residence in Great Britain and resume his duty and allegiance as a subject of Her Majesty the Queen of Great Britain and Ireland; that, on the 7th day of March, 1875, in Ireland, upon a requisition made in behalf of the government of the United States, he was seized and thereafter charged with the crimes of forging and uttering a bond and affidavit purporting to be the bond and affidavit of one F. L. Blanding, and thereupon such proceedings were had upon said charge, that, in pursuance of the extradition act of the parliament of Great Britain, passed August 9, 1870 (33 and 34 Vict., ch. 52), by arrangement between the government of the United States and the government of Great Britain, it was agreed, in respect to his surrender, that he should not, until he had been restored, or had an opportunity of returning, to Her Majesty's dominions, be detained or tried within the United States for any offense committed prior to his surrender, other than the extradition crimes of forging and uttering the said bond and affidavit, and thereafter, by force of said arrangement and agreement, and upon the faith thereof, an extradition warrant was issued, reciting that the defendant was accused of the crimes of forging and uttering a certain bond and affidavit within the United States, by virtue of which warrant the accused was conveyed within the jurisdiction of the United States, where he is subject to be tried for the crimes of forging and uttering the said bond and affidavit, and for no other crime or charge whatsoever. In this plea reference is also made to the act of congress of March 3, 1869 (15 U. S. Stat. at Large, 337), in pursuance of which it is averred that the president of the United States, on the 21st of May, 1875, issued his order directly to the district attorney of the United States for the southern district of New York, wherein said attorney was directed to stay all proceedings against the accused, except upon the charges upon which he was extradited, until further order. After setting out the order in full, and averring that no further order has been made by the president, the plea goes on to set out a direction from the attorney-general of the United States, addressed to the district attorney for the southern district of New York, bearing date December 22, 1875, which order of the president and direction of the attorney-general the plea avers were made for the purpose of giving the defendant security against "lawless violence," and for the purpose of enforcing in his favor the rights to which he is entitled by virtue of the treaty of 1842, the act of congress of 1869, the act of parliament of 1870, and the arrangement entered into as aforesaid. The plea then avers that the offenses with which the accused is charged in the indictment are not the offenses on which his surrender to the United States was grounded, but are other and different crimes from those specified in said warrant of extradition; and that he has been held in custody for the crimes specified in the warrant of extradition, but he has not been tried for either of said offenses; wherefore the accused insists that this court has no jurisdiction to try the present indictment, until a reasonable time shall have elapsed, after his trial for the crimes speci-

fied in the extradition warrant, that he may have an opportunity to return to Her Britannic Majesty's dominions. To this plea the United States filed a replication, wherein it is admitted that the accused has been held in custody for the crimes specified in the warrant of extradition, and that he has not yet been tried for the said crimes. It is then averred that, in the extradition proceedings against the accused, he was not, as in the plea alleged, charged with forging and uttering a bond and affidavit purporting to be the bond of one F. L. Blanding, but that, in said proceedings, evidence of the forging of twelve bonds was offered and admitted and made the basis of the claim of the United States for his surrender. It is then averred that no arrangement was made between the government of the United States and the government of Her Britannic Majesty, express or implied, whereby it was provided and agreed that the accused should not, until he had been restored to, or had an opportunity of returning to, Her Majesty's dominions, be detained or tried for any offense other than the extradition crime on which his surrender was claimed; and it is insisted that by the laws of Great Britain and of the United States, as well as by the practice of both parties to the treaty, no limitation exists as to the number and character of the offenses for which a person extradited may be tried. The order of the president, set out in the plea, is admitted, but it is denied that such order was issued, or intended to be issued, in pursuance of the act of congress of March 3, 1869, and, after admitting the direction of the attorney-general of the United States, of December 22, 1875, set out in the plea, the replication proceeds to set out various and sundry other subsequent communications from the attorney-general to the district attorney, and from the district attorney to the attorney-general, by letter and by telegraph, in respect to the accused, whereby it is claimed the last instructions of the attorney-general are shown to be to move the trial of the present indictment; and the plea concludes with a general averment that the offenses in the indictment are the same specified in the warrant of extradition, and are not other and different offenses, and that the district attorney is not prohibited by any order or direction, nor is there any contract which should or can restrain him, from moving the trial of this indictment. To this replication the defendant filed a rejoinder, in which the facts set forth in the plea are again set forth, without substantial change. To this rejoinder the government filed a general demurrer; and the cause is thus before the court on the demurrer.

§ 3468. *In criminal as in civil cases judgment is to be given on demurrer against the party committing the first fault in pleading.*

In determining the questions of law thus presented by these extraordinary pleadings, it is necessary, at the outset, to ascertain what questions are open for determination, inasmuch as it is urged in behalf of the defendant that only the pleading demurred to is before the court for its judgment upon it, and it is insisted that the rule of pleading in civil cases, that judgment is to be given against the party committing the first fault, is not the rule in criminal cases. Upon this question my opinion is, that the rule of pleading in criminal and civil cases is the same. The same reason for the rule exists in both classes of cases; and, although no criminal case has been cited where the rule has been applied, the rule is stated by Archbold, without qualification, as the rule applied in criminal cases. He says (16 Eng. ed., p. 122): "A demurrer has the effect of laying open to the court not only the pleading demurred to, but the entire record, for their judgment upon it as to the matter of law; and, if two or more of the pleadings be bad in substance, the court will give judgment against

the party who committed the first fault." This rule is applied the more readily in the present instance, because the examination of the issues of fact raised by the plea and replication is unnecessary, and ought not to be pursued unless it were indispensable to the protection of the legal rights involved. The entire record being thus before the court, I pass at once to the plea, and proceed to determine whether the facts there stated are sufficient in law to show that this court has no jurisdiction to try the present indictment.

§ 3469. *Extradition proceedings do not secure the defendant immunity from prosecution for other offenses than that for which he was surrendered.*

In disposing of the questions argued before me upon this demurrer, I first notice the position taken, that all extradition proceedings, by their nature, secure to the person surrendered immunity from prosecution for offenses other than the one upon which his surrender was made. This question is not open in this court. It was decided in *United States v. Caldwell*, 8 Blatch., 131. That determination has since received strong support from the decision of the court of appeals of this state, in *Adrianse v. Lgrave*, 59 N. Y., 110, where the existence of any such immunity was denied in a civil case; and it should be noticed that the present circuit judge of this circuit took part in the decision of the court of appeals, being then a member of the court. This ground of defense is therefore dismissed, with the remark that an offender against the justice of his country can acquire no rights by defrauding that justice. Between him and the justice he has offended no rights accrue to the offender by flight. He remains at all times, and everywhere, liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm.

§ 3470. — *construction of extradition treaties, and acts of congress on that subject.*

But here it has been contended that the accused has such immunity by reason of the provisions of the treaty of August 9, 1842 (8 U. S. Stat. at Large, 572), under which his surrender was made, which, it is correctly said, is a law of the United States binding upon the courts. The decision in *Caldwell's* case is decisive of this question also, for *Caldwell* was surrendered under the treaty of 1842. But, as no argument was made in *Caldwell's* case based upon the provisions of this particular treaty, the argument now made in support of this construction of the treaty may properly be examined.

At the outset, let it be noticed that no language is used in the treaty which can be supposed to confer the immunity here claimed. On the contrary, the language of the treaty is calculated to repel the idea, for it declares that the offender shall be "delivered up to justice"—a significant and comprehensive expression, plainly importing that the delivery is for the purposes of public justice, without qualification.

It is, however, argued that both the parties to this treaty have placed a construction upon its provisions, which confers the immunity for which the accused contends; and reference is made to the acts of congress of August 12, 1848 (9 U. S. Stat. at Large, 302), and March 3, 1869 (15 id., 337, U. S. R. S., §§ 5270–5277), and to the British extradition act of August 9, 1870 (33 and 34 Vict., ch. 52), as supporting the assertion.

The act of congress of 1869 is a general law, intended for the protection of extradited offenders; but the protection it confers is expressly limited to cases of "lawless violence." It is true that it assumes, as well it may, that the offender will be tried for the offense upon which his surrender is asked, but

there are no words indicating that he is to be protected from trial for all other offenses. The absence of any provision indicating an intention to protect from prosecution for other offenses, in a statute having no other object than the protection of extradited offenders, is sufficient to deprive of all force the suggestion that the act of 1869, as a legislative act, gives to the treaty of 1842 the construction contended for by the accused.

So of the act of 1848, the provision of which relied upon (sec. 3) is, that it shall be lawful for the secretary of state to order the offender "to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly." It does not seem reasonable to suppose that it was the intention of congress, by the above language, to give a legislative construction to the existing treaty of 1842. The provision of the act of 1848 is within the broad provision of that treaty, but does not restrict the operation of that provision; and it may be safely assumed that, if the intention to limit the effect of, or give a construction to, that or any other treaty, had been entertained — assuming such a function to belong to a statute of this character, — that intention would have been plainly expressed. The acts of congress referred to, therefore, fail to afford a legislative construction of the treaty, in the particular under consideration.

§ 3471. — *the British extradition act of parliament of 1870 has no binding force on the courts of the United States.*

It is still more difficult to find support for the doctrine of the defense in the provisions of the British extradition act of 1870. How can it be, that, without any action on the part of the treaty-making power of the United States, the parliament of Great Britain, by a statute of Great Britain passed twenty-eight years after the treaty of 1842, can engraft upon that treaty a provision of immunity not found in the treaty, and which must thereafter be enforced by courts as part of the laws of the United States? The effect proper to be given by the executive department of the government to any condition found in an extradition statute of Great Britain, to which the government of the United States has assented in any particular case, is not under consideration. Here, the question is judicial, and it is, whether the British act of 1870, by reason of its subject-matter, becomes a law of the United States, and, as such, affords a legislative construction of this treaty, binding upon the courts of the United States. Upon such a question no time need be spent, and it is dismissed with the observation that it would appear that the English courts incline to the opinion that the act of 1870 has no effect in England, even, to limit the operation of the treaty of 1842, as is seen by the opinions delivered in the court of queen's bench, in *Ex parte Bouvier* (27 Law Times, 844). The words of the lord chief justice in that case are: "I see plainly what was the intention of the legislature — that is to say, it was intended" (by the act of 1870), "while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force."

§ 3472. — *construction of the extradition treaty by the executives respectively of the English and the American governments.*

Nor is it made to appear that any such construction of the treaty of 1842 has been adopted by the executive department of either government. An agreement for such immunity in the present instance is set up by the plea. But it is competent for the government of the United States to enter into such an agreement with the government of England, in the absence of any provision

for immunity in the treaty; and the demand for such an agreement on the one side, as well as the giving thereof on the other, leads to the inference that no such protection is afforded by the treaty itself. A single instance of such an agreement does not, therefore, help the argument. The understanding of the treaty by the executive department is better shown by the action taken or omitted in the cases that have arisen where there has been no agreement. Thus in the case of Heilbronn, who was surrendered by the United States upon the request of England, for an extradition crime, a trial was had in England for an offense not provided for in the treaty, without interference by the executive there, and without complaint from the government of the United States. So, also, Burley, an offender surrendered by England to this government, was put upon trial in this country for an offense other than the one upon which he was extradited, and, the case being called to the attention of the law officers of the crown, it was considered that, "if the United States put him *bona fide* upon his trial for the offense in respect of which he was given up, it would be difficult to question their right to put him upon his trial also for piracy, or any other offense which he might be accused of committing within their territory, whether or not such offense was a ground of extradition, or even within the treaty." Clarke on Extradition, 2d ed., p. 90, note. No case has been referred to where the right above spoken of has been questioned by the British government. On the contrary, if I am correctly informed, such right has not hitherto been denied in England.

As to the effect of the fact of a previous trial for the offense for which the offender was given up, to which allusion is above made, it is plain that such fact is immaterial in determining the judicial question, where legal immunity is set up by way of defense in a prosecution for other offenses, however important that fact might be, as evidence of good faith, in determining the political question, when it arises.

It may be added that the action of the executive department of the government of the United States, in the cases where extradited offenders have been tried in this country for offenses other than those upon which their surrender had been asked, has a significant bearing upon the legal question under consideration, because, in criminal cases, as distinguished from civil cases, the executive, by reason of the power conferred by law to control the prosecuting officer, as also its power to pardon, is not confined to a consideration of the political question alone, but may also act upon a determination of the judicial question.

But it is further said that the British act of 1870 amounts either to an abrogation of the extradition section of the treaty of 1842, or to a modification of the provisions; and that, inasmuch as, by the eleventh section, the government of Great Britain could at any time abrogate that portion of the treaty, the act of 1870, if considered by the government of the United States as an abrogation, would have been so declared, and, in the absence of such a declaration, must be considered to be acquiesced in by the government of the United States, as its construction of the treaty, and becomes a part of the treaty, binding upon the courts. This proposition is answered by what has been already said in regard to the effect of the British act of 1870, and the action of the government of the United States in the cases which have hitherto arisen. Moreover, if the action of the two governments and the act of 1870 be given the utmost effect possible in favor of the accused, all that can be extracted from them is an implied engagement to afford protection to persons extradited in pursuance of the treaty, from prosecution for causes other than those upon which their surrender was

asked — which addresses itself to the political, not to the judicial, department. It is not intended to suggest that such can be their effect, but simply to express the opinion that, in any aspect, they have no greater effect, and in view of the language of the treaty cannot be relied on as affording a legislative or executive construction of that instrument, binding upon the courts.

It may, therefore, without hesitation, be declared that the claim of legal immunity, here made, is without foundation in the treaty of 1842. In support of this conclusion, reference is made to the authority of the court of appeals of the state of New York, which high court, in Lagrave's case, was called on to consider the effect of this same treaty.

§ 3473. *The jurisdiction of a court cannot be limited by an order of the president.*

There remains to be examined that portion of the defense which is based upon the order of the president and the direction of the attorney-general, set out in the plea. In regard to this defense, it is sufficient to say that no order of the president nor direction of the attorney-general can have any legal effect to restrict or to enlarge the jurisdiction conferred by law upon the courts. The courts, in determining the extent of their jurisdiction, look to the law, and within that jurisdiction they are absolutely free from the control of any other department of the government. See the remarks of Blatchford, J., in *The United States v. Blaisdell*, 3 Ben., 143. It should be observed, in this connection, that it is evident that neither the order of the president, nor the communication of the attorney-general to the district attorney, of December 22, 1875, set out in the plea, were intended to be resorted to as matter of defense, but are official communications intended solely for the consideration and guidance of the officer to whom they were addressed, and, presumably have no reference whatever to judicial action. The mass of letters and telegrams with which the record is incumbered are, therefore, to be considered as wholly irrelevant. They are outside the case, and constitute no ground of objection to the jurisdiction of the court.

It may be added that the presence of this indictment before the court, and moved for trial by the district attorney, by whom the government is represented before the court, as also it may now be by the attorney-general in person, by virtue of the act of June 22, 1870 (16 U. S. Stat. at Large, 162, now U. S. R. S., § 359), is inconsistent with the averment that the trial is moved in opposition to the directions of the attorney-general. When the attorney-general of the United States, having knowledge of the moving of a criminal trial, permits the moving thereof, in law he directs the same, and the court must consider the trial to be moved by the government.

§ 3474. *An alleged agreement of the American and British governments as to the trial of a prisoner, limiting it to a certain offense, cannot avail him as a plea to the jurisdiction of a court, before which the government is moving for his trial.*

All the positions taken in behalf of the accused have now been examined, except that based upon the fact set up in the plea, that, in the case of the accused, an express agreement was made between the government of the United States and the government of Great Britain, by which it was provided and agreed that the accused should not, until he had been restored, or had an opportunity of returning, to Her Majesty's dominions, be detained or tried within the United States for any offense committed prior to his surrender, other than the crime of forging and uttering the said bond and affidavit on which his

surrender was thus claimed. Upon this point the argument made is that the existence of such an agreement being admitted by the demurrer, it must be recognized by the court, and the accused be protected by the court from prosecution upon an indictment charging offenses other than those mentioned in the agreement, as stated. This position is supposed to be supported by the rule applied in civil cases when a defendant has been inveigled within reach of the process of the court. But the rule referred to has no application in criminal cases. The duty of the courts in criminal cases is stated by the court of king's bench in *Ex parte Scott*, 9 B. & C., 447. Scott was indicted in England for perjury, and a warrant for her arrest issued. The officer proceeded to Brussels, and there finding Scott, seized her without resort to extradition proceedings or other legal process. Application for assistance was then made by her to the British ambassador at Brussels, who refused to interfere, and she was carried to London, where she was brought before the court upon *habeas corpus*, and the above facts made to appear. Lord Tenterden, C. J., in delivering the opinion of the court, thus lays down the rule in criminal cases: "The question is whether, if a person charged with a crime is found in this country, it is the duty of the court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them." These words express the opinion of this court. A different rule would seriously embarrass the administration of the criminal laws, and cannot be permitted here to obtain until it has received the sanction of controlling authority. If, then, an agreement exists between the government of the United States and the government of Great Britain, such as is set forth in the plea, the performance thereof is within the power of the government, by reason of its legal control over the prosecuting officer; and all that need be said here is that such an agreement can avail nothing to a defendant setting it up by way of plea to the jurisdiction of the court before which his trial is moved by the government.

The decision, therefore, must be that the plea to the jurisdiction and all subsequent pleadings in this case be set aside, with liberty to the defendant to plead anew to the charges in the indictment contained.

§ 8475. In general.—The power of surrendering up fugitives from justice is a delicate one, and should be limited and guarded with great care to prevent abuses, and exercised with the utmost caution and deliberation. *Ex parte Kaine*,* 3 Blatch., 1.

§ 8476. Case must be provided for by treaty.—The crime of larceny is not among those for the commission of which the extradition of fugitives is provided for in our treaties of 1794 and 1842, with Great Britain. And it is an established rule of the United States neither to grant nor to ask for the extradition of fugitives from justice, as between us and foreign governments, unless in cases for which stipulation is made by express convention. *International Extradition*,* 6 Op. Att'y Gen'l, 431.

§ 8477. In the absence of treaty stipulations, nations are under no political obligations to surrender fugitives from justice. *The British Prisoners*,* 1 Woodb. & M., 66.

§ 8478. The judicial tribunals of the United States possess no power to arrest, and surrender to a foreign country, fugitives from justice, except as authorized by treaty stipulations, and acts of congress passed in pursuance thereof. And it seems that this power belongs to the treaty-making power alone, and cannot be exercised independently of a treaty. (Per NELSON, J., dissenting.) *Ex parte Kaine*, 14 How., 135.

§ 8479. There being no treaty between the United States and Portugal for the mutual delivery of fugitives from justice, and no act of congress authorizing the president to deliver up fugitives from justice, the president has no authority to surrender a fugitive from the justice of Portugal. *Extradition*,* 2 Op. Att'y Gen'l, 559.

§ 8480. There is nothing in the law of nations which imposes on us any obligation to deliver up to the British government the master of a British schooner and his accomplices, all

British subjects, who have run away with the schooner and her cargo, and are found within our jurisdiction. If the obligation existed, the president would have no power to make the delivery, since neither the treaty nor the acts of congress contain any provision on the subject. Foreign Requisitions,* 1 Op. Att'y Gen'l, 509.

§ 3481. Independently of special compact, no nation is bound to deliver up fugitives from the justice of another nation. Any nation may, in its discretion, do this as a matter of international comity. But all such discretion is of inconvenient exercise in a constitutional republic like our own. It is therefore the settled policy of our government to refuse to grant extradition, except in virtue of express stipulations to that effect. It is therefore unjust and unwise, in point of principle, for the United States to ask for the extradition of a fugitive from her justice, in any case in which she cannot demand it by virtue of a treaty. International Extradition,* 6 Op. Att'y Gen'l, 85.

§ 3482. There being no treaty stipulation between the two governments for the mutual delivery of fugitives from justice, the president of the United States is not justifiable in directing the surrender of a person upon whom stolen diamonds belonging to the Princess of Orange may have been found, in order that he may be brought to trial in the country where he is supposed to have committed the robbery. Diamonds of the Princess of Orange,* 2 Op. Att'y Gen'l, 452.

§ 3483. Claims for extradition, how founded.—The practice of our government, as well as that of Great Britain, requires that all claims for extradition should be founded on a judicial warrant, with proper evidence to justify the warrant. Such a warrant may issue upon indictment found, or upon lawful testimony before a committing magistrate, but judicial inquiry and authority are indispensable prerequisites of the demand for extradition. A mere complaint on oath before a justice of the peace, without a warrant accompanied by sufficient evidence of the guilt of the accused to justify his commitment for trial, is not sufficient. International Extradition,* 6 Op. Att'y Gen'l, 485.

§ 3484. Power to make extradition treaties.—A stipulation in a treaty to deliver up fugitives from justice is within the authority of the treaty-making power. *In re De Giacomo*,* 12 Blatch., 391.

§ 3485. Extradition treaties and laws do not provide for a punishment of crime, and extradition is in no sense a punishment, so that the constitutional provisions relating to *ex post facto* laws cannot apply. *Ibid*.

§ 3486. A treaty stipulation for the delivery of persons charged with having committed a crime previous to the making of the stipulation is not invalid under the constitution as being either an *ex post facto* law or a bill of attainder. *Ibid*.

§ 3487. There is nothing in the tenth article of our treaty with Great Britain concluded at Washington, August 9, 1842, providing for the extradition of fugitives, and which declares that any judge or magistrate of the government may, upon complaint made under oath, issue a warrant for the apprehension of the fugitive, and if he thinks the evidence sufficient to sustain the charge, it shall be his duty to certify the same to the proper executive authority that a warrant may be issued for the surrender of such fugitive, which conflicts with the fourth and fifth amendments to the constitution. Extradition,* 4 Op. Att'y Gen'l, 201.

§ 3488. Reciprocal obligations.—The act of congress of August 12, 1848, entitled "An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivering up of certain offenders," providing that "in every complaint as aforesaid, and on a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any such foreign country may have been granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them, to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended," is in aid of our treaty with Great Britain, and cannot be in conflict with such treaty, since it does not assume to interdict or diminish the engagements of the treaty. The effect of the act is domestic and infra-territorial, and it cannot be contested that congress has power to provide for the extradition of criminals escaping from foreign countries to this, without regard to any reciprocal obligations on the part of the home country of the fugitives toward us. *In re Kaine*,* 10 N. Y. Leg. Obs., 257; *In re Heilbronn*,* 12 N. Y. Leg. Obs., 65.

§ 3489. Agency of the courts.—It is a doctrine firmly established in the jurisprudence of this country and England, in respect to the surrender of fugitives from justice, whether the obligation to surrender is deduced from the law of nations, or is recognized only when expressly stipulated by treaty, that the extradition is to be effectuated through the agency of the tribunals of justice, whose province it is to determine the existence of reasonable cause for the charge of crime, and if there be sufficient evidence to justify the putting of the accused upon his trial. *In re Metzger*,* 5 N. Y. Leg. Obs., 83.

§ 3490. The constitution having placed treaties in the same rank with itself and with the

acts of congress, and having declared them to be the law of the land, the provisions of our treaty with France of November 9, 1843, which are addressed to our judicial power, and which require an investigation of the charges against alleged fugitives from the justice of that government and the arrest and imprisonment of the accused, assume the character of municipal law rather than a contract, and the courts of the United States, under their jurisdiction extending to all crimes cognizable under the authority of the United States, carry these treaty provisions into execution without further authority or direction from congress. *Ibid.*

§ 3491. The executive alone possesses no authority, under the constitution and laws of the United States, to deliver up to a foreign power any alleged fugitive from justice found within the states of this Union, without the intervention of the judiciary. The surrender is founded upon an alleged crime, and the judiciary is the appropriate tribunal to inquire into the charge. (Per NELSON, J., dissenting.) *In re Kaine*, 14 How., 140.

§ 3492. An executive order for the surrender of an alleged criminal on demand of a foreign government is a purely national act, and must be performed through the secretary of state by order of the president. But congress may invest authority in judicial magistrates to arrest and commit preparatory to surrender, and such arrest may be made, when properly authorized by law, without previous authority from the president. *Ibid.*

§ 3493. Under the extradition provisions of the treaty of 1842 with Great Britain, the judiciary possess no jurisdiction for the apprehension and committal of an alleged fugitive without a previous requisition, made under the authority of Great Britain, upon the president, and his authority for that purpose. *Ex parte Kaine*,* 3 Blatch., 1.

§ 3494. Power of the states.—No state can, without the consent of congress, enter into any agreement or compact, express or implied, to deliver up fugitives from justice from a foreign state who may be found within its limits. *Obligation to Surrender Fugitives*,* 3 Op. Att'y Gen'l, 661.

§ 3495. A fugitive from justice of a foreign country was held under a warrant from the governor of Vermont, with a view to his extradition. On a writ of error to the state supreme court to revise its decision on a writ of *habeas corpus* remanding the prisoner to the custody of the sheriff, the supreme court were divided in opinion whether the state had power to deliver up the fugitive. They were also divided in opinion whether they had jurisdiction of the writ of error, and it was dismissed. *Holmes v. Jennison*, 14 Pet., 510 (APPEALS, §§ 1009-34).

§ 3496. State interference.—Where a fugitive from the justice of Great Britain is in the hands of the marshal of the United States, with the final authority of the president for his extradition, and an application has been made to a state court for a warrant by which the fugitive may be taken from the British agent after being delivered by the marshal, it is the duty of the marshal to quietly conduct the fugitive either to a vessel or to the line of the state and there deliver him to the agent. *Extradition of Fugitives*,* 6 Op. Att'y Gen'l, 290.

§ 3497. A state court has no authority, by issuing a writ of *habeas corpus* to bring the accused before it, to interfere with a proceeding before a United States commissioner, preliminary to the extradition of a fugitive to a foreign power. The possible innocence of the accused, or the possible inadequacy of the proofs adduced, affords no ground for the interference of a state court. It is the duty of the marshal to disobey the *habeas corpus*, and it is the duty of the United States courts to protect him from amenability to state authority for such disobedience. *Extradition of Fugitives*,* 6 Op. Att'y Gen'l, 237.

§ 3498. Successive applications for extradition.—Until a decision founded upon an adequate investigation and a full consideration, the proceedings under successive applications for extradition are, in effect, if not in character, analogous to successive preliminary hearings before committing magistrates under ordinary charges of crime. The refusal of such an application in one state will not, therefore, bar the hearing of a second application for the extradition of the same person for the same crime, in another state, where upon the former application there was no decision upon a full investigation. *Muller's Case*,* 5 Phil., 289.

§ 3499. Where a prisoner sought to be extradited for forgery has been discharged for want of proof, he may on such discharge be arrested and proceeded against with a view to his extradition to the same demanding government for other forgeries, although in the first charge the crime of forgery was charged *ex vi termini*, since each forgery is a separate offense, and there may be as many demands of surrender as there are instruments forged. *In re Macdonnell*,* 11 Blatch., 170.

§ 3500. While an alleged fugitive from the justice of a foreign government was under arrest, which arrest had been held to be legal by the circuit court on *habeas corpus*, and during the existence of proceedings before a commissioner for his extradition, a second warrant of arrest was issued by the commissioner and placed in the hands of the marshal, based upon another mandate of the executive and another complaint from the foreign government

charging him with other offenses of like character. The prisoner was notified of this warrant. The then pending proceedings under the first arrest were afterwards dismissed for want of proof, and the prisoner discharged from that arrest, but he was detained by the marshal by virtue of the second warrant. It was held (1) that the discharge from the prior arrest, for want of proof, did not operate retrospectively to render the arrest illegal from the beginning; (2) that the proceedings for the second charge were properly instituted by a warrant of arrest delivered to the marshal, and that the detention under the second warrant was legal. *Ibid.*

§ 8501. The arrest, examination and discharge of a demanded fugitive will not prevent his re-arrest and examination by another judge or magistrate, if the demanding government set fit to pursue the matter further. Extradition of Muller,* 10 Op. Att'y Gen'l, 501.

§ 8502. Political questions.— Whether our government is bound by a treaty compact to deliver up a fugitive for offenses committed by him in a foreign country, which are not crimes by our laws; whether the accused is within the description of persons named in the treaty as subject to extradition; whether the treaty went into operation from its date or from its ratification by assent of the senate; and finally, whether the obligation assumed by the treaty will be fulfilled or not, are considerations addressed to the political department of the government, and over these questions the judiciary has no immediate control or jurisdiction. *In re Metzger*,* 5 N. Y. Lég. Obs., 83.

§ 3503. A new authorization from the state department to proceed in an extradition case pending before a commissioner is not necessary upon the receipt of a new set of papers in the case, until the first shall have been exhausted by the judicial examination of the person accused and his release or condemnation. But such a new letter may be granted if the reclaiming government so desires. Extradition,* 7 Op. Att'y Gen'l, 536.

§ 8504. Complaint sworn to abroad.— The treaty of 1842 between the United States and Great Britain, providing for the extradition of fugitives from justice, and declaring that "the respective judges and magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made on oath, to issue a warrant for the apprehension of the fugitive," does not require that the complaint under oath should be made directly to a magistrate of the country to which the fugitive has fled; but if it is made in the country where the crime was committed, to a magistrate who has power to administer oaths and to investigate the criminal charge made, and take jurisdiction of the same, and the same, or a duly certified copy of the same, is transmitted to the government of the country where the fugitive has sought an asylum, and the government of the country to which the same has been transmitted recognizes its authenticity, the terms of the treaty have been satisfied. The authenticity of such papers and the authority of the foreign magistrate are recognized by the issuing of the warrant of investigation by the president. *In re Heilbronn*,* 12 N. Y. Lég. Obs., 65.

§ 8505. Complaint by private person.— A complaint for extradition, purporting to be made by a private individual and not a public officer, upon information and belief, and without stating any sources or details of his information, is defective, and gives the commissioner no jurisdiction. *Ex parte Lane*,* 6 Fed. R., 34.

§ 8506. Description of commissioner.— In the complaint before a commissioner, and in subsequent proceedings before him, in extradition cases, he ought to be described as a commissioner of the circuit court of the United States, specially authorized by said court to take cognizance of applications for extradition, or by words of similar import. *Ibid.*

§ 8507. A commissioner, in an application for extradition, has no authority to interline the word "extradition" in his jurat to the complaint, thus changing the title of his office from "United States commissioner" to "United States extradition commissioner," after the conclusion of the testimony, and without the knowledge of the petitioner. *Ibid.*

§ 8508. Description and definition of offense.— In our treaties covering the subject of extradition, offenses are mentioned with reference to their definitions in the system of general jurisprudence. But the treaties require the specific applications of the definitions to be conformable, in particular cases, to the jurisprudence and legislation of the respective places where the parties may be arrested; and likewise require the local rules of decision as to the sufficiency of the evidence. Where the charge is forgery or the like, the legislation and jurisprudence of the particular state where the arrest is made must be referred to. *Muller's Case*,* 5 Phil., 289.

§ 3509. Judicial notice — Complaint.— The complaint, in an application for extradition, which alleges the crime to have been committed at Rondeau, in the province of Ontario, need not aver that Ontario is within the territorial domain of Great Britain. The court will notice the latter fact judicially. *Ex parte Lane*,* 6 Fed. R., 34.

§ 3510. Act not a crime under our laws.— Under our treaty with France of November 9, 1843, a fugitive from the justice of that country, when found in this, is subject to extradi-

tion, although the crime with which he is charged is not a crime under our laws. *In re Metzger*,* 5 N. Y. Leg. Obs., 83.

§ 3511. **Power to issue habeas corpus.**—The judiciary has authority to inquire, through a writ of *habeas corpus*, into the cause of commitment, in case of arrest of fugitives from justice, on application made under the treaty between the United States and Great Britain. *In re Kaine*,* 10 N. Y. Leg. Obs., 257.

§ 3512. **Power of district judge.**—Congress having made each district judge (within his district) the competent judge for the purposes expressed in the ninth article of the convention between France and the United States, the supreme court cannot control the district judge in the exercise of his discretion in issuing a warrant under that article, or interfere with his decision in any manner. *Judicial Discretion*,* 1 Op. Att'y Gen'l, 55.

§ 3513. Under our treaty with Great Britain stipulating for the mutual surrender of fugitive criminals, and under the act of congress of August 12, 1848, for carrying into effect these stipulations, a district judge has jurisdiction to issue a warrant requiring the alleged fugitive to be brought before him, without any previous authority from the executive department of our government. *Ex parte Ross*,* 2 Bond, 252.

§ 3514. **Offenses by American citizens abroad.**—Where citizens of the United States have been accused as accessory to the running away of a British vessel by British subjects, and the bringing of such vessel within our ports in violation of our revenue laws, the district attorney should, in compliance with a requisition of the British government, calling for the punishment of such citizens, be instructed to inquire into the facts and institute such proceedings as the law warrants. *Foreign Requisitions*,* 1 Op. Att'y Gen'l, 509.

§ 3515. **Power of the president.**—According to the practice of the executive department, the president is not considered as authorized, in the absence of an express provision by treaty, to order the surrender of fugitives from justice. *Obligation to Surrender Fugitives*,* 3 Op. Att'y Gen'l, 661.

§ 3516. **Demand by Spain.**—If demand were formally made that a Spanish subject having fled from the justice of that government to the United States, or that any of our citizens, heinous offenders within the domain of Spain, should be delivered to their government for trial and punishment, the United States would be in duty bound to comply. *Territorial Rights*,* 1 Op. Att'y Gen'l, 68.

§ 3517. **Preliminary proceedings under treaty with Prussia.**—To grant a mandate for the commencement of proceedings for the extradition of a fugitive from justice, in pursuance of our treaty stipulations with Prussia covering that subject, the president does not require all the evidence which is necessary to an actual extradition. A warrant of arrest, setting forth the crime (being one within the treaty), purporting to have been issued upon due inquiry and evidenced by the competent judicial authority in Prussia, and being sufficiently authenticated by the certificate of the minister himself, is held sufficient. *International Extradition*,* 6 Op. Att'y Gen'l, 217.

§ 3518. **Offenses on the lakes.**—The extradition of persons living in Canada and committing robbery on Lake Erie may be demanded, as pirates under the Ashburton treaty. *Lake Erie Pirates*,* 11 Op. Att'y Gen'l, 114.

§ 3519. **Duty of officers.**—All the federal judges and the commissioners appointed by them are required to give their aid in execution of the extradition treaties existing between this and foreign governments. The marshal is required to execute process with vigor and good faith. There is no provision in any act of congress which requires the attorneys of the United States to appear on the part of foreign governments claiming the extradition of fugitives. If the foreign government needs legal skill, she may select counsel at pleasure, and is not confined to the officer appointed by the United States. *Costs of Extradition*,* 9 Op. Att'y Gen'l, 497.

§ 3520. **Proceedings in foreign country.**—In an extradition proceeding it is not necessary that a warrant of arrest should have been issued or proceedings had against the accused in the foreign jurisdiction. *In re Thomas*,* 12 Blatch., 370.

§ 3521. It is not a prerequisite to an extradition proceeding that the person arrested should have been charged, in the country where the crime was committed, by a public accusation corresponding in effect to our indictment. Any proceeding in that country under which evidence has been or might be lawfully taken there, with a view either to a criminal prosecution, or to deciding whether to institute one, satisfies the requirements of our treaties on that subject. *Muller's Case*,* 5 Phil., 289.

§ 3522. **Crimes committed prior to treaty.**—In extradition treaties crimes committed prior to the adoption of the treaty are included, unless the language of the treaty expressly excludes them. *In re De Giacomo*,* 12 Blatch., 391.

§ 3523. — **right of asylum.**—Where the extradition of a fugitive from justice is sought it is immaterial whether he came to this country before or after the adoption of the treaty

which includes him. The right of asylum is not a substantial personal right of which he could not be deprived by treaty. *Ibid.*

§ 3524. A treaty of extradition provided that it was not to apply to any crime committed prior to its date, except murder and arson, and that it should not take effect till twenty days after its ratification. *Held*, that it applied to crimes committed between the date of its ratification and within the twenty days. *In re Vandervelpen*,* 14 Blatch., 137.

§ 3525. An application for the extradition of a fugitive from justice may be sustained where the act with which he is charged was made punishable as a crime, in the state where the proceedings are had, after the date of the treaty under which the application is made, but before the act was committed. *Muller's Case*,* 5 Phil., 289.

§ 3526. Proceedings before state magistrates.—An examination of an alleged fugitive from justice may be held by a state magistrate, and the alleged fugitive may be committed for extradition, especially where no objection is made on the examination to such magistrate's authority. *The British Prisoners*,* 1 Woodb. & M., 66.

§ 3527. Review of proceedings before commissioner.—The action of a commissioner in extradition proceedings, in passing upon the effect of the evidence introduced before him, is not subject to review by any judicial tribunal or officer. *In re Vandervelpen*,* 14 Blatch., 137; *In re Wahl*,* 15 Blatch., 334.

§ 3528. Where a United States commissioner has jurisdiction of an examination in an extradition case, courts have no jurisdiction, on *habeas corpus*, to sit in review upon the merits of the decision, either on the facts or the law. *Ex parte Van Aernam*,* 3 Blatch., 160; *Ex parte Van Hoven*,* 4 Dill., 415.

§ 3529. In extradition proceedings the commissioner before whom the examination is held is sole judge of the weight of the evidence, subject only to a review by the president. *United States v. Wiegand*,* 14 Blatch., 370.

§ 3530. Upon the hearing on the return of a writ of *habeas corpus*, issued to inquire into the legality of the detention of one committed for surrender as a fugitive from justice, the court does not sit as an appellate tribunal, for the purpose of reviewing the proceedings before the commissioner, as upon allegation of error, and will not order the prisoner's discharge for improper admission of evidence by the commissioner, if without that evidence the proofs are sufficient to sustain his commitment for surrender. *In re Macdonnell*,* 11 Blatch., 170.

§ 3531. The court is of opinion that a judge or a court, in cases where extradition is sought, is not at liberty, on *habeas corpus*, to weigh the evidence before the commissioner, and inquire whether they would have reached the same conclusion. *Ibid.*

§ 3532. Where an alleged fugitive from the justice of a foreign country stands committed by a commissioner for surrender to the authorities of the country from which he fled, and obtains a review of the proceedings had before the commissioner by a writ of *habeas corpus* and a writ of *certiorari* from the circuit court, and it appears on such review that the commissioner has improperly excluded evidence offered in the prisoner's behalf, an examination *de novo* will be ordered, and the prisoner will stand under arrest as before, charged and held for examination. *In re Farez*,* 7 Blatch., 491.

§ 3533. If the commissioner has jurisdiction to commit a fugitive from justice with a view to his extradition under our treaty with Great Britain, the district court on *habeas corpus* can only inquire into the sufficiency of the evidence on which the commitment is made. It cannot correct or regard either error or irregularity of that officer in conducting the proceedings, or in his final determination. *In re Kaine*,* 10 N. Y. Leg. Obs., 257.

§ 3534. A commissioner having the same authority in examinations of charges against fugitives from justice as any judge of the United States, and the act of congress, in prescribing the duties of commissioners, providing that "if on such hearing the evidence be deemed sufficient by him (the commissioner) to sustain the charge, under the provisions of the proper treaty," it shall be his duty to issue a warrant of commitment of the person accused, to await the determination of the president, whether he will, upon the evidence taken before the commissioner, issue a warrant of extradition, the district court will not, upon a writ of *habeas corpus*, inquire into the sufficiency of the evidence upon which the commissioner acted. Such a power is vested in the president alone. *In re Heilbronn*,* 12 N. Y. Leg. Obs., 65.

§ 3535. Proceedings against accused in state court.—Where one has caused the death of another in the British jurisdiction, and proceedings are pending against the offender in the state of Michigan, where the injured person died, the British government has a right to institute preliminary proceedings to the end that the offender may be extradited if he shall be discharged by the authorities of Michigan. Such proceedings may be begun by obtaining a warrant from a commissioner for the arrest of the criminal. No previous mandate from the state department is necessary. *Tyler's Case*,* 9 Op. Att'y Gen'l, 379.

§ 3536. Approval of district attorney not necessary.—There is nothing in the extradition laws which requires the proceedings against a foreign criminal or a deserting seaman to be

either carried on or approved by the attorney of the United States for the proper district. Extradition,* 9 Op. Att'y Gen'l, 246.

§ 8537. **Authority of attorney-general.**—The attorney-general has no such official relation to a judge of a United States district court as would warrant him in asking of the judge an explanation of his judicial action in a proceeding for the extradition of a fugitive from justice in which he had lawful jurisdiction. Extradition of Muller,* 10 Op. Att'y Gen'l, 501.

§ 8538. **Demand must be made on the president.**—Under our system of government a demand upon the nation for the surrender of an alleged fugitive from justice must be made upon the president, who has charge of all its foreign relations, and with whom alone foreign governments are authorized or even permitted to hold any communication of national concern. A demand for extradition must be made upon the executive, and cannot be made through any other department or in any other way. The judiciary can only act when put in motion by the president. (Per NELSON, J., dissenting.) *In re Kaine*, 14 How., 137.

§ 8539. The mere notification by a local officer of the fact that a party, guilty of a certain crime within the treaty, has escaped from the territory of the Elector of Hesse Cassel, where the crime was committed, and perhaps fled to the United States, and suggesting her extradition, said notification being under the seal of the criminal court of the city of Fulda, is not sufficient to justify the president in issuing a mandate for judicial inquiry. The demand for extradition must come from the executive of the demanding nation. International Extradition,* 7 Op. Att'y Gen'l, 6.

§ 8540. Under our treaty with Great Britain of August 9, 1843, providing for the mutual extradition of fugitives from justice, the British government may take the first step for the extradition of a fugitive, either by the filing of a complaint, under oath, before the proper judge or other magistrate, who is then authorized by the treaty to issue a warrant for the apprehension of the fugitive, or it may make a formal requisition on our executive, who will thereupon issue a mandate to the proper magistrate to inquire into the charge. The latter method, however, is not pointed out in the treaty, but seems to have been thought necessary by some of the judges in *Kaine's Case* (14 How., 103). International Extradition,* 6 Op. Att'y Gen'l, 91.

§ 8541. Mere judicial documents are not the "requisitions" required by our treaty with Great Britain and our statute in execution of the treaty, in order that a fugitive from justice may be delivered up. There must be, in order to the final extradition of the criminal, a formal requisition made by such executive agents or officers of the foreign government as may be entitled to recognition for that purpose at the department of foreign affairs. But by our statute, any competent judge or other magistrate of the United States may, on his own motion, and without having any previous diplomatic requisition, arrest and examine a fugitive from foreign justice, commit him to prison to await requisition, and then certify the facts to the secretary of state, in which case the party stands committed for the space of two months, when, not having been delivered over, he may, on due notice to the secretary of state, apply to a judge for discharge. International Extradition,* 8 Op. Att'y Gen'l, 240.

§ 8542. A demand of extradition made upon the authority of a *mandat d'arrêt*, duly certified and duly transmitted through the minister, is sufficient foundation for the president to issue a mandate for judicial inquiry. Extradition,* 8 Op. Att'y Gen'l, 106.

§ 8543. **Authentication of papers.**—The act of June 22, 1860, relating to the authentication of evidence in extradition cases, does not repeal the act of August 12, 1848, in any of its requirements. The latter act is not in any manner affected by the former. The act of 1860 enlarges the provisions of the act of 1848, by exacting, as a mode of proof of the authenticity of the papers, the certificate of the minister, or consular officer of the United States in the foreign country, that they are verified as required by the act of 1848. But this does not repeal or alter the act of 1848, authorizing the admission of papers "certified under the hand of the person or persons issuing such warrant, and attested by the oath of the party producing them, that they are true copies." *Ex parte Ross*,* 2 Bond, 252.

§ 8544. In a proceeding for the extradition of a fugitive criminal demanded by Great Britain, the complaints, informations and inquisitions taken before an acting magistrate of the county of Longford, since deceased, which are authenticated by the official certificate of another magistrate of the same county, that they are true copies from the crown office of the county; and also authenticated by the oral testimony of witnesses who swear that they accurately and carefully compared the originals with the copies, and that the copies are true; and who further testify that they have been employed in the constabulary force of the county, that the magistrate before whom the proceedings were had was an acting magistrate of the county, that the magistrate certifying the papers was also an acting magistrate of the county, that they saw him sign the several certificates authenticating the copies, that said magistrate, upon the original documents, issued a warrant of arrest for the accused, which warrant the

witnesses produce, are held to be properly receivable in evidence, under the act of congress of August 12, 1848. *Ibid*.

§ 3545. Forgery is one of the crimes for which the mutual extradition of fugitives from justice is stipulated by the convention between Prussia and the United States. Documents, therefore, consisting of testimony taken before the proper criminal tribunal of Breslau, in the kingdom of Prussia, and a warrant in due form from said judicial authorities, together with other papers, the same being authenticated by the certificate of the foreign office of Prussia and that of the American minister there, showing that the fugitive demanded is charged with the forgery of sundry checks, by means of which, whilst an employee of the communal chest of Breslau, he obtained and absconded with a considerable sum of money belonging to said communal chest, are sufficient to justify the granting of the customary mandate on the part of the president for a judicial inquiry. *International Extradition*,* 6 Op. Att'y Gen'l, 761.

§ 3546. The second section of the act of August 12, 1848, respecting the manner of authenticating the evidence in proceedings for extradition, is repealed by the act of June 22, 1860. *Extradition of Muller*,* 10 Op. Att'y Gen'l, 501.

§ 3547. Executive mandate.—In extradition cases, where the treaty does not require it, the issuing of an executive mandate is not a prerequisite to the entertaining of proceedings and the issuing of a warrant of arrest by a magistrate. *In re Thomas*,* 12 Blatch., 370.

§ 3548. Under our treaty with Great Britain of August 9, 1842, for the extradition of fugitives from justice, a competent magistrate may take jurisdiction of proceedings for extradition voluntarily, and no previous mandate from the president, authorizing judicial inquiry, is necessary. *International Extradition*,* 8 Op. Att'y Gen'l, 240.

§ 3549. An immaterial clerical error in the president's mandate, authorizing the institution of proceedings in extradition, cannot in any degree vitiate the proceedings. *International Extradition*,* 8 Op. Att'y Gen'l, 420.

§ 3550. Under the treaty with Great Britain a judge may issue his warrant for the arrest of the alleged fugitive, upon a sworn complaint, without waiting for the mandate of the president. *In re Kelley*,* 2 Low., 339.

§ 3551. Warrant for arrest of fugitive.—It is not necessary that the warrant for the arrest of an alleged fugitive from justice, whose extradition is sought, be issued by the president. The mandate for the arrest is issued by the executive through the department of state, but the warrant, under our system, issues by the judiciary. *Ex parte Van Hoven*,* 4 Dill., 415.

§ 3552. It is not necessary, in proceedings for extradition, that it appear from the mandate of the secretary of state that a warrant has been issued for the apprehension of the accused in the country where the crime was committed, even though the treaty requires that such warrant shall have been issued before the mandate issues. It will be presumed from the fact that the mandate issued that such warrant was actually issued. *Ibid*.

§ 3553. Under a treaty stipulation that the certificate for the arrest of a fugitive from justice should be made by "proper executive authority," such certificate is properly made by the state department. *The British Prisoners*,* 1 Woodb. & M., 66.

§ 3554. A warrant of extradition is not a warrant of arrest and cannot be used for that purpose. Where a warrant of extradition is issued by the department of state, and the accused, then in custody of the United States marshal under a warrant for his apprehension as a fugitive from justice in accordance with the act of August 12, 1848, "for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery up of certain offenders," is discharged in consequence of some delay in the appointment of an agent to receive him, he cannot be arrested on the warrant of extradition. According to the above act, the warrant of extradition is merely for the delivery of the person committed to the agent authorized to receive him for the purpose of extradition. *Vance's Case*,* 12 Op. Att'y Gen'l, 75.

§ 3555. Powers of commissioners.—Under the tenth article of our treaty with Great Britain concerning the extradition of fugitives from justice, which declares that "the respective judges or other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made on oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive," a United States commissioner, who is authorized to "exercise all the powers that any justice of the peace or other magistrate of any of the United States may now exercise in respect to offenders, for any crime or offense against the United States, by arresting, imprisoning," etc., may, without the aid of any leg-

isolation by congress, perform the duties required of judges and magistrates in the treaty. The provisions of this treaty do not require a requisition to be made by one government upon the other, but the complaint made on oath to the judge or magistrate may be the first application. *In re Kaine*,* 10 N. Y. Leg. Obs., 257.

§ 3556. The act of August 23, 1842, provides that the commissioners who now are, or hereafter may be, appointed by the circuit courts of the United States to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes, shall and may exercise all the powers that any justice of the peace or other magistrate of any of the United States may now exercise in respect to offenders for any crime or offense against the United States, by arresting, imprisoning, or bailing the same, under and by virtue of the thirty-third section of the act of September 24, 1789. The act referred to declares "that for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense." A commissioner is, therefore, a magistrate of the government of the United States, within the meaning of the tenth article of the treaty of 1842, with Great Britain, respecting the extradition of fugitives from justice, which declares that "the respective judges or magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or other person charged," and to hear the evidence of his criminality, "and if, on such hearing the evidence be deemed sufficient to sustain the charge, . . . to certify the same to the proper executive authority that a warrant may issue for the surrender of such fugitive." *Extradition*,* 4 Op. Att'y Gen'l, 201.

§ 3557. It is no objection to the power of a commissioner to act under our treaty with Great Britain of 1842, for the extradition of fugitives, that the judicial authority is vested by the constitution in the supreme courts and such inferior courts as congress shall establish, and that congress has not authorized commissioners to act in proceedings for extradition, since the validity of the treaty stipulation is in no wise dependent on the character of the magistrate designated to hear and determine upon the evidence against the accused. *Ibid*.

§ 3558. Evidence.—Evidence taken in France, pursuant to the laws of that country, is admissible in our courts in support of charges against fugitives from justice required to be delivered up by the treaty, provided such evidence be clothed with all substantial proof of verity. *In re Metzger*,* 5 N. Y. Leg. Obs., 83.

§ 3559. Testimony given under oath, in a proceeding for the extradition of a fugitive from the justice of Great Britain, that the lord mayor of London is the chief criminal magistrate of that city, and the certificate of the lord mayor that the depositions produced in support of the charge were the depositions upon which he issued the warrant of arrest, and the certificate of our minister that these papers were properly authenticated, was held to be sufficient proof of the jurisdiction of the lord mayor to issue the warrant of arrest. *In re Macdonnell*,* 11 Blatch., 170.

§ 3560. Under the acts of congress of August 12, 1848, and June 22, 1860, depositions upon which the warrant of arrest for the offender was issued abroad, certified by the lord mayor of London to be the depositions upon which he issued the warrant, and also certified by our minister at the court of St. James to be authenticated in the manner required by the act, to wit, so authenticated as to entitle them to be received for similar purposes by the tribunals of Great Britain, are properly received in evidence by a commissioner in support of a charge upon which the extradition of the accused is sought. *Ibid*.

§ 3561. The provisions of our treaty with Great Britain, that fugitives from justice shall be surrendered only upon such evidence of criminality as, according to the laws of the place where the fugitive or person charged is found, would justify his apprehension and commitment for trial, if the offense had been there committed, have reference to the degree, *quantum* or weight of evidence, rather than the instruments of evidence themselves; and the act of congress prescribing what instruments or vehicles of evidence shall be received, and how they may be authenticated, is not inconsistent with the treaty. *Ibid*.

§ 3562. The proof in all cases, under a treaty of extradition, should be not only competent, but full and satisfactory, that the offense had been committed by the fugitive in the foreign jurisdiction—sufficiently so to warrant a conviction, in the judgment of the magistrate, of the offense with which he is charged, if sitting upon the final trial and hearing of the case. *Ex parte Kaine*,* 3 Blatch., 1.

§ 3563. Sufficiency of evidence.—Where, upon the hearing before the proper magistrate of the charges against an alleged fugitive from justice, sought to be extradited in pursuance of the stipulations of our treaty with Great Britain of August 9, 1842, the magistrate certifier

that there is not sufficient evidence to sustain the charge, and a motion is made to remand the accused until further evidence can be obtained from Great Britain to maintain the charge, and the magistrate decides that he cannot under the circumstances comply with the motion, such decision is conclusive,—not subject to any direction by the president or review of any court. A new complaint and a new warrant of arrest is the only remedy in such a case. There is no doubt, however, of the general power of the magistrate to remand the fugitive for examination after further evidence is had. *International Extradition*,* 6 Op. Att'y Gen'l, 91.

§ 3564. Under our treaty with Great Britain of August 9, 1842, for the mutual extradition of fugitives from justice, the president has no authority to issue a warrant for the surrender of the fugitive where the magistrate before whom the inquiry is had certifies that the evidence is not sufficient to sustain the charge. *i. e.*, would not be sufficient to justify a commitment for trial if the crime had been committed in the state in which the proceedings are had. *Ibid.*

§ 3565. In an examination before a commissioner with a view to the apprehension and commitment of an alleged fugitive from justice, preparatory to his extradition in pursuance of our treaty with Great Britain of 1842, the inquiry is, whether the evidence would justify the commitment of the accused for trial here, if charged with the commission here of the same crime. *United States v. Warr*,* 3 N. Y. Leg. Obs., 346.

§ 3566. Where a magistrate of the United States, duly authorized to act in the premises, has, upon the hearing of the evidence of the criminality of the accused, in a proceeding for the extradition of a fugitive from justice in pursuance of our treaty stipulation with Great Britain, certified to the proper executive authority that the evidence is sufficient to warrant the extradition of the accused, it is the duty of the president to issue a warrant for the surrender of the prisoner, without awaiting the decision of a question of *habeas corpus*, said to have been issued from one of the courts of a state. *Extradition of Fugitives*,* 6 Op. Att'y Gen'l, 270.

§ 3567. Under the tenth article of the treaty of Washington reciting that "It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions, etc., deliver up to justice all persons who, being charged with murder, etc., committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other; provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed; and the respective judges or other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive." the *casus fœderis* has unquestionably occurred when the offense charged is murder, alleged to have been committed in Scotland, within the jurisdiction of Great Britain, and the accused is found in New York, within the territory of the United States, and is shown to have fled from the place where the offense is alleged to have been committed, provided it is sustained by the evidence. When the commissioner before whom the proceeding has been prosecuted has certified his decision that the evidence is sufficient to sustain the charge, it is not the duty or the province of the president to look behind this judgment. It is the duty of the president, in such a case, to issue a warrant for the surrender of the fugitive, if he is satisfied with the regularity of the proceedings and the authority of the commissioner to entertain them. *Extradition*,* 4 Op. Att'y Gen'l, 201.

§ 3568. *Costs*.—The extradition treaty between the United States and Prussia expressly declares that the costs of the apprehension and delivery of the fugitive "shall be borne and defrayed by the party who makes the requisition and receives the fugitive." A judge can make no charge for his services. The commissioner and the marshal may lawfully demand such fees as are usual for analogous services rendered the United States. *Costs of Extradition*,* 9 Op. Att'y Gen'l, 497.

§ 3569. The district attorney having, under instructions, attended the trial of proceedings for the extradition of a fugitive from the criminal justice of a foreign country, in order to assert the federal jurisdiction in case any attempt to embarrass the proceedings should be made by state authority, his fees are properly taxed against the reclaiming government, provided the case did not go beyond the limits of the routine of such cases provided by treaty and by statute. *International Extradition*,* 7 Op. Att'y Gen'l, 612.

§ 3570. By our treaty with Great Britain providing for the extradition of fugitives, the expenses of extradition are to be borne by the government making the requisition. But where

extra expenses are incurred by proceedings to prevent the release of the fugitive by a *habeas corpus* from a state court, such expenses should be paid in the first instance, at least, by the United States, when they in fact have instructed and directed their officer in these proceedings. As to the fund to which they shall be charged, it deserves reflection whether they are not properly chargeable to the contingent expenses of foreign intercourse in the administration of the secretary of state. Extradition,* 7 Op. Att'y Gen'l, 396.

§ 3571. **Appeal.**—In extradition cases, the judge or magistrate acts under special authority conferred by treaties and acts of congress; and though his action is in form and effect judicial, it is not an exercise of any part of what is technically considered the judicial power of the United States. No appeal is given by the law under which he acts, and therefore no right of appeal exists. A decision in such a case is beyond the reach of correction either by the executive or judicial power. Extradition of Muller,* 10 Op. Att'y Gen'l, 501.

§ 3572. **Desertion by mariners.**—The naval vessels of the North German Union are ships of war of Prussia within the meaning of the treaty of 1828, between the United States and Prussia, stipulating for the arrest and imprisonment by the local authorities of each country of deserters from the ships of war and merchant vessels of the other. Case of Deserters,* 12 Op. Att'y Gen'l, 463.

§ 3573. **Murder—Excusable homicide.**—The term "murder," used in the extradition treaty of 1842 with Great Britain, includes the lowest degree of inexcusable homicide. *In re Palmer*,* 18 Int. Rev. Rec., 84.

§ 3574. Where there has been a homicide in a foreign jurisdiction, and the extradition of the person who has done the killing is demanded, it must be granted because it is only in the foreign courts that the question whether the homicide was excusable or not can be determined, and the grade of guilt, if any. *Ibid.*

§ 3575. Where a treaty provides for the surrender of a person charged with murder, the crime of manslaughter is not included. *In re Kelley*,* 2 Low., 339.

§ 3576. **Offenses not within treaty.**—Larceny is not among the crimes for the commission of which the extradition of the offender is provided for in any convention between the United States and Great Britain. International Extradition,* 6 Op. Att'y Gen'l, 85.

§ 3577. Embezzlement by officers of a railroad company is not a crime provided for in the original convention with France of November 9, 1843, providing for extradition in cases of "embezzlement by public officers when the same is punishable with infamous punishment." But the case is provided for in the supplemental article of 1845, authorizing the extradition of persons accused of burglary "and the corresponding crimes included under the French law in the words *vol qualifié crime*." Extradition,* 8 Op. Att'y Gen'l, 106.

§ 3578. **Place where offense was committed.**—To justify the commencement of proceedings for the extradition of a fugitive, it must be shown by the papers that the crime with which the accused is charged was committed in the territory of the government making the demand. International Extradition,* 8 Op. Att'y Gen'l, 215.

§ 3579. **Statutory offenses.**—The complaint, in extradition proceedings, which charges the crime of forgery committed in Ontario "against the statute in that case made and provided," is not objectionable because no proof is made of any statute in the province of Ontario punishing the crime of forgery, since forgery is a crime at common law. *Ex parte Lane*,* 6 Fed. R., 34.

§ 3580. **Crimes on the high seas.**—The twenty-seventh article of the treaty of 1794 between the United States and Great Britain, providing for the delivery of fugitives from justice, is confined expressly to persons who are charged with murder or forgery committed within the jurisdiction of either nation and who seek refuge in the other—meaning territorial jurisdiction, respectively. It does not apply, therefore, to these crimes when committed on the high seas. The United States will not deliver up a fugitive for a crime committed upon the high seas, since its tribunals are fully competent to try and punish such offenses. Extradition,* 1 Op. Att'y Gen'l, 83.

§ 3581. Where persons are charged with the commission of piracy upon the high seas, as defined by the law of nations, it is not in the power of the president to deliver them up at the demand of a foreign power as fugitives from justice. Under the act of congress of March 3, 1819, it is the duty of the government to bring them to trial in the circuit court for the district into which they were brought, or where they were found. Extradition,* 2 Op. Att'y Gen'l, 559.

§ 3582. A person having committed murder on board a British vessel on the high seas, fled to this country. On demand of the British minister that he be delivered up to the British authorities, pursuant to the treaty with Great Britain, and the production of affidavits that the crime was committed, and the request of the president of the United States, the marshal having the prisoner in custody was ordered by the district court to deliver him to the British authorities. *United States v. Nash, Bee*, 266.

§ 3583. Under treaty with France. — A fraudulent breach of trust by private persons, made grand larceny by statute in California, is not embraced within the terms of the convention between the United States and France for the reciprocal surrender of criminals. It is not provided for in the additional article which speaks of "crimes included under the French law in the words *vol qualifié crime*." International Extradition,* 7 Op. Att'y Gen'l, 643.

§ 3584. It is no impediment to the extradition of a criminal demanded by France, that he left France for cause of bankruptcy and not as a fugitive on account of the crime charged, since our convention includes "persons who . . . shall seek an asylum, or shall be found, in the territories of the other." International Extradition,* 8 Op. Att'y Gen'l, 306.

§ 3585. The mode and manner prescribed in our treaty with France, for the surrender of fugitives from justice, is: "Requisitions made in the name of the respective parties through their respective diplomatic agents. The evidence upon which it is to be done is only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed." The degree of evidence required in any case must depend on the law of the particular state in which the fugitive may be arrested or found. Extradition,* 4 Op. Att'y Gen'l, 330.

§ 3586. The eleventh section of the act of March 3, 1863, "providing a temporary government for the territory of Idaho," declaring that the amount required to defray the expenses of the legislative assembly, etc., shall be expended by the secretary of the territory, who is required to account to the secretary of the treasury for the manner in which such money shall be expended; and the sixteenth section of the act of August 6, 1846, having declared that all officers and other persons charged with the safe-keeping, transfer or disbursement of the public moneys, who shall convert the same to their own use in any manner whatever, shall be deemed guilty of embezzlement, and having declared the offense to be a felony punishable by imprisonment for a term of years, the secretary of Idaho who converts to his own use public moneys in his possession, appropriated for legislative expenses, and flees to France, may be demanded as a fugitive under our treaty with that government, providing for the extradition of persons charged with various crimes, and, among others, "with embezzlement by public officers, when the same is punishable with infamous punishment." Imprisonment being an infamous punishment by the laws of France, the punishment is infamous by the laws of both countries. Gilson's Case,* 12 Op. Att'y Gen'l, 326.

§ 3587. An application for the extradition of a fugitive from France, for the crime of forgery committed in that country, which comes in due form through the ministry of foreign affairs of the French Empire, and is founded on a *mandat d'arrêt* issued, upon suitable evidence, by the proper judicial authority in France, and setting forth the crime imputed to the criminal, is sufficient ground for the president to issue a mandate authorizing judicial inquiry, although without the proofs on which it is founded the *mandat* would not be sufficient to sustain a final order of extradition. Extradition,* 7 Op. Att'y Gen'l, 285.

§ 3588. A revolt was committed on the high seas by the crew of an American vessel, who were neither citizens of the United States nor subjects of France, and the ship was thereby forced to put into a French port. On arrival the French authorities took temporary custody of the members of the crew at the request of the American consul. The French authorities afterwards redelivered a portion of the prisoners to the consul to be held on board the vessel, and subsequently retook the same prisoners from on board the vessel, against the remonstrance of the consul. It is held (1) that the consul acted lawfully in requesting the local authorities to take temporary charge of the prisoners; (2) that, no crime having been committed by these men within the territorial waters of France, her authorities had no power to retake the seamen from the vessel; (3) that all the crew must be considered as either having been wrongfully taken from our national custody by inadvertence of the local authority, which ought as a correction of the error to return them to our custody; or else they are to be regarded as prisoners held by the local authority *pro tanto* acting for us under the consular convention and bound to transfer them on demand to the direction of the consul in order to be replaced on board the vessel; (4) that an attempt to commit murder having been committed by these men on the putative territory of the United States, and the crime being justiciable by the federal courts alone, their extradition may be demanded under our convention with France, since the convention provides for the extradition of "persons who shall be found within the territories of the other." American Ships in Foreign Ports,* 8 Op. Att'y Gen'l, 83.

§ 3589. Treaty with Great Britain of 1842. — Under the tenth article of our treaty with Great Britain, concluded August 9, 1842, making provision for the mutual surrender of fugitives from justice. "provided that this shall only be done upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed," the president has no authority to surrender a fugitive where there is nothing to

certify that there is such evidence, or that an offense within the treaty has been committed, or that any complaint has been made to any judge or magistrate of the government of the United States by whom such evidence has been heard and considered, as is required by the treaty. Extradition,* 4 Op. Att'y Gen'l, 240.

§ 8590. The treaty of Washington, between the United States and Great Britain, concluded August 9, 1842, providing for the surrender of fugitives from justice, having prescribed by its own terms the manner, mode and authority in and by which it shall be executed, and having indicated means suitable and efficient for the accomplishment of its objects, and left nothing to be supplied by legislative authority, no legislation by congress is necessary to render it effective. Extradition,* 4 Op. Att'y Gen'l, 201.

§ 8591. Treaty with Bavaria.—The extradition convention between the United States and Bavaria was not terminated by the adoption of Bavaria into the German empire in 1871. *In re Thomas*,* 12 Blatch., 370.

§ 8592. Treaty with Prussia of 1852.—Under the language of our treaty of June 16, 1852, with Prussia, and other states of the Germanic confederation, that the contracting parties agree to mutually "deliver up to justice all persons who, being charge'd with" certain crimes "committed within the jurisdiction of either party, shall seek an asylum, or shall be found, within the territories of the other," viewed in connection with the entire language of the treaty, and the language of the preamble, that the convention is entered into "for the better administration of justice, and the prevention of crime within the territories and jurisdiction of the parties respectively," and in order "that persons committing certain heinous crimes, being fugitives from justice," shall, under certain circumstances, be reciprocally delivered up, it is held that a subject of Prussia, who has committed within the kingdom of Belgium a crime mentioned in the treaty, and has fled thence to this country, may be demanded by the Prussian government to be delivered up as a fugitive, the accused being, by the laws of Prussia, subject to be tried and punished for the offense in the kingdom of Prussia, although the offense was committed within the kingdom of Belgium. *In re Stupp*,* 11 Blatch., 124.

§ 8593. Our treaty with Prussia of June 16, 1852, provides for the mutual surrender of fugitives from justice for certain crimes "committed within the jurisdiction of either party." It is held that, under this treaty, Prussia cannot demand of the United States the extradition of a Prussian subject, who has committed a crime within the territory of Belgium, and fled to the United States, although such crime was at the date of the treaty and still is punishable in Prussia by the laws of Prussia, though committed in Belgium. The words "committed within the jurisdiction," as used in the treaty, do not refer to the personal liabilities of the criminal, but to *locality*. The *locus delicti*, the place where the crime was committed, must be within the jurisdiction of the party demanding the fugitive. Extradition,* 14 Op. Att'y Gen'l, 281.

2. Interstate.

SUMMARY—*Power of federal court to issue writ of habeas corpus*, § 8594.—*The crime must have been committed in the state making the demand*, § 8595.—*Federal government cannot coerce the executive of a state*, § 8596.—*What offenses included within the constitutional provision*, §§ 8597, 8602.—*Identity of party arrested; inquiry on habeas corpus*, § 8598.—*Mandate of governor conclusive*, § 8599.—*Duty of states to surrender fugitives*, § 8600.—*Right declared by the constitution is absolute*, §§ 8597, 8601.—*Not material as to the time an act was made a crime*, § 8602.—*Surrender, an executive act*, § 8603.—*Evidence need not be attached to warrant; requiring production of record*, § 8604.—*Warrant must show that it was issued on proper demand*, § 8605.—*Proof that alleged fugitive has fled from state making demand*, § 8606.—*Liability of state agent*, §§ 8607, 8603.

§ 8594. A federal court may, by a writ of *habeas corpus*, inquire into the legality of the restraint of a person in custody under a warrant issued by the executive of a state, ordering his surrender to the authorities of another state, which has demanded him as a fugitive from justice, under the constitutional provision providing for such surrender, and the act of congress carrying it into effect. Such a person is confined "under color of or by virtue of the authority of the United States," and the judiciary act of 1789 gives the federal courts power to issue a *habeas corpus* in such cases. *Ex parte Smith*, §§ 8609-14.

§ 8595. The provision in the constitution, declaring that "a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime," does not authorize a surrender unless the crime was committed in the state making the demand, and the person demanded

actually fled from such state into the state from which he is demanded. A citizen of the latter state cannot be demanded by the former for being accessory to a crime committed in the former while he was at the time in the territory of the latter. *Ibid.* See § 3640.

§ 3596. Although the constitution declares that fugitives from justice "shall, on demand of the executive authority of the state from which he fled, be delivered up;" and the act of February 12, 1793, providing the regulations necessary to carry this compact into execution, declares that, on compliance with these regulations, "it shall be the duty of the executive authority of the state or territory to which such person shall have fled to cause him to be arrested and secured," and to cause him to be delivered to the agent of the state making the demand; and although the duty of the executive under this act is merely ministerial, the performance of this duty is left to depend on the fidelity of the states executing the compact, and there is no power delegated to the general government, either through the judicial or any other department, to use any coercive means to compel a state executive to make the surrender. *Kentucky v. Dennison, Governor, etc.*, §§ 3615-25.

§ 3597. The constitutional provision that "a person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime," includes every offense made punishable by the law of the state in which it was committed. The right to "demand" implies that it is an absolute right, and there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or the policy or laws of the state to which the fugitive has fled. *Ibid.*

§ 3598. In interstate extradition cases the identity of the party arrested with the party for whose arrest a warrant has been issued is always an open question and may be tested on *habeas corpus*. *In re Leary*, §§ 3626-35.

§ 3599. In an interstate extradition case the mandate of the governor is conclusive proof that the person therein named is charged with a crime in the state demanding his extradition. *Ibid.*

§ 3600. The duty of delivering up fugitives from justice, as between independent states and nations, unless affected by treaty, rests wholly on principles of comity, that is, upon the natural inclination of states on terms of amity with each other to concede to each other such reasonable favors on request as shall not be inconsistent with their own interests, or the rights and interests of their own subjects or citizens, and to secure to themselves a reciprocity of benefits of the exchange of such friendly offices. *Ibid.*

§ 3601. The language of the constitution providing for interstate extradition is imperative, and the right of surrender thus declared is an absolute right. *Ibid.*

§ 3602. The word "crime," used in the extradition clause of the constitution, embraces every species of offense made punishable as a crime by the laws of the state making the demand, even though it is not a crime by the common law, or by the law of the state to which the accused has fled, and even though made a crime by a law passed subsequent to the adoption of the constitution and the passage of the act of congress regulating such extradition. *Ibid.*

§ 3603. The surrender of fugitives from justice is an executive act, and in cases of interstate extradition is lodged in the governor. *Ibid.*

§ 3604. In an interstate extradition case the governor issuing the warrant of arrest is not required to attach to it the evidence on which he acted, or a copy of it, nor can a federal court issue *certiorari* to the governor requiring the production of the record. *Ibid.*

§ 3605. A warrant of extradition issued by the governor of a state, on demand of the governor of another state, must show *prima facie* that it has been issued on proper demand and proof. The facts necessary to give executive jurisdiction must be stated or recited in the warrant. *In re Jackson*, §§ 3636-37.

§ 3606. Before the governor of a state can issue his warrant for the arrest of a person charged with a crime in another state, it must be shown by evidence making a *prima facie* case that such person has fled from the demanding state. This must be shown by competent evidence, as the fact of fleeing lies at the foundation of the right to issue such warrant. The certificate of the demanding governor is no evidence of the fact. It is as essential to the right of arrest and extradition to prove to the satisfaction of the governor on whom the demand is made that the person charged with the crime has fled from justice as to prove that he is charged with crime in the state making the demand. The evidence must not only be satisfactory to the governor, but it must be legally sufficient. A copy of the indictment, or a sworn complaint certified by the demanding governor, is sufficient proof of the charge of crime, and that the defendant has fled from justice should be proved by sworn evidence such as would authorize a warrant of arrest in any other case. *Ibid.*

§ 3607. Where the agent of a state in an interstate extradition proceeding is arrested for malicious prosecution for acts done by him as such agent he is entitled to a writ of *habeas corpus* from a federal court. *In re Titus*, § 3638.

§ 3608. No personal liability is incurred by the agent of a state in an interstate extradition proceeding for acts done by him as such agent, though the indictment in the state demanding extradition did not show an offense cognizable by the state courts, and though the agent acted maliciously, if he acted within the scope of his duty as agent. *Ibid.*

[NOTES.—See §§ 3639-3646.]

EX PARTE SMITH.

(Circuit Court for Illinois: 8 McLean, 121-139. 1842.)

STATEMENT OF FACTS.—Proceedings on a writ of *habeas corpus* issued by the federal court to the sheriff of Sangamon county, Illinois. The sheriff made return that he held the petitioner by virtue of a warrant issued by the governor of Illinois, upon a requisition by the governor of Missouri. The affidavit on which the requisition was made stated that the affiant (Lilburn W. Boggs), "while sitting in his dwelling in the town of Independence, in the county of Jackson, he was shot with intent to kill," etc., "and that he believes, and has good reason to believe, etc., that Joseph Smith . . . was accessory before the fact of the intended murder; and that the said Joseph Smith is a citizen or resident of the state of Illinois." There was no allegation that Smith had fled from the state, or that he was ever in the state; but the requisition of the governor of Missouri and the warrant of the governor of Illinois stated that he had fled from the state of Missouri and had taken refuge in Illinois.

Opinion by POPE, J.

The importance of this case, and the consequences which may flow from an erroneous precedent, affecting the lives and liberties of our citizens, have impelled the court to bestow upon it the most anxious consideration. The able arguments of the counsel for the respective parties have been of great assistance in the examination of the important question arising in this cause.

When the patriots and wise men who framed our constitution were in anxious deliberation to form a perfect union among the states of the confederacy, two great sources of discord presented themselves to their consideration; *the commerce between the states and fugitives from justice and labor*. The border collisions in other countries had been seen to be a fruitful source of war and bloodshed, and most wisely did the constitution confer upon the national government the regulation of those matters, because of its exemption from the excited passions awakened by conflicts between neighboring states, and its ability alone to adopt a uniform rule, and establish uniform laws among all the states in those cases.

§ 3609. *The circuit court may, on habeas corpus, inquire into the cause of detention of an alleged fugitive arrested on the warrant of the governor of a state.*

This case presents the important question arising under the constitution and laws of the United States, whether a citizen of the state of Illinois can be transported from his own state to the state of Missouri, to be there tried for a crime, which, if he ever committed, was committed in the state of Illinois; whether he can be transported to Missouri, as a fugitive from justice, when he has never fled from that state.

Joseph Smith is before the court, on *habeas corpus*, directed to the sheriff of Sangamon county, state of Illinois. The return shows that he is in custody under a warrant from the executive of Illinois, professedly issued in pursuance

of the constitution and laws of the United States, and of the state of Illinois, ordering said Smith to be delivered to the agent of the executive of Missouri, who had demanded him as a fugitive from justice, under the second section, fourth article, of the constitution of the United States, and the act of congress passed to carry into effect that article. The article is in these words, viz.: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." The act of congress made to carry into effect this article directs that the demand be made on the executive of the state where the offender is found, and prescribes the proof to support the demand, viz., indictment or affidavit.

The court deemed it respectful to inform the governor and attorney-general of the state of Illinois of the action upon the *habeas corpus*. On the day appointed for the hearing, the attorney-general of the state of Illinois appeared, and denied the jurisdiction of the court to grant the *habeas corpus*.

1st. Because the warrant was not issued under color or by authority of the United States, but by the state of Illinois.

2d. Because no *habeas corpus* can issue in this case from either the federal or state courts, to inquire into facts behind the writ. In support of the first point, a law of Illinois was read, declaring that whenever the executive of any other state shall demand of the executive of this state any person as a fugitive from justice, and shall have complied with the requisition of the act of congress in that case made and provided, it shall be the *duty* of the executive of this state to issue his warrant to apprehend the said fugitive, etc. It would seem that this act does not purport to confer any additional power upon the executive of this state, independent of the power conferred by the constitution and laws of the United States, but to make it the *duty* of the executive to obey and carry into effect the act of congress. The warrant on its face purports to be issued in pursuance of the constitution and laws of the United States, as well as of the state of Illinois. To maintain the position that this warrant was not issued under color or by authority of the laws of the United States, it must be proved that the United States could not confer the power on the executive of Illinois. Because if congress could and did confer it, no act of Illinois could take it away, for the reason that the constitution, and laws of the United States passed in pursuance of it, and treaties, are the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. This is enough to dispose of that point. If the legislature of Illinois, as is probable, intended to make it the *duty* of the governor to exercise the power granted by congress, and no more, the executive would be acting by authority of the United States. It may be that the legislature of Illinois, appreciating the importance of the proper execution of those laws, and doubting whether the governor could be punished for refusing to carry them into effect, deemed it prudent to impose it as a duty, the neglect of which would expose him to impeachment. If it intended more, the law is unconstitutional and void. *Prigg v. Pennsylvania*, 16 Pet., 617.

§ 3610. *On habeas corpus the acts of an executive officer may be reviewed and his reasons passed upon.*

In supporting the second point, the attorney-general seemed to urge that there was greater sanctity in a warrant issued by the governor than by an in-

ferior officer. The court cannot assent to this distinction. This is a government of laws, which prescribes a rule of action, as obligatory upon the governor as upon the most obscure officer. The character and purposes of the *habeas corpus* are greatly misunderstood by those who suppose that it does not review the acts of an executive functionary. All who are familiar with English history, must know that it was extorted from an arbitrary monarch, and that it was hailed as a second *magna charta*, and that it was to protect the subject from arbitrary imprisonment by the king and his minions, which brought into existence that great palladium of liberty in the latter part of the reign of Charles the Second. It was, indeed, a magnificent achievement over arbitrary power. Magna Charta established the principles of liberty; the *habeas corpus* protected them. It matters not how great or obscure the prisoner, how great or obscure the prison-keeper, this munificent writ, wielded by an independent judge, reaches all. It penetrates alike the royal towers and the local prisons, from the garret to the secret recesses of the dungeon. All doors fly open at its command, and the shackles fall from the limbs of prisoners of state as readily as from those committed by subordinate officers. The warrant of the king and his secretary of state could claim no more exemption from that searching inquiry, "The cause of his caption and detention," than a warrant granted by a justice of the peace. It is contended that the United States is a government of granted powers, and that no department of it can exercise powers not granted. This is true. But the grant is to be found in the second section of the third article of the constitution of the United States: "The judicial power shall extend to all cases in law or equity, arising under this constitution, the laws of the United States, and treaties made and which shall be made under their authority."

§ 3611. *When a habeas corpus purports to be issued by virtue of authority of the United States, the circuit court of the United States has jurisdiction.*

The matter under consideration presents a case arising under the second section, fourth article, of the constitution of the United States, and the act of congress of February 12, 1793, to carry it into effect. The judiciary act of 1789 confers on this court (indeed on all the courts of the United States) power to issue the writ of *habeas corpus*, when a person is confined "under color of or by the authority of the United States." Smith is in custody under color of and by authority of the second section, fourth article, of the constitution of the United States. As to the instrument employed or authorized to carry into effect that article of the constitution (as he derives from it the authority to issue the warrant), he must be regarded as acting by the authority of the United States. The power is not official in the governor, but personal. It might have been granted to any one else by name, but considerations of convenience and policy recommended the selection of the executive who never dies. The citizens of the states are citizens of the United States; hence the United States are as much bound to afford them protection in their sphere as the states are in theirs.

This court has jurisdiction. Whether the state courts have jurisdiction or not, this court is not called upon to decide. The return of the sheriff shows that he has arrested and now holds in custody Joseph Smith, in virtue of a warrant issued by the governor of Illinois, under the second section of the fourth article of the constitution of the United States, relative to fugitives from justice, and the act of congress passed to carry it into effect. The article of the constitution does not designate the person upon whom the demand for the

fugitive shall be made; nor does it prescribe the proof upon which he shall act. But congress has done so. The proof is "an indictment or affidavit," to be certified by the governor demanding. The return brings before the court the warrant, the demand and the affidavit. The material part of the latter is in these words, viz.: "Lilburn W. Boggs, who, being duly sworn, doth depose and say, that on the night of the 6th day of May, 1842, while sitting in his dwelling in the town of Independence, in the county of Jackson, he was shot with intent to kill; and that his life was despaired of for several days, and that he believes, and has good reason to believe, from evidence and information now in his possession, that Joseph Smith, commonly call the Mormon prophet, was accessory before the fact of the intended murder, and that the said Joseph Smith is a citizen or a resident of the state of Illinois."

This affidavit is certified by the governor of Missouri to be authentic. The affidavit being thus verified, furnished the only evidence upon which the governor of Illinois could act. Smith presented affidavits proving that he was not in Missouri at the date of the shooting of Boggs. This testimony was objected to by the attorney-general of Illinois, on the ground that the court could not look behind the return. The court deems it unnecessary to decide that point, inasmuch as it thinks Smith entitled to his discharge for defect in the affidavit. To authorize the arrest in this case, the affidavit should have stated distinctly, 1st. That Smith had committed a crime. 2d. That he committed it in Missouri.

§ 3612. *An alleged fugitive cannot be sent to a state unless it appears that the crime charged was committed in such state.*

It must appear that he fled from Missouri to authorize the governor of Missouri to demand him, as none other than the governor of the state from which he *fled* can make the demand. He could not have fled from justice unless he committed a crime, which does not appear. It must appear that the crime was committed in Missouri, to warrant the governor of Illinois in ordering him to be sent to Missouri for trial. The second section, fourth article, declares he "shall be removed to the state having jurisdiction of the crime." As it is not charged that the crime was committed by Smith in Missouri, the governor of Illinois could not cause him to be removed to that state, unless it can be maintained that the state of Missouri can entertain jurisdiction of crimes committed in other states. The affirmative of this proposition was taken in the argument with a zeal indicating sincerity. But no adjudged case or *dictum* was adduced in support of it. The court conceives that none can be. Let it be tested by principle.

Man in a state of nature is a sovereign, with all the prerogatives of king, lords and commons. He may declare war and make peace, and, as nations often do who "feel power and forget right," may oppress, rob and subjugate his weaker and unoffending neighbors. He unites in his person the legislative, judicial and executive power—"can do no wrong," because there is none to hold him to account. But when he unites himself with a community, he lays down all the prerogatives of sovereign (except "self-defense"), and becomes a subject. He owes obedience to its laws and the judgments of its tribunals, which he is supposed to have participated in establishing, either directly or indirectly. He surrenders, also, the right of self-redress. In consideration of all which, he is entitled to the ægis of that community to defend him from wrongs. He takes upon himself no allegiance to any other community, so owes it no obedience, and therefore cannot disobey it. None other than his own sovereign can prescribe a rule of action to him. Each sovereign regulates

the conduct of its subjects, and they may be punished upon the assumption that they know the rule and have consented to be governed by it. It would be a gross violation of the social compact, if the state were to deliver up one of its citizens to be tried and punished by a foreign state, to which he owes no allegiance and whose laws were never binding on him. No state can or will do it.

In the absence of the constitutional provision, the state of Missouri would stand on this subject in the same relation to the state of Illinois that Spain does to England. In this particular the states are independent of each other. A criminal, fugitive from the one state to the other, could not be claimed as of right to be given up. It is most true, as mentioned by writers on the laws of nations, that every state is responsible to its neighbors for the conduct of its citizens, so far as their conduct violates the principles of good neighborhood. So it is among private individuals. But for this, the inviolability of territory, or private dwelling, could not be maintained. This obligation creates the right, and makes it the duty of the state to impose such restraints upon the citizen as the occasion demands. It was in the performance of this duty that the United States passed laws to restrain citizens of the United States from setting on foot and fitting out military expeditions against their neighbors. While the violators of this law kept themselves within the United States, their conduct was cognizable in the courts of the United States, and not of the offended state, even if the means provided had assisted in the invasion of the foreign state. A demand by the injured state upon the United States for the offenders, whose operations were in their own country, would be answered, that the United States laws alone could act upon them, and that, as a good neighbor, it would punish them.

It is the duty of the state of Illinois to make it criminal in one of its citizens to aid, abet, counsel or advise any person to commit a crime in her sister state. Any one violating the law would be amenable to the laws of Illinois, executed by its own tribunals. Those of Missouri could have no agency in his conviction and punishment. But if he shall go into Missouri, he owes obedience to her laws, and is liable before her courts, to be tried and punished for any crime he may commit there; and a plea that he was a citizen of another state would not avail him. If he escape, he may be surrendered to Missouri for trial. But when the offense is perpetrated in Illinois, the only right of Missouri is, to insist that Illinois compel her citizens to forbear to annoy her. This she has a right to expect. For the neglect of it, nations go to war and violate territory.

The court must hold that where a necessary fact is not stated in the affidavit, it does not exist. It is not averred that Smith was accessory before the fact, in the state of Missouri, nor that he committed a crime in Missouri; therefore, he did not commit the crime in Missouri — did not flee from Missouri to avoid punishment.

§ 3613. *The evidence and information on which the affidavit is founded should be incorporated in the affidavit.*

Again, the affidavit charges the shooting on the 6th of May, in the county of Jackson, and state of Missouri, "that he believes, and has good reason to believe, from evidence and information now (then) in his possession, that Joseph Smith was accessory before the fact, and is a resident or citizen of Illinois." There are several objections to this. Mr. Boggs, having the "evidence and information in his possession," should have incorporated it in the affidavit, to

enable the court to judge of their sufficiency to support his "belief." Again, he swears to a legal conclusion, when he says that Smith was *accessary before the fact*. What acts constitute a man an accessary is a question of law, and not always of easy solution. Mr. Boggs' opinion, then, is not authority. He should have given the facts. He should have shown that they were committed in Missouri, to enable the court to test them by the laws of Missouri, to see if they amounted to a crime. Again, the affidavit is fatally defective in this, that Boggs swears to his *belief*.

The language in the constitution is, "charged with felony or other crime." Is the constitution satisfied with a *charge* upon suspicion? It is to be regretted that no American adjudged case has been cited to guide the court in expounding this article. Language is ever interpreted by the subject-matter. If the object were to arrest a man near home, and there were fears of escape if the movement to detain him for examination were known, the word *charged* might warrant the issuing of a *capias* on *suspicion*. Rudyard (reported in *Skin*, 676) was committed to Newgate for refusing to give bail for his good behavior, and was brought before the common pleas on *habeas corpus*. The return was, that he had been complained of for exciting the subjects to disobedience of the laws against *sedition* *conventicles*, and upon examination they found *cause* to suspect him. Vaughan, chief justice: "Tyrrel and Archer *v.* Wild, held the return insufficient — 1st, because it did not appear but that he might abet frequenters of conventicles in the way the law allows; 2d, to say that he was complained of, or was examined, is no proof of his guilt; and then to say that he had cause to suspect him, is too cautious; for who can tell what they count a cause of *suspicion*, and how can that ever be tried? At this rate they would have arbitrary power, upon their own allegation, to commit whom they pleased."

From this case it appears that *suspicion* does not warrant a commitment, and that all legal intendments are to avail the prisoner. That the return is to be most strictly construed in favor of liberty. If suspicion in the foregoing case did not warrant a commitment in London by its officers, of a citizen of London, might not the objection be urged with greater force against a commitment of a citizen of our state, to be transported to another, on *suspicion*? No case can arise demanding a more searching scrutiny into the evidence, than in cases arising under this part of the constitution of the United States. It is proposed to deprive a freeman of his liberty — to deliver him into the custody of strangers, to be transported to a foreign state, to be arraigned for trial before a foreign tribunal, governed by laws unknown to him — separated from his friends, his family and his witnesses, unknown and unknowing. Had he an immaculate character, it would not avail him with strangers. Such a spectacle is appalling enough to challenge the strictest analysis.

The framers of the constitution were not insensible of the importance of courts possessing the confidence of the parties. They therefore provided that citizens of the different states might resort to the federal courts in civil causes. How much more important that the criminal have confidence in his judge and jury? Therefore, before the *capias* is issued, the officers should see that the case is made out to warrant it. Again, Boggs was shot on the 6th of May. The affidavit was made on the 20th of July following. Here was time for inquiry, which would confirm into certainty or dissipate his suspicions. He had time to collect facts to be laid before a grand jury or be incorporated in his affidavit. The court is bound to assume that this would have been the course of Mr. Boggs, but that his suspicions were light and unsatisfactory.

§ 3614. *An affidavit upon which a governor issues a demand to another governor for the surrender of a fugitive from justice must be positive, must charge a crime, and further, that the same was committed within the state whence the fugitive fled.*

The affidavit is insufficient, 1st, because it is not positive; 2d, because it charges no crime; 3d, it charges no crime committed in the state of Missouri. Therefore he did not flee from the justice of the state of Missouri, nor has he taken refuge in the state of Illinois. The proceedings in this affair, from the affidavit to the arrest, afford a lesson to governors and judges, whose action may hereafter be invoked in cases of this character. The affidavit simply says that the affiant was shot with intent to kill, and he believes that Smith was accessory before the fact to the intended murder, and is a citizen or resident of the state of Illinois. It is not said who shot him, or that the person was unknown. The governor of Missouri in his demand calls Smith a fugitive from justice, charged with being accessory before the fact to an assault with intent to kill, made by one O. P. Rockwell on Lilburn W. Boggs, in this state (Missouri). This governor expressly refers to the affidavit as his authority for that statement. Boggs, in his affidavit, does not call Smith a *fugitive from justice*, nor does he state a fact from which the governor had a right to infer it. Neither does the name of O. P. Rockwell appear in the affidavit, nor does Boggs say Smith *fled*. Yet the governor says he *fled* to the state of Illinois. But Boggs only says he is a *citizen or resident* of the state of Illinois.

The governor of Illinois, responding to the demand of the executive of Missouri for the arrest of Smith, issues his warrant for the arrest of Smith, reciting that "whereas, Joseph Smith stands charged, by the affidavit of Lilburn W. Boggs, with being accessory before the fact to an assault with intent to kill, made by one O. P. Rockwell on Lilburn W. Boggs, on the night of the 6th day of May, 1842, at the county of Jackson, in the said state of Missouri, and that the said Joseph Smith has fled from the justice of said state, and taken refuge in the state of Illinois." Those facts do not appear by the affidavit of Boggs. On the contrary, it does not assert that Smith was accessory to O. P. Rockwell, nor that he had *fled from the justice of the state of Missouri, and taken refuge in the state of Illinois*.

The court can alone regard the *facts* set forth in the affidavit of Boggs as having any legal existence. The misrecitals and overstatements in the requisition and warrant are not supported by oath and cannot be received as evidence to deprive a citizen of his liberty and transport him to a foreign state for trial. For these reasons Smith must be discharged.

At the request of J. Butterfield, counsel for Smith, it is proper to state, in justice to the present executive of the state of Illinois, Governor Ford, that it was admitted on the argument that the warrant which originally issued upon the said requisition was issued by his predecessor; that when Smith came to Springfield to surrender himself up upon that warrant, it was in the hands of the person to whom it had been issued at Quincy in this state; and that the present warrant, which is a copy of the former one, was issued at the request of Smith, to enable him to test its legality by writ of *habeas corpus*.

Let an order be entered that Smith be discharged from his arrest.

COMMONWEALTH OF KENTUCKY v. DENNISON.

(24 Howard, 66-110. 1860.)

STATEMENT OF FACTS.—This application was made to the supreme court to compel the governor of Ohio to deliver an alleged fugitive from justice from the state of Kentucky.

Opinion by TANEX, C. J.

The court is sensible of the importance of this case, and of the great interest and gravity of the questions involved in it, and which have been raised and fully argued at the bar. Some of them, however, are not now for the first time brought to the attention of this court; and the objections made to the jurisdiction, and the form and nature of the process to be issued, and upon whom it is to be served, have all been heretofore considered and decided, and cannot now be regarded as open to further dispute.

As early as 1792, in the case of *Georgia v. Brailsford*, the court exercised the original jurisdiction conferred by the constitution without any further legislation by congress to regulate it than the act of 1789. And no question was then made, nor any doubt then expressed, as to the authority of the court. The same power was again exercised without objection in the case of *Oswald v. The State of Georgia*, in which the court regulated the form and nature of the process against the state, and directed it to be served on the governor and attorney-general. But in the case of *Chisholm v. State of Georgia*, at February term, 1793, reported in 2 Dal., 419, the authority of the court in this respect was questioned, and brought to its attention in the argument of counsel; and the report shows how carefully and thoroughly the subject was considered. Each of the judges delivered a separate opinion, in which these questions, as to the jurisdiction of the court, and the mode of exercising it, are elaborately examined.

§ 3615. *Where this court has original jurisdiction it can exercise it without any further act of congress.*

Mr. Chief Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson and Mr. Justice Blair decided in favor of the jurisdiction, and held that process served on the governor and attorney-general was sufficient. Mr. Justice Iredell differed, and thought that further legislation by congress was necessary to give the jurisdiction and regulate the manner in which it should be exercised. But the opinion of the majority of the court upon these points has always been since followed. And in the case of *New Jersey v. New York*, in 1831, 5 Pet., 284, Chief Justice Marshall, in delivering the opinion of the court, refers to the case of *Chisholm v. State of Georgia*, and to the opinions then delivered, and the judgment pronounced, in terms of high respect, and after enumerating the various cases in which that decision has been acted on, reaffirms it in the following words:

"It has been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution and existing acts of congress. The rule respecting the process, the persons on whom it is to be served, and the time of service, are fixed. The course of the court, on the failure of the state to appear after due service of process, has been also prescribed." And in the same case, page 289, he states in full the process which had been established by the court as a rule of practice in the case of *Grayson v. State of Virginia*, 3 Dal., 320, and ever since followed. This rule directs "that when process at

common law, or in equity, shall issue against a state, the same shall be served upon the governor or chief executive magistrate, and the attorney-general of such state."

§ 3616. *A mandamus is a process to which every one is entitled where it is the appropriate remedy.*

It is equally well settled that a *mandamus* in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It was so held by this court in the cases of *Kendall v. United States*, 12 Pet., 615; *Kendall v. Stokes*, 3 How., 100. So, also, as to the process in the name of the governor, in his official capacity, in behalf of the state.

§ 3617. *A state may sue or be sued by or through its governor.*

In the case of *Madraso v. The Governor of Georgia*, 1 Pet., 110, it was decided that in a case where the chief magistrate of a state is sued, not by his name as an individual, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party on the record. This was a case where the state was the defendant; the practice, where it is plaintiff, has been frequently adopted of suing in the name of the governor in behalf of the state, and was indeed the form originally used, and always recognized as the suit of the state.

Thus, in the first case to be found in our reports in which a suit was brought by a state, it was entitled and set forth in the bill as the suit of "The State of Georgia, by Edward Telfair, governor of the said state, complainant, against Samuel Brailsford and others;" and the second case, which was as early as 1793, was entitled and set forth in the pleadings as the suit of "His excellency Edward Telfair, esquire, governor and commander-in-chief in and over the state of Georgia, in behalf of the said state, complainant, against Samuel Brailsford and others, defendants."

§ 3618. *In all cases in which the supreme court has original jurisdiction, it may exercise it without any further act of congress.*

The cases referred to leave no question open to controversy as to the jurisdiction of the court. They show that it has been the established doctrine upon this subject ever since the act of 1789, that in all cases where original jurisdiction is given by the constitution this court has authority to exercise it without any further act of congress to regulate its process or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice. And that it has also been settled that where the state is a party, plaintiff or defendant, the governor represents the state, and the suit may be, in form, a suit by him as governor in behalf of the state where the state is plaintiff, and he must be summoned or notified as the officer representing the state where the state is defendant. And, further, that the writ of *mandamus* does not issue from or by any prerogative power, and is nothing more than the ordinary process of a court of justice to which every one is entitled where it is the appropriate process for asserting the right he claims. We may, therefore, dismiss the question of jurisdiction without further comment, as it is very clear that if the right claimed by Kentucky

can be enforced by judicial process, the proceeding by *mandamus* is the only mode in which the object can be accomplished.

§ 3619. *Meaning of the constitutional provision; what crimes included.*

This brings us to the examination of the clause of the constitution which has given rise to this controversy. It is in the following words: "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction. The words, "treason, felony or other crime," in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the state. The word "crime" of itself includes every offense from the highest to the lowest in the grade of offenses, and includes what are called "misdemeanors" as well as treason and felony. 4 Bl. Com., 5, 6, and note 3, Wendell's edition. But as the word crime would have included treason and felony without specially mentioning those offenses, it seems to be supposed that the natural and legal import of the word, by associating it with those offenses, must be restricted and confined to offenses already known to the common law and to the usage of nations, and regarded as offenses in every civilized community, and that they do not extend to acts made offenses by local statutes growing out of local circumstances, nor to offenses against ordinary police regulations. This is one of the grounds upon which the governor of Ohio refused to deliver Lago, under the advice of the attorney-general of that state.

But this inference is founded upon an obvious mistake as to the purposes for which the words "treason and felony" were introduced. They were introduced for the purpose of guarding against any restriction of the word "crime," and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. According to these usages, even where they admitted the obligation to deliver the fugitive, persons who fled on account of political offenses were almost always excepted, and the nation upon which the demand is made also uniformly claims and exercises a discretion in weighing the evidence of the crime, and the character of the offense. The policy of different nations, in this respect, with the opinions of eminent writers upon public law, are collected in Wheaton on the Law of Nations, 171; Fœlix, 312; and Martin, Vergé's edition, 182. And the English government, from which we have borrowed our general system of law and jurisprudence, has always refused to deliver up political offenders who had sought an asylum within its domains. And as the states of this Union, although united as one nation for certain specified purposes, are yet, so far as concerns their internal government, separate sovereignties, independent of each other, it was obviously deemed necessary to show, by the terms used, that this compact was not to be regarded or construed as an ordinary treaty for extradition between nations altogether independent of each other, but was intended to embrace political offenses against the sovereignty of the state, as well as all other crimes. And as treason was also a "felony" (4 Bl. Com., 94), it was necessary to insert those words, to show, in language that could not be mistaken, that political offenders were included in it. For this was not a compact of peace

and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines, whenever such aid was needed and required; for it is manifest that the statesmen who framed the constitution were fully sensible that, from the complex character of the government, it must fail unless the states mutually supported each other and the general government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a state, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the state, to repeat the offense as soon as another opportunity offered.

§ 3620. *Practice of the colonies on the subject of the mutual extradition of criminals.*

Indeed, the necessity of this policy of mutual support, in bringing offenders to justice, without any exception as to the character and nature of the crime, seems to have been first recognized and acted on by the American colonies; for we find by Winthrop's History of Massachusetts, vol. 2, pages 121 and 126, that as early as 1643, by "articles of confederation between the plantations under the government of Massachusetts, the plantation under the government of New Plymouth, the plantations under the government of Connecticut and the government of New Haven, with the plantations in combination therewith," these plantations pledged themselves to each other, that, upon the escape of any prisoner or fugitive for any criminal cause, whether by breaking prison, or getting from the officer, or otherwise escaping, upon the certificate of two magistrates of the jurisdiction out of which the escape was made that he was a prisoner or such an offender at the time of the escape, "the magistrate, or some of them, of the jurisdiction where, for the present, the said prisoner or fugitive abideth, shall forthwith grant such a warrant as the case will bear, for the apprehending of any such person, and the delivery of him into the hands of the officer or other person who pursueth him; and if there be help required for the safe returning of any such offender, then it shall be granted unto him that craves the same, he paying the charges thereof." It will be seen that this agreement gave no discretion to the magistrate of the government where the offender was found; but he was bound to arrest and deliver upon the production of the certificate under which he was demanded.

§ 3621. *The provisions for mutual surrender of criminals by the confederation.*

When the thirteen colonies formed a confederation for mutual support, a similar provision was introduced, most probably suggested by the advantages which the plantations had derived from their compact with one another. But, as these colonies had then, by the declaration of independence, become separate and independent sovereignties, against which treason might be committed, their compact is carefully worded, so as to include treason and felony—that is, political offenses—as well as crimes of an inferior grade. It is in the following words: "If any person, guilty of or charged with treason, felony, or other high misdemeanor, in any state, shall flee from justice, and be found in any other of the United States, he shall, upon demand of the governor or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offense."

§ 3622. *The provisions for demand and surrender of criminals between the states by the constitution of the United States.*

And when these colonies were about to form a still closer union by the present constitution, but yet preserving their sovereignty, they had learned from experience the necessity of this provision for the internal safety of each of them, and to promote concord and harmony among their members; and it is introduced in the constitution substantially in the same words, but substituting the word "crime" for the words "high misdemeanor," and thereby showing the deliberate purpose to include every offense known to the law of the state from which the party charged had fled. The argument on behalf of the governor of Ohio, which insists upon excluding from this clause new offenses created by a statute of the state, and growing out of its local institutions, and which are not admitted to be offenses in the state where the fugitive is found, nor so regarded by the general usage of civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The governor of the demanding state would probably draw one line, and the governor of the other state another. And if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. It would have been far better to omit it altogether, and to have left it to the comity of the states, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never-failing subject of dispute and ill-will.

The clause in question, like the clause in the confederation, authorizes the demand to be made by the executive authority of the state where the crime was committed, but does not in so many words specify the officer of the state upon whom the demand is to be made, and whose duty it is to have the fugitive delivered and removed to the state having jurisdiction of the crime. But under the confederation, it is plain that the demand was to be made on the governor or executive authority of the state, and could be made on no other department or officer; for the confederation was only a league of separate sovereignties, in which each state, within its own limits, held and exercised all the powers of sovereignty; and the confederation had no officer, either executive, judicial or ministerial, through whom it could exercise an authority within the limits of a state. In the present constitution, however, these powers, to a limited extent, have been conferred on the general government within the territories of the several states. But the part of the clause in relation to the mode of demanding and surrendering the fugitive is (with the exception of an unimportant word or two) a literal copy of the article of the confederation, and it is plain that the mode of the demand and the official authority by and to whom it was addressed, under the confederation, must have been in the minds of the members of the convention when this article was introduced, and that, in adopting the same words, they manifestly intended to sanction the mode of proceeding practiced under the confederation—that is, of demanding the fugitive from the executive authority, and making it his duty to cause him to be delivered up.

Looking, therefore, to the words of the constitution—to the obvious policy and necessity of this provision to preserve harmony between states, and order and law within their respective borders, and to its early adoption by the col-

onies, and then by the confederated states, whose mutual interest it was to give each other aid and support whenever it was needed,—the conclusion is irresistible that this compact engrafted in the constitution included, and was intended to include, every offense made punishable by the law of the state in which it was committed, and that it gives the right to the executive authority of the state to demand the fugitive from the executive authority of the state in which he is found; that the right given to “demand” implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the state to which the fugitive has fled. This is evidently the construction put upon this article in the act of congress of 1793, under which the proceedings now before us are instituted. It is therefore the construction put upon it almost coterminously with the commencement of the government itself, and when Washington was still at its head, and many of those who had assisted in framing it were members of the congress which enacted the law.

§ 3623. *Provisions for the demand and surrender of fugitives from justice in the act of February 12, 1793.*

The constitution having established the right on one part and the obligation on the other, it became necessary to provide by law the mode of carrying it into execution. The governor of the state could not, upon a charge made before him, demand the fugitive; for, according to the principles upon which all of our institutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department. The executive authority of the state, therefore, was not authorized by this article to make the demand unless the party was charged in the regular course of judicial proceedings. And it was equally necessary that the executive authority of the state upon which the demand was made, when called on to render his aid, should be satisfied by competent proof that the party was so charged. This proceeding, when duly authenticated, is his authority for arresting the offender.

This duty of providing by law the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon congress; for if it was left to the states, each state might require different proof to authenticate the judicial proceeding upon which the demand was founded; and as the duty of the governor of the state where the fugitive was found is, in such cases, merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the state or of congress to authorize it. These difficulties presented themselves as early as 1791, in a demand made by the governor of Pennsylvania upon the governor of Virginia, and both of them admitted the propriety of bringing the subject before the president, who immediately submitted the matter to the consideration of congress. And this led to the act of 1793, of which we are now speaking. All difficulty as to the mode of authenticating the judicial proceeding was removed by the article in the constitution which declares “that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; and the congress may by general laws prescribe the manner in which acts, records and proceedings shall be proved, and the effect

thereof." And without doubt the provision of which we are now speaking — that is for the delivery of a fugitive, which requires official communications between states, and the authentication of official documents — was in the minds of the framers of the constitution and had its influence in inducing them to give this power to congress. And acting upon this authority, and the clause of the constitution which is the subject of the present controversy, congress passed the act of 1793, February 12th, which, as far as relates to this subject, is in the following words:

"Section 1. That whenever the executive authority of any state in the Union, or of either of the territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice of the executive authority of any such state or territory to which such person shall have fled, and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of any state or territory as aforesaid, charging the person so demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear, but if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory.

"Section 2. And be it further enacted, that any agent, appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the state or territory from which he or she shall have fled; and if any person or persons shall by force set at liberty or rescue the fugitive from such agent while transporting as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding \$500, and be imprisoned not exceeding one year."

§ 3624. *When a demand is duly made for a fugitive from justice the duty of the executive of the state in which he may be found is merely ministerial — to cause him to be arrested and surrendered.*

It will be observed that the judicial acts which are necessary to authorize the demand are plainly specified in the act of congress; and the certificate of the executive authority is made conclusive as to their verity when presented to the executive of the state where the fugitive is found. He has no right to look behind them, or to question them, or to look into the character of the crime specified in this judicial proceeding. The duty which he is to perform is, as we have already said, merely ministerial — that is, to cause the party to be arrested, and delivered to the agent or authority of the state where the crime was committed. It is said in the argument that the executive officer upon whom this demand is made must have a discretionary executive power, because he must inquire and decide who is the person demanded. But this certainly is not a discretionary duty upon which he is to exercise any judgment, but is a mere ministerial duty — that is, to do the act required to be done by him, and such as every marshal and sheriff must perform when process, either criminal or civil, is placed in his hands to be served on the person named in it. And it never

has been supposed that this duty involved any discretionary power, or made him anything more than a mere ministerial officer; and such is the position and character of the executive of the state under this law, when the demand is made upon him and the requisite evidence produced. The governor has only to issue his warrant to an agent or officer to arrest the party named in the demand.

The question which remains to be examined is a grave and important one. When the demand was made, the proofs required by the act of 1793 to support it were exhibited to the governor of Ohio, duly certified and authenticated; and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other state. And whether the charge against Lago is legally and sufficiently laid in this indictment according to the laws of Kentucky is a judicial question to be decided by the courts of the state, and not by the executive authority of the state of Ohio.

§ 3625. *The federal government has no power to compel a state officer to perform a duty by mandamus or otherwise.*

The demand being thus made, the act of congress declares that "it shall be the duty of the executive authority of the state" to cause the fugitive to be arrested and secured and delivered to the agent of the demanding state. The words "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several states bear to each other, the court is of opinion the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created when congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the constitution which arms the government of the United States with this power. Indeed, such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the federal government under the constitution has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the state.

It is true that congress may authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal. And we are very far from supposing that in using this word "duty," the statesmen who framed and passed the law, or the president who approved and signed it, intended to exercise a coercive power over state officers not warranted by the constitution. But the general government having in that law fulfilled the duty devolved upon it, by prescribing the proof and mode of authentication upon which the state authorities were bound to deliver the fugitive, the word "duty" in the law points to the obligation on the state to carry it into execution.

It is true that, in the early days of the government, congress relied with

confidence upon the co-operation and support of the states, when exercising the legitimate powers of the general government, and were accustomed to receive it upon principles of comity and from a sense of mutual and common interest, where no such duty was imposed by the constitution. And laws were passed authorizing state courts to entertain jurisdiction in proceedings by the United States to recover penalties and forfeitures incurred by breaches of their revenue laws, and giving to the state courts the same authority with the district courts of the United States to enforce such penalties and forfeitures, and also the power to hear the allegations of parties, and to take proofs if an application for a remission of the penalty or forfeiture should be made, according to the provisions of the acts of congress. And these powers were for some years exercised by state tribunals, readily, and without objection, until in some of the states it was declined because it interfered with and retarded the performance of duties which properly belonged to them, as state courts; and in other states doubts appear to have arisen as to the power of the courts, acting under the authority of the state, to inflict these penalties and forfeitures for offenses against the general government, unless especially authorized to do so by the state.

And in these cases the co-operation of the states was a matter of comity which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the constitution. And the acts of congress conferring the jurisdiction merely give the power to the state tribunals, but do not purport to regard it as a duty, and they leave it to the states to exercise it or not as might best comport with their own sense of justice and their own interest and convenience.

But the language of the act of 1793 is very different. It does not purport to give authority to the state executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the state authority is bound to perform. And when it speaks of the duty of the governor it evidently points to the duty imposed by the constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the state executive to the compact entered into with the other states when it adopted the constitution of the United States, and became a member of the Union. It was so left by the constitution, and necessarily so left by the act of 1793.

And it would seem that when the constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every state, for every state had an equal interest in the execution of a compact, absolutely essential to their peace and well-being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, "it shall be his duty." But if the governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him. And upon this ground the motion for the *mandamus* must be overruled.

IN RE LEARY.

(District Court, Southern District of New York: 10 Benedict, 197-223. 1879.)

Opinion by CHOAPE, J.

STATEMENT OF FACTS.—The petitioner, John Leary, by his petition sworn to the 21st day of December, 1878, applied to this court for a writ of *habeas corpus*, averring that he was held in custody by the sheriff of the city and county of New York; that the pretense of his imprisonment was a warrant issued by the governor of New York directing the sheriff to arrest said Leary and deliver him over to the custody of one Pinkerton, to be taken to the state of Massachusetts, upon a requisition of the governor of Massachusetts to the governor of New York, charging him with the commission of a felony in the state of Massachusetts, and with being a fugitive from justice from said state; that the petitioner denied that he was the person named and mentioned in said requisition or in said warrant of extradition, or that he ever fled from the said state of Massachusetts to the state of New York.

The writ was allowed, and the sheriff produced the prisoner and made return that he arrested and held him under a writ or requisition directed and duly issued to him as such sheriff by the governor of New York, of which writ he annexed to his return a copy and the original of which he produced, and *secondly*, that while he so held the petitioner in custody, a writ of *habeas corpus* was served upon him issuing out of the supreme court of the state of New York, requiring him to produce the petitioner before one of the justices of that court; that in compliance with that writ he had produced the petitioner before said justice; that a hearing was had on said writ of *habeas corpus* and finally determined by an order dismissing the writ and remanding the prisoner; that afterwards the prisoner sued out a writ of *certiorari* to review said determination, upon which writ a justice of said supreme court had made an indorsement allowing the same and directing that said writ operate as a stay of proceedings until the decision of the general term of said court thereon, and directing that the sheriff in the meanwhile keep the prisoner in his custody. The relator filed his answer or traverse, wherein he denied that he was the person mentioned or described in the alleged requisition, if any was made by the governor of Massachusetts, or that he was the person mentioned in the warrant of arrest, or that a copy certified as authentic by the governor of Massachusetts, of any indictment found or affidavit made before any magistrate of said state of Massachusetts, charging him with having committed any crime in Massachusetts, was produced by the executive authority of Massachusetts to the governor of New York in connection with any such alleged demand, or that any charge of any crime under the provisions of the constitution of the United States, or of the acts of congress in such behalf, had ever been made in the state of Massachusetts against him, on which the arrest and detention were founded, or that any such pretended charge in the form of an indictment or affidavit had been produced before, furnished or exhibited to him, the relator, as the basis of said proceedings for extradition. And he craved oyer of said pretended charge, if any, and that the respondent should be put to his proper and necessary proof. He also denied that, at the date of the alleged demand by the governor of Massachusetts, the governor of that state had before him any facts showing that the petitioner then was, or ever had been, a fugitive from the justice of that state, and he denied that he was such fugitive, or that any facts or evidence were shown or produced to the governor of New York, sufficient to show that he

was such fugitive from justice. He also denied the commission of any offense in the state of Massachusetts, or that he was ever in the county of Hampshire, where said crime was alleged to have been committed. He further alleged that he was a citizen of the state of New York and had been a resident thereof for the last five years; that he was not in the state of Massachusetts at the date when said alleged crime was committed, nor for five years prior thereto, nor at any time since; that the said requisition was procured and his arrest and extradition promoted for some hidden and ulterior motives, and that the whole proceeding was a misuse and abuse of the provisions of the constitution and laws of the United States, in which the governors of Massachusetts and New York had been unwittingly misled.

The writ or mandate issued by the governor of New York recited that "whereas, it has been represented to me by the governor of the state of Massachusetts that John Leary, James Brady, James Draper and James Grier stand charged with the crime of burglary and entering the Northampton National Bank and stealing the moneys thereof, committed in the county of Hampshire in said state, and that they have fled from justice in that state, and have taken refuge in the state of New York; and the said governor of Massachusetts having, in pursuance of the constitution and laws of the United States, demanded of me that I shall cause the said John Leary, James Brady, James Draper and James Grier to be arrested and delivered to Robert A. Pinkerton, who is duly authorized to receive them into his custody and convey them back to the said state of Massachusetts; and whereas, the said representation and demand is accompanied by a copy of this indictment, whereby the said John Leary, James Brady, James Draper and James Grier are charged with the said crime, and with having fled from said state and taken refuge in the state of New York, which is certified by the said governor of Massachusetts to be duly authenticated, you are therefore required to arrest and secure," etc., etc.

Upon the return day of the writ, besides the sheriff, who appeared in person and by counsel, the state of Massachusetts appeared by counsel.

§ 3626. *No pleading required after a traverse of the return to a writ of habeas corpus.*

The petitioner having filed his traverse or answer to the return, it was held that the statute required no further pleading, but that the averments of the answer would be taken as denied by the respondent.

§ 3627. *Jurisdiction of federal court in cases of habeas corpus.*

The return having been filed, the counsel for the state of Massachusetts moved that the writ be dismissed or that the prisoner be remanded pending the proceedings in the state court on the writ of *certiorari*, on the ground that the prisoner was to be regarded as constructively in the custody of the state court, and that therefore this court would not, on principles of comity, proceed with a matter which might involve the taking of the prisoner out of the custody of the state court. But it was *held* that the proceeding pending in the state court, in the nature of a review on appeal from the decision of the justice, did not prevent this court from proceeding with the cause, and the motion was denied. The counsel for Massachusetts then, and before the traverse was filed, by leave of the court withdrew his appearance.

§ 3628. *Notice to attorney-general.*

The counsel for the prisoner moved that notice be given of these proceedings to the attorney-general of the state of New York. But it was held that the statute required no such notice and the motion was denied.

§ 3629. *Circumstances which constitute sufficient prima facie evidence to hold a person arrested as a fugitive from justice for extradition.*

The respondent then called as a witness one Robert A. Pinkerton, who testified that his occupation was that of a detective; that he had known the prisoner for four or five years in several cities; that he was present at proceedings before the grand jury of Hampshire county in Massachusetts in June, 1877, and was sworn as a witness; that the subject of inquiry was the robbery of the Northampton Bank; that his testimony related to John Leary, James Brady, James Draper and James Grier, and in relation to meetings between those four persons; that the John Leary to whom his testimony related was the prisoner; that he caused this mandate of the governor of New York to be procured and that it was sent to him by the governor. On cross-examination he testified that he never saw the prisoner in Massachusetts.

The mandate of the governor was then read in evidence. Upon this evidence, the respondent having rested, the counsel for the prisoner moved for his discharge, on the ground that there was not sufficient evidence that he was the person against whom the mandate issued, nor that he was a fugitive from justice, nor any competent evidence that he was *charged with crime*. This motion was denied, and it was held that there was sufficient evidence for the respondent on these issues, at least *prima facie*. The counsel for the prisoner offered to read in evidence as an affidavit the petition for the writ of *habeas corpus*. The prisoner was in court. The motion was denied on the ground that it would not be a proper exercise of the discretion with which the court is vested, to receive affidavits in evidence on proceedings of this character, to receive this affidavit, the affiant being present and able to testify in person.

The counsel for the prisoner claimed that the burden of proof as to a charge of crime was upon the respondent; that the petitioner having denied that he was charged with crime, the respondent should be held obliged to produce a copy of the indictment, if any there was, duly authenticated according to the provisions of the act of congress regulating the authentication of the judicial records of one state that are offered in evidence in another state, that is, a copy certified by the clerk of the court under its seal with the certificate of the judge to the genuineness of the clerk's attestation; that the respondent was also bound to produce proof that a requisition had been made by the governor of Massachusetts in the form and with the accompanying documents required by the constitution and act of congress, and that these papers on which the governor of New York issued his mandate, or authenticated copies of them, should be produced before the court, so that the court might pass judicially on the question whether those papers contained a charge of crime and justified the issue of the warrant. And the counsel for the prisoner claimed further, that, even if the recitals of the mandate are *prima facie* evidence of the existence and sufficiency of these papers, the prisoner has a right to produce them, and in case they, or copies of them, are not on his request furnished by the governor, that he should have the process of the court to compel their production.

The prisoner has shown that he has applied to the governor of New York for these papers or copies of them, and that the governor has declined to furnish them. He has also used due diligence to obtain copies of them from the governor of Massachusetts, but he has declined to furnish them. And the counsel for the prisoner has applied to the court for its aid by some compulsory process to obtain this evidence. And upon the case, as it stands, if these

papers would, when produced, be competent evidence in his behalf, and if the court has the power to compel their production, a case has been made out for a postponement of the cause for the issue and return of process for this purpose.

§ 3630. *Upon habeas corpus in the case of a person held under a warrant from the governor of a state upon demand from the governor of another state, the warrant for the arrest of the party is conclusive evidence that the person named therein stands charged with crime.*

On the other hand, it is contended by the respondent that the mandate of the governor is not only *prima facie*, but conclusive, evidence in these proceedings of the fact that the prisoner is "*charged with crime*" within the meaning of the constitution and the act of congress; that the papers on which the governor acted would not be, if produced, competent evidence, and that there is no power in the court to compel their production.

This question depends upon the construction of the clause of the constitution relating to fugitives from justice, and of the act of congress which was passed to carry it into effect. The clause of the constitution is as follows: "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." And the act of congress, passed in 1793, to carry this constitutional provision into effect and to provide a mode of procedure under it (1 Stat. at Large, p. 302) is as follows: "Section 1. That, whenever the executive authority of any state in the Union, etc., shall demand any person as a fugitive from justice of the executive authority of any state, etc., to which such person shall have fled, and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of any state, etc., as aforesaid, charging the person so demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state, etc., from whence the prisoner so charged fled, it shall be the duty of the executive authority of the state, etc., to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear." Section 2 authorizes such agent to transport the person so delivered to him to the state from which he shall have fled.

For the proper understanding of these provisions it is necessary to consider the nature of the subject-matter thus regulated, and the existing state of affairs at the time of the adoption of the constitution and the passage of this statute. The duty of delivering up fugitives from justice, as between independent states and nations, unless affected by treaty, that is, by express contract between them, rests wholly on principles of comity, that is, upon the natural inclination of states on terms of amity with each other to concede to each other such reasonable favors on request as shall not be inconsistent with their own interests or the rights and interests of their own subjects or citizens, and to secure for themselves a reciprocity of benefits by the exchange of such friendly offices. And while some continental jurists have claimed that the surrender of fugitives from justice in cases of atrocious crime may be demanded as a right by one state of another, this right has, in England and this country, been denied to have any existence. Story on Conflict of Laws, § 628, and authorities cited; Opinions

of Jefferson, Monroe and Clay, cited in Hurd on Hab. Corp. (2d ed.), pp. 578 and 579. And see *Holmes v. Jennison*, 14 Pet., 540.

It has been said that, "prior to the American Revolution, a criminal flying from one English colony into another found no protection, but was arrested by the authorities of the territories into which he fled and delivered up for trial within the jurisdiction where the offense was committed, and this because the several colonies formed but parts of the same empire, under a common sovereign, and therefore presented no opportunities for the conflict of the rights and duties of independent sovereigns." Letter of Judge Bell to the Governor of Pennsylvania, 2 Penn. L. J., 150.

It appears, however, that the practice of returning such fugitives, as between the American colonies, rested partly, at least, on treaties between the several colonies. Treaty between the colonies of Massachusetts, New Plymouth and Connecticut, referred to by Chief Justice Taney in *Commonwealth of Kentucky v. Dennison*, 24 How., 101 (§§ 3615-25, *supra*). But whatever may have been the practice in this respect between the colonies, and on whatever basis of law or treaty it rested, there is no doubt that when the colonies achieved their independence they stood towards each other, as regards this matter, in the position of independent states, and the surrender of fugitives from justice became, as with other sovereign states, purely a matter of comity, except so far as it was or should be regulated by treaty or compact between them. And yet from the manner in which the country had been settled, and from the artificial character of the state boundaries, the dividing lines between them having been fixed with little or no regard to natural barriers or lines of defense, running in some cases in the close vicinity of cities or large towns, being, in fact, such boundaries as could only have been produced or continued during a long period of peace between the colonies, the escape of fugitives from one of the states to another was peculiarly easy, and the mischiefs thus resulting threatened not only the domestic peace of the states, but also their friendly relations with each other, unless some reasonable regulation thereof was effected. And when the articles of confederation were adopted, a provision was made for the surrender of fugitives from justice almost identical with that afterwards incorporated into the constitution of the United States.

§ 3631. *The extradition clause in the constitution is imperative. The word "crime" includes every action punishable as crime by the laws of the demanding state.*

The language of the constitution is, as regards the nature of the duty to deliver the fugitive, imperative and unequivocal. "A person charged with treason, felony or other crime, who shall flee from justice and be found in another state, *shall*, on demand, etc., be delivered up." And the great weight of authority, as well as the obvious import of the language used, is that the constitution established an *absolute right* to the surrender, when the case was one coming within the terms of the constitution—that is, the case of a person *charged with crime*—who had *fled from justice*—and *whose surrender was demanded by the proper authority*. It is true that the duty has been by the governors of some of the states treated as discretionary, but the authorities are clearly against this view. *Kentucky v. Dennison*, 24 How., 66. It has been well remarked, in reference to the case last cited, that although the court finally came to the conclusion that they had no jurisdiction to grant the *mandamus* prayed for, yet the views expressed in that decision as to the construction of this clause of the constitution possess but little less than the force of absolute

authority. *Matter of Voorhees*, 32 N. J. L. R., 149. And it is now settled by a great preponderance of authority, state as well as federal, that the word crime in this clause of the constitution embraces every species of offense made punishable as a crime by the laws of the state making the demand, even though it were not a crime by the common law or the laws of other states, and even though for the first time made a crime by a law passed subsequently to the adoption of the constitution and the passage of this act of congress.

Therefore, it appears that the right to demand the surrender of a fugitive from justice, as between these states, is no longer an imperfect right to be conceded as matter of favor or comity, or refused, if the state in which he has taken refuge may so determine, on consideration of its interest or policy, or its view of international law, nor a right resting in the obligation of a contract alone, as by treaty, but a constitutional and legal right, having fixed and well-ascertained conditions. And the same instrument or frame of government, which for national purposes welded the several states into a single country, brought this matter and this obligation within the purview and jurisdiction of the federal authority. As the constitution is more than a compact between the states, so this right and this obligation, as secured by the constitution, became something more than an obligation and a right resting in contract or treaty.

But the constitution did not provide means for carrying into effect this provision, and soon a case arose between Virginia and Pennsylvania, in which the return of a fugitive was denied, because congress had passed no law pointing out the means for enforcing this provision,—determining how and on what officer the demand should be made, and by what evidence it should be supported. Then followed the act of 1793, now in question. By that act the demand is required to be made on the governor of the state, and to be accompanied by a copy of the indictment found, or affidavit before the magistrate, charging the crime, certified by the governor of the state making the demand as authentic.

§ 3632. *The surrender of fugitives from justice is an executive power lodged in the governor.*

Independently of all constitutional and legislative provisions, the surrender of fugitives from justice has, between nations, been treated as an executive power lodged in the supreme executive authority of the state. It was an international concern, and the executive is the organ of communication between one state and another, and under the first treaty with Great Britain, in the case of *Robbins*, the power of the president to surrender a fugitive from justice, whose extradition was claimed under a treaty which is declared by the constitution to have the force of law, was held by the concurring authority of the executive department of the government, the house of representatives and the district court of the United States for the district of South Carolina to be exclusively an executive power and duty in the absence of any legislative regulation. See statement of this case in *Hurd on Habeas Corpus*, 2d ed., pp. 582-583. See, also, *Holmes v. Jennison*, *supra*. Although this case provoked great discussion, yet the result shows how strongly, at that time, the opinion prevailed that this was essentially an executive power. While congress had a considerable latitude of choice as to the means to be employed to enforce this constitutional obligation and right, it saw fit to preserve, as nearly as possible, the existing methods as to dealing with the subject, devolving the duty of performing the obligation on the supreme executive authority of the state where the fugitive might be found. As to the evidence to be produced to him that the party demanded is

charged with crime, the mode of proof is particularly prescribed and limited by the act itself. It must be by a copy of an indictment or affidavit certified by the governor of the state making the demand as authentic. Under this statute clearly no other evidence is sufficient or can be received by the governor on whom the demand is made as sufficient in proof of the fact that such indictment or affidavit exists as the basis of the charge of crime. The constitution provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and congress may, by general laws, prescribe the manner in which acts, records and proceedings shall be proved, and the effect thereof." Congress has, by general laws, provided the mode of proving in one state the judicial records of another state, but it was clearly competent for congress, by a general law, to provide what should be the mode of proving an indictment or other judicial proceeding for the purpose of these extradition proceedings, and congress having legislated thereon, the authentication by the governor of the copy is clearly the mode provided by general law for this purpose, and such authentication imports absolute verity, and no other authentication is necessary to enable the governor to act under the statute, although for other purposes congress has provided a different mode of proving state records. This disposes of the claim that a copy of the indictment certified by the clerk of the court with the accompanying certificate of the judge must be produced either to the governor or to this court in proof of the fact that the party is charged with crime.

§ 3533. *Where, in an extradition case, a person has been arrested under the warrant of the governor, he is not entitled to have a copy of the indictment produced, nor to a writ of certiorari to the governor requiring the production of the papers.*

And upon the question whether the warrant of the governor is conclusive evidence in this proceeding that the party named in the warrant stands charged with crime in the state demanding his surrender, I am of opinion that both on reason and authority the warrant is conclusive. The statute itself especially provides that the governor shall cause the party to be arrested and delivered up. It makes no provision for any other proceedings whatever subsequent to the issue of the mandate of the governor except the delivery of the party and his removal by the agent of the demanding state. It may well be assumed that in devolving this duty and responsibility on the highest executive officer of the state, congress understood that they were making a suitable provision for securing the careful execution of the duty under circumstances calling for great caution and circumspection. The governors of these states were the representatives of the sovereignty of the states, so far as it still existed in a qualified form. They were aided in their positions by high legal officials, and in some of the states had the constitutional right to call on the highest court in the state for its opinion on doubtful questions of law. They were especially charged with the execution of the laws of the state, and might be assumed to be naturally jealous of any attempt to abuse this particular right of demanding fugitives, since it was a demand for the surrender of their own citizens or persons found within the protection of their own laws. Not only is there nothing in the act to show that any proceedings subsequent to the issue of the warrant were contemplated to give full authority for the arrest and removal of the party, but there is nothing in the act requiring the governor issuing the warrant to attach thereto the evidence or copies of the evidence on which he acted, nor since the passage of the act has the practice obtained, so far as ap-

pears, of attaching such copies. This uniform practice of eighty-five years is strong proof that no such copies are necessary to accompany the warrant. Moreover, neither by this act, nor by any other, is any process given for compelling the governor of a state to perform a federal duty or obligation devolved upon him by a federal law. In this very matter the supreme court of the United States have held that while the duty of surrender is absolute and a mere ministerial duty, yet that, especially in view of the nature and dignity of the office of governor and the great public mischiefs that would result from the exercise of such coercive powers against him, the federal government has not in any of its departments the power to issue the writ of *mandamus* against him to compel the issue of the warrant. *Kentucky v. Dennison, ut supra*. It is suggested in the present case that this court can issue a writ of *certiorari* against the governor, to compel the production of this record, but the objections stated in the case last cited against a *mandamus* apply with equal or still greater force to the exercise of such a power by this court. Nor can the governor of the state be regarded as in the position of an inferior tribunal or magistrate to whom the writ of *certiorari* will issue in aid of a writ of *habeas corpus*. In the performance of this duty, he does not act as an inferior magistrate, but as the representative of, and the officer vested with, the executive authority of the state, and not as a federal officer or magistrate.

Speaking of the governor's duty to issue the warrant, Chief Justice Taney says: "The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the constitution which arms the government of the United States with this power. Indeed, such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the federal government, under the constitution, has no power to impose on a state officer as such any duty whatever and compel him to perform it; for if it possessed this power it might overload the officer with duties, which would fill up all his time and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the state." "But if the governor of Ohio refuses to discharge this duty [*i. e.*, "the obligation on the state to carry into execution" this law] there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him." And if it was not within the contemplation of congress that any coercive measures should be used against the governor to compel the performance of the principal duty involved, namely, the issuing of the warrant, it is not supposable that it was within their contemplation that any coercive measures would or could be used to compel the performance of any other duty that might devolve upon him as an incident to, or result of, the performance of such principal duty. And if the issue of a *mandamus* by the supreme court against a governor might lead to imposing on him duties inconsistent with the performance of the duties of his office of governor of the state and with the dignity of his position, yet more unseemly and improper would be the attempt of an inferior court of the United States to subject him to the process of *certiorari* to compel the production of papers with the consequences which must flow from his refusal, of his being treated by the court as in contempt. The total want of power to compel the production of the papers on which the governor acted is itself a strong argu-

ment, against the intention of congress to make the governor's determination subject to review by the courts.

The relations in which the states stood to each other at the time of the formation of the constitution, and the relations which that constitution created between them, as known and understood at the time of the passage of the act, make it not improbable nor unreasonable to suppose that the warrant of the governor should on this question of the fact and sufficiency of the charge be made conclusive within the intention of congress, even though the effect of it is that the party should, when arrested on the warrant, be deprived of an opportunity to contest that fact on *habeas corpus* in the state in which he is arrested. The prior relations of the states were friendly. They had recently won their independence by a war in which they had acted together. Their territories were largely settled by people from the same country, and in all of them the system of the common law of England obtained, by which all persons restrained of their liberty had free access to the courts on *habeas corpus*, to inquire into the cause of their detention. And the people of these states had entered by this constitution into "a more perfect union," among the declared objects of which were "to establish justice, insure domestic tranquillity and promote the general welfare." The thirteen states thereby became one nation, in all parts of whose territory the citizens of each were to have the rights and immunities of citizens of that common country, and were not to be in any of the states in the position of strangers and foreigners. Considering that all the disadvantage that results from the conclusiveness of the warrant of the governor on this point is that the alleged fugitive is thereby removed to another state of the Union, where he has open to him still the privileges of *habeas corpus*, and a trial according to the methods and under the securities of a system of law similar to that prevailing in his own state, and where all his privileges of citizenship remain, and considering the existing relations of the states, there was neither such hardship nor such apparent risk of injustice as to have created any reasonable apprehension that such an arrangement imperiled or put in jeopardy the life or liberty of the citizen, or was liable to subject him to any unreasonable detention or inconvenience beyond what was essential to a proper regard to the public safety and the orderly administration of public justice. The unhappy differences that have since arisen between the several parts of the Union, and which might have suggested danger to life or liberty in this arrangement, did not then exist, and cannot have been had in view by the congress which framed this law.

§ 3634. *Recitals of the warrant, how far conclusive as to the crime charged.*

In the treatment of this subject it is not to be overlooked that this is in the nature of a national police regulation, and that the arrest, detention and removal of the alleged offender are not for the purpose of punishment, but for purposes preliminary to trial, and for the securing of persons against whom there is probable cause to believe that they are offenders against the laws, and that this provision of the constitution and this act of congress are based upon the theory that as between these states the proper place for the inquiry into the question of guilt or innocence is the state where the offense is alleged to have been committed.

In view, then, of the nature of the right and obligation sought to be enforced by this statute, of the prior history of the subject-matter, of the terms of the law itself and the practice under it, of the character and dignity of the office of the governor on whom the duty of determining the question prior to the

issue of the warrant devolved, of the security against abuse afforded by his position, responsibility and surroundings, of the evident impossibility of issuing process to review his decision, and of the relation between the states before and at the time of the enactment of the law, and of the purpose and effect of the warrant of removal, I think that the recital of the warrant was intended by congress to be conclusive as to the charge of crime made against the alleged fugitive, and that the refusal of Governor Robinson to furnish to the petitioner the requisition and accompanying copy of indictment for the purpose of the proposed review of this decision by this court was in entire accordance with the proper view of his official duty under the act of congress in question.

As a question of authority, the decisions of the courts are conflicting. In *State v. Buzine*, 4 Harr. (Del.), 572, Ch. Justice Booth held the warrant conclusive, disposing of the matter in the following language: "These matters are intrusted to the judgment of the executive upon whom the demand is made; and if his mind is fully satisfied in regard to them, the act of congress makes it his imperative duty to cause the fugitive to be arrested and delivered up to the regularly constituted agent of the state from which he fled. The warrant of the executive under the great seal of the state, reciting the facts necessary under the act of congress to give him jurisdiction of the case, would, in my opinion, at the hearing of the *habeas corpus*, be conclusive evidence of the existence of those facts, of his judgment in relation to them, and of a compliance with the constitution of the United States and the act of congress. No investigation, therefore, in such a case, can be made beyond the warrant of the executive, and no examination into the facts and circumstances of the alleged offense with which the party stands charged." "In the present case, the return fully sets forth copies of all the documents transmitted by the governor of Pennsylvania to the executive of this state, and the appointment of Schremer as the agent of the state of Pennsylvania to receive the petitioner as a fugitive from justice and to carry him to that state. It appears that all the requisites of the act of congress have been complied with. No suggestions or exceptions have been made to the return. It is therefore admitted to be true. And although my belief is, that the alleged offense with which the petitioner is charged is the same which, upon examination of witnesses at the hearing of the former *habeas corpus*, clearly appeared to be a breach of trust and not a larceny, he must be remanded because the return in this case is conclusive. When taken to Pennsylvania, he can obtain relief, if the circumstances of his case entitle him to it, by suing out the writ of *habeas corpus*."

The same view of the nature of the obligation and the imperative duty to make the surrender is declared in the following cases, in which, however, the exact point now in question was not directly involved, but from the views therein expressed the conclusiveness of the governor's determination is properly to be inferred: *Commonwealth of Kentucky v. Dennison*, 24 How., 66 (§§ 3615-25, *supra*); *Johnson v. Reilly*, 13 Ga., 98; *Matter of Voorhies*, 32 N. J. L. R., 141. In the case of *The People ex rel. Lawrence v. Brady*, 56 N. Y., 182, the majority of the court of appeals of New York do indeed express the opinion that on *habeas corpus* against the sheriff holding an alleged fugitive under the governor's warrant, it is competent for the court to go behind the warrant and inquire into the fact and sufficiency of the charge of crime upon the evidence presented to the governor, that is to say, the requisition of the governor of the demanding state, and accompanying papers, and in that case

they discharged the prisoner on the ground that such papers did not show that the facts alleged in the affidavit accompanying the requisition constituted a *crime* by the law of Michigan, the demanding state; but it weakens the force of this authority, that the point of the conclusiveness of the recitals in the warrant was not urged upon the court on the argument, and that the case was submitted by counsel as turning upon the question whether the affidavit did charge a crime by the law of Michigan. See argument of the district attorney, p. 185. The court says (p. 186): "It was not claimed by the counsel for the people, that, if the papers were defective and insufficient, it was not competent for the court to take cognizance of the question and discharge the prisoner." It is noticeable also that, by the pleadings, the papers on which the governor acted were voluntarily brought before the court, and by the demurrer to the traverse their insufficiency appears to have been admitted. The court also alludes to the fact that there was no indictment against the prisoner, but an affidavit only (p. 188). Now in some of the cases a distinction has been taken between a case based upon affidavit and one based upon indictment; that in the latter case the authentication of the demanding governor is evidence that the facts charged constitute a crime in the demanding state, and in the former case it is not. This distinction seems to be based on the circumstance that an indictment is everywhere recognized as the proper mode of proceeding for a crime, and, therefore, that the fact that the charge has been made in that form is to be taken in itself as showing that the facts constitute a crime, that is, an indictable offense. How far this distinction may have influenced the court of appeals in reaching the conclusion they came to in that particular case, and whether they would hold the same rule in case it appeared that an indictment against the party, duly authenticated, accompanied the requisition, cannot with certainty be gathered from their opinion. Judge Grover dissented from the conclusions of the court. The court says: "Courts have exercised the right to interfere and to examine the grounds upon which the executive warrant in such cases has issued, and the jurisdiction is justified both by reason and authority." They, however, do not give the reasoning by which they claim to justify it, and they refer for the authority relied on only to the cases of *Ex parte Smith*, 3 McL., 121 (§§ 3609-14, *supra*), and *In re Clark*, 9 Wend., 219. The case of *In re Clark* does not, in my judgment, support the position taken by the learned court. It is true that, in that case, the court examined and *found sufficient* the facts alleged in the affidavits accompanying the requisition, as charging a crime under the laws of Rhode Island; the court did not discuss nor decide the point now in question, and, so far as its opinion on that point can be inferred from the language of Chief Justice Savage, it would seem to be adverse to the position taken by the learned counsel for the petitioner. The papers were voluntarily laid before the court, and it is to be observed that the charge was by affidavit and not by indictment. And it certainly is not so well settled by authority that the authentication by the governor of an affidavit charging the party is, under the statute, to be taken as conclusive proof that the facts charged in the affidavit constitute a *crime* in the demanding state, where those facts do not constitute a crime at common law, as it is in case of an indictment so authenticated. That question, however, does not arise in this case, since the offense charged here is by *indictment* for *burglary*, an acknowledged felony at common law. The case of *Ex parte Smith*, 3 McL., 121, undoubtedly gives some support of authority to the position that this court may go behind the warrant and inquire *whether the prisoner*

is a fugitive from justice. There was, however, this peculiarity about the offense charged: It was a charge against Smith, the Mormon prophet, for being accessory, before the fact, to a murder committed in Missouri, and it was not alleged in the affidavit that he was in Missouri at the time of the commission of the offense; nor was his presence at the time and place of the alleged offense necessarily to be inferred from the nature of the charge, if the charge itself was true. Whether the question of the party demanded having in fact fled from the justice of the demanding state is, under the act of congress, submitted to the conclusive determination of the governor on whom the demand is made, or whether he can receive any evidence on that point outside of the papers submitted to him by the governor of the demanding state, are questions, however, that do not arise in the present case, since the offense charged is one which necessarily implies the actual presence of the party indicted within the jurisdiction of the demanding state at the time of the alleged offense, and the better opinion seems to be that, where such a charge by indictment is duly authenticated by the demanding governor, and the party indicted is in fact found in another state, this is certainly sufficient *prima facie* evidence of his having fled from justice within the meaning and for the purposes of this statute, perhaps conclusive on the court upon *habeas corpus*, if not on the governor. And in this case the prisoner has not overcome this *prima facie* case. So far as the cases of *People ex rel. Lawrence v. Brady* and *Ex parte Smith* are opposed to the views above expressed, I think they are not sustained by reason or by the weight of authority. The *People v. Brady*, though followed by the general term of the first department, was in conflict with the view of the judges of the supreme court in that department, and its correctness on this point is still questioned by them. *People ex rel. Connors v. Reilly*, 11 Hun, 94. The case of Senator Patterson before Judge Humphreys of the supreme court of the District of Columbia, also referred to, seems to have turned on the question whether a person sent by a state to congress as its senator can be held to have fled from that state within the meaning of the act of congress. How that fact was brought before the court does not appear in the copy of the opinion furnished me. Other cases were cited upon the argument which it is unnecessary to discuss in detail. *In re Hayward*, 1 Sandf. S. C., 702; *In re Solomon*, 1 Abb. Pr. (N. S.), 347; *In re Washburn*, 4 Johns. Ch., 106; *In re Leland*, 7 Abb. Pr. (N. S.), 64; *State v. Howell*, Charlton (Ga.), 20; *Kingsbury's Case*, 106 Mass.; *Brown's Case*, 112 Mass., 409; *Dow's Case*, 18 Penn., 37; *Com. v. Deacon*, 10 S. & R., 125; *Vallid v. Sheriff*, 2 Mo., 26; *In re Greenough*, 31 Vt., 279. See also a discussion of the statute, 6 Penn. L. J., 417. It is not intended in this opinion to pass on the question whether the requisition itself is sufficient evidence to the governor of the state on which the demand is made that the party charged has fled from justice, where the indictment or affidavit does not expressly or by necessary implication charge that the party accused was within the jurisdiction of the demanding state at the time of the commission of the alleged offense. There is a class of cases, of which *Ex parte Smith* was one, apparently wholly outside the purview of the constitution and act of congress, inasmuch as the party cannot be said to have fled from the state making the demand. These cases are those in which a state has assumed jurisdiction to make an offense indictable although the party charged was not then, and perhaps never was, within the state, as, for instance, for a murder where the fatal blow was struck outside the state but the injured party died within the state. Perhaps the only and the proper remedy of a party arrested under such a warrant

in such a case is to apply to the governor for a revocation of the warrant. All that is necessary to hold in this case as to this point, of the party having fled from justice, is that where it appears by the recitals in the warrant that the governor had before him a duly authenticated copy of an indictment against the party for an offense, the commission of which necessarily implies the presence of the party at the time and place of the alleged offense, and, as was the case here, no evidence is offered tending to show that the party is not a fugitive from justice, he is properly held under the warrant. It is not intended to be intimated that evidence that the party never was within the jurisdiction of the demanding state would, if offered, be admissible on *habeas corpus* after the arrest on the warrant. One obvious objection that might be urged to the admission of such evidence is, that it would be apparently trying the question of an *alibi*, one of the possible defenses of the party on his trial for the crime alleged, which, as involved in the question of his guilt or innocence, it may have been the design of the constitution and the act of congress to remit for trial exclusively to the state in which the party stands charged with having committed the offense. And another objection might be urged, that congress has apparently submitted the question whether the party charged has fled from justice to the determination of the governor alone.

§ 3635. *The identity of the prisoner is always, in extradition cases, on habeas corpus, an open question.*

The question of the identity of the party arrested with the party described as the alleged fugitive in the mandate of the governor is of course always open to inquiry on *habeas corpus*, since that is simply the question whether the mandate has been executed against the party named therein; but on this question the fact has been determined against the petitioner on the evidence. The writ must be dismissed and the prisoner remanded.

IN RE JACKSON.

(District Court, Western District of Michigan: 2 Flippin, 183-190. 1878.)

Opinion by WITHEY, J.

STATEMENT OF FACTS.—The constitutional provision that “a person charged in any state with crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime,” is supplemented by an act of congress providing the mode of effecting the extradition. The act of 1793, Revised Statutes, section 5278, provides that “Whenever the executive authority of any state demands a person as a fugitive from justice of the executive authority of a state to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate, charging the person demanded with having committed a crime, certified as authentic by the governor of the state from whence the person so charged has fled, it shall be the duty of the executive of the state to which such person has fled to cause him to be arrested and secured, and to cause notice of his arrest to be given to the executive authority of the state making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.”

1. It must appear and be shown that the person has fled from the demanding state and from justice. 2. The person must be demanded by the governor of

such other state as a fugitive from justice. 3. A copy of indictment found, or affidavit, etc., charging the person with crime must be presented and be certified as authentic.

These things being made to appear to the executive of this state, it becomes his duty "to cause the person to be arrested and secured for the purposes of rendition. What was shown to the executive of the state of Michigan upon the application for the warrant of extradition is not before the court.

§ 3636. *Right to the writ of habeas corpus.*

Jackson has petitioned for a writ of *habeas corpus* upon the alleged ground that he has been arrested and is held in custody in violation of the constitution and laws of the United States, specifying several causes. R. S. U. S., sec. 753. Every citizen deprived of his liberty is entitled, upon petition setting forth a sufficient showing, to the writ in order that the cause of his arrest and detention may be inquired into. To the writ Hollis C. Pinkham, having said Jackson in custody, has made return that he is the agent of the state of Massachusetts, named in the warrant of the executive of Michigan, and to him directed, a copy of which warrant is made part of the return; that by virtue thereof he, as such agent, has said Jackson in custody, and that the true cause of such imprisonment and detention of Jackson is set forth and fully appears in said warrant. The right to hold the relator depends wholly upon the sufficiency of the warrant of extradition on its face, and nothing else, and with our present views we should not be disposed to look behind the warrant. The warrant recites proceedings anterior to its issuance, and upon which the executive based his action, with a view to show that *prima facie* the requirements of the act of congress had been complied with, which made it the duty of the governor to issue his warrant of extradition. Among other things the warrant recites that Pinkham is agent of the state of Massachusetts to receive and remove Jackson, the presentation of an authentic copy of an indictment charging Jackson with crime in that state, and a demand by the governor of that state on the executive of Michigan.

The warrant does not state that it has been satisfactorily shown to the governor of Michigan that Jackson has fled from the state of Massachusetts or from justice. What it recites on that subject is that the executive of Massachusetts "has, by letters under his hand and made patent by the great seal of the state, represented to me that one Samuel D. Jackson has fled from justice in said state of Massachusetts." Is this sufficient on the face of the warrant to show *prima facie* that Jackson has fled from justice or from Massachusetts?

§ 3637. *What is necessary to be shown to authorize the extradition of a person charged with crime, under the provisions of the constitution. The certificate of the demanding governor is not evidence.*

The constitution declares that "a person charged with crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up." Now it is manifest that before the executive of Michigan is authorized to issue his warrant to cause to be arrested and secured a person charged in another state with crime, it should be shown by evidence making a *prima facie* case that such person has fled from the demanding state. This should be shown by competent evidence, as the fact of fleeing lies at the foundation of the right to issue a warrant of extradition. The certificate of the demanding governor is no evidence of the fact. Neither the act of congress nor any rule of evidence makes his certificate evidence of such fact. The act of congress makes it the duty of the ex-

ecutive of the state "to which such person has fled" to cause him to be arrested and secured. The mere fact that a citizen of Michigan has been charged with crime and indicted in another state is not legally sufficient to authorize the arrest and extradition of such citizen. He may be charged with crime, and indicted in a state into which he has never entered or was never in, and from which, therefore, he never fled. It is as essential to the right of arrest and extradition to prove to the satisfaction of the governor of Michigan that the person charged with crime has fled from justice as to prove that he is charged with a crime in such other state. The latter is sufficiently proved in either of the two methods provided by the law of congress; by copy of an indictment, or by an affidavit made before some magistrate charging the person demanded with having committed a crime, certified as authentic by the demanding governor. No provision is made as to the method of proving that the person demanded as a fugitive has fled from justice. But when the constitution says a person charged with crime "*who shall flee from justice*" shall be delivered up, the converse is, that a person charged with crime who shall not have fled from justice shall not be delivered up to be removed. Hence it is essential that it be shown that the accused is a fugitive from justice, and when such person represents by petition to a court that he is unlawfully deprived of his liberty, if the court may act at all, it is a material inquiry whether the governor's warrant is *prima facie* sufficient to justify the arrest and removal.

The evidence that the person has fled from justice must not only be satisfactory to the governor, but must be legally sufficient before the executive authority can be exercised. He cannot act upon rumor, nor upon the mere representation of a person, nor upon the demanding governor's certificate. It should be sworn evidence, such as will authorize a warrant of arrest in any other case. Had the governor of Michigan stated in his warrant of arrest and removal that it has been satisfactorily shown to him that Jackson had fled from justice, or was a fugitive from justice from Massachusetts, such statement would be *prima facie* sufficient and possibly conclusive. There are judgments which seem well considered, holding the warrant would, if *prima facie* sufficient, be conclusive, and that courts will not go behind it in such cases. But it is manifest if the warrant fails to recite or state any conclusion of the executive issuing it, that the person charged has fled, and recites only that the demanding governor has so represented, that the warrant is not legally sufficient to authorize an arrest and extradition. It is a common principle that a process of arrest must be legally sufficient on its face. We are called upon to say whether the warrant of extradition is *prima facie* sufficient under the constitution and laws of congress, and we are of opinion that it is not. The question is in principle within the case of *Ex parte Thornton*, 9 Tex., 635. The warrant recited that it had been represented and made known by the demanding governor of Arkansas to the governor of Texas, that Thornton stands charged with the crime of forgery and had fled from justice in the state of Arkansas and taken refuge in the state of Texas; it failed to state that such representation was accompanied by an authenticated copy of an indictment, etc., charging the relator with crime, and for that reason the warrant was held defective and insufficient. That it showed the governor of Texas had acted on the mere representation of the demanding governor. The exact point in the case at bar was not raised, but if such representation by the demanding governor is not sufficient for one purpose, it is not as to any other material fact.

State v. Schlemn, 4 Harr., 577, has been cited. It was ruled in that case

that "the warrant of the executive, under the great seal of the state, reciting the facts necessary, under the act of congress, to give him jurisdiction of the case, would, at the hearing of the *habeas corpus*, be conclusive evidence of the existence of those facts, of his judgment in relation to them, and of a compliance with the constitution of the United States and of the act of congress." This view has not always been acquiesced in by the courts; but, assuming the judgment to be correct, "the facts necessary" to give the executive jurisdiction must be stated or recited in the warrant.

Several cases have been cited as controlling the case at bar, holding certain things only are essential to be shown to render it the duty of the executive on whom the demand is made to remand, and that inasmuch as evidence that the party has fled from justice is not stated to be one of the essential matters, therefore it is claimed not necessary either to show such fact or to recite in the warrant any conclusion by the executive as to the fact. Those cases were decided on the questions raised therein, and are authority only as to those questions. Courts not unfrequently lay down general rules not necessary to the decision of the case being considered, and which therefore often fail to stand the test when a different question, not anticipated or considered, is presented. The relator must be discharged. We do not suppose his discharge will have the necessary effect to defeat his extradition, if in fact he has fled from justice. Doubtless the executive, upon a renewed application, can reconsider the case and issue a second warrant, for which there is precedent. But certainly unless it is shown that the relator was in Massachusetts at or about the time when the offense is charged to have been committed, and has since that time departed that state, there would be no just or legal ground for saying he had fled from justice in Massachusetts.

The state of Massachusetts enacts that no person should be surrendered to the authority of another state unless there is sworn evidence "that the party charged is a fugitive from justice." In Pennsylvania it is said the practice is to issue the warrant of surrender whenever a requisition is supported by indictment, etc., "and by an affidavit that the defendant has fled from such state into one where the warrant is demanded." 6 Penn. L. J., 412. See, also, Hurd on Habeas Corpus, page 606, where it is said "there must be an actual fleeing from justice, and of this the governor of the state of whom the demand is made should be satisfied." See, also, *Ex parte* Smith, 3 McL., 121 (§§ 3609-14, *supra*).

The importance of adhering to the views expressed could be made apparent by referring to many cases where indictments have been found in one state upon no evidence or upon wholly insufficient evidence, and where the indictment subserved no end of justice. We have in mind an indictment found in a neighboring state against a citizen of Michigan upon wholly insufficient evidence inspired by revenge and blackmailing purposes. It was said a late governor of Michigan inquired into the facts and refused to issue a warrant. We noticed in the papers of an adjoining state, not long since, that one or more indictments had been found by a grand jury without any evidence whatever, on request of a prosecuting officer. Such cases, considering the facility with which indictments are sometimes obtained, afford sufficient justification not only to the executive of a state on whom a demand for extradition is made, but to the courts, to see that the case falls within the laws.

IN RE TITUS.

(District Court, Eastern District of New York: 8 Benedict, 411-419. 1876.)

Opinion by BENEDICT, J.

STATEMENT OF FACTS.—The petitioner, H. B. Titus, presents his petition for a writ of *habeas corpus*, directed to the sheriff of the county of Kings, to the end that he may be discharged from the custody of such sheriff. The facts upon which the petitioner bases his demand for a discharge are as follows:

On the 7th day of November, the governor of the state of Arkansas commissioned the petitioner to present to the governor of the state of New York the requisition of the governor of Arkansas, for the surrender of a fugitive from justice from the state of Arkansas, named Augustine R. McDonald, together with a duly authenticated copy of an indictment found against the said McDonald by the grand jury of Ashley county, Arkansas. In pursuance of his commission and the instructions of the governor of the state of Arkansas, the petitioner, as such agent, presented said requisition, together with said authenticated indictment, to the governor of the state of New York, who, thereupon, issued to the sheriff of the county of Kings his mandate directing the arrest of McDonald, and his delivery to the petitioner, the agent of the state of Arkansas duly commissioned and authorized to receive said fugitive, in accordance with the laws of the United States in such case made and provided. The sheriff of Kings county, on receipt of the mandate of the governor, arrested McDonald for the purpose of delivering him to the petitioner in accordance with the terms of the mandate; but before such delivery was made the fugitive was released from the custody of the sheriff upon *habeas corpus* issued by a justice of the supreme court of the state of New York. After being so released McDonald brought an action for malicious prosecution against the petitioner, and obtained from the supreme court of the state an order for his arrest, in pursuance whereof he is now held in custody by the sheriff of Kings county. Being so detained in custody, he presents his petition to this court, setting forth the above facts, and claims his discharge at the hands of this court, upon the ground that he is detained in custody by reason of acts committed by him in pursuance of the laws of the United States, and which are justified by such laws.

Notice of the application having been given to the attorneys for McDonald, at whose suit the petitioner is imprisoned, they have appeared, and, in opposition to the petition, deny the jurisdiction of this court to issue the writ of *habeas corpus*, upon the ground that the acts of the petitioner, which were the foundation of the action against him, are not acts done in pursuance of any law of the United States, and the further ground that the indictment, presented to the governor of the state of New York, and upon which he issued his mandate to the sheriff, does not charge any crime of which the grand jury of Ashley county, Arkansas, could take cognizance; whence it is concluded that all the proceedings towards the surrender of McDonald were void, and afford no justification for the petitioner and no foundation for the interposition of this court.

By the constitution of the United States the whole subject of interstate extradition is remitted to the cognizance of the general government. This jurisdiction of the government of the United States is exclusive. *Prigg v. Commonwealth of Pennsylvania*, 16 Pet., 622. The act of 1793, now section 5278 of the Revised Statutes of the United States, provides the method by

which such extradition is to be accomplished. That statute authorizes the executive authority of any state from which a fugitive from justice may have fled, to demand his return of the executive authority of the state to which such person has fled, upon producing to such executive a copy of an indictment found, or an affidavit made before a magistrate of the state, charging the person demanded with having committed treason, felony or other crime, such indictment or affidavit to be certified as authentic by the governor or chief magistrate of the state from which the person so charged has fled. Upon receipt of the requisition and certified indictment, the executive authority of the state to which such person has fled is authorized to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making the demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.

§ 3638. *Where an agent for the extradition of a fugitive was arrested in an action for malicious prosecution, held, that he was restrained for an act done in pursuance of a law of the United States, and was entitled to a writ of habeas corpus.*

The petition and accompanying documents disclose plainly that the only acts charged upon the petitioner, and because of which he is arrested, are acts performed by him as the agent appointed by the executive of the state of Arkansas in pursuance of the commission issued to him by such governor, which acts are those prescribed by the act of 1793 as above stated. The case of the petitioner, therefore, is that of a ministerial officer acting within the scope of an authority conferred upon him by the governor of a state, by virtue of the provisions of the act of 1793, who, being held in custody by reason of such acts, applies for his discharge from such custody by virtue of the provisions of law found in chapter 13, title 13, of the United States Revised Statutes. Those provisions of law make it the duty of the judges of the courts of the United States within their respective jurisdictions to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty, where a prisoner is in custody for an act done or omitted in pursuance of a law of the United States. U. S. Rev. Stat., § 753. The question therefore is, whether the petitioner is in custody for acts intended to be covered by section 753 of the Revised Statutes of the United States.

It is contended, in opposition to the petition, that acts performed in and about the surrender of fugitives from justice are not acts done in pursuance of the laws of the United States, but are the acts of a governor of a state done in discharge of his duty to the state and not otherwise. Reliance is placed upon the case of *Commonwealth of Kentucky v. Dennison*, 24 How., 66 (§§ 3615-25, *supra*), for this position. But I do not find the position to be supported by the authority referred to, nor do I consider it tenable on principle. The case of *Kentucky v. Dennison* simply decides that the supreme court of the United States has no power to issue a *mandamus* to compel the governor of a state to cause the surrender of a fugitive when demanded by the executive of the state from which he has fled. The question here raised could not arise in that case, for the reason that in that case the governor of Ohio refused to act at all. Here the governors respectively have acted, and the acts performed are those required by the laws of the United States to be performed.

It seems clear that the authority exercised is an authority conferred by the laws of the United States and by no other laws. The supreme court of the

United States, in *Prigg v. Commonwealth of Pennsylvania*, when speaking of the act of 1793, say: "As to the authority so conferred upon state magistrates, while a difference of opinion has existed and may exist still on the point in different states, whether state magistrates are bound to act under it, none is entertained by this court that state magistrates may, if they choose, exercise that authority unless prohibited by state legislation." So in *Kentucky v. Dennison*, where it was argued that the act of 1793 must be held to speak only to state authorities, and to leave its execution wholly to the authorities of the state themselves, and therefore to be void, the supreme court, maintaining the validity of the act, declares that the act makes it the duty of the state executive to cause a fugitive from justice to be delivered up, and that "as the duty of the governor of the state where the fugitive was found is in such case merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the state or congress to authorize it."

'There are no laws of the state to authorize the acts specified in the act of congress. The governors and their agents are compelled, therefore, to rely upon the statute of the United States for authority to do the acts required thereby, and the statute of the United States affords them justification. It seems impossible, therefore, to hold that when they so act they act otherwise than in pursuance of a law of the United States. In so acting they but discharge an absolute obligation created by a law of the United States which they are bound to perform, and for which there is no other law, and their acts are none the less acts done in pursuance of a law of the United States, because, as decided in *Kentucky v. Dennison*, there is no power in the general government to use coercive measures to compel performance.

This view of the scope of section 753 appears to be in harmony with the object of the statute, which plainly is intended to afford to all persons arrested for acts done in discharge of obligations to the United States, and arising under the constitution and laws thereof, a summary method of obtaining release from unjust imprisonment. Certainly those are entitled to such protection and are clearly within the spirit of the act, who, in conformity with a law of the United States, exercise that portion of the delicate and important power in respect to fugitives from justice granted by the constitution to the national government, which has been called into operation by the act of 1793 — a power of necessity belonging to the national government, but which operates largely, if not exclusively, in the interest of harmony between the states. Entertaining these views, which find support in the case of *Ex parte Smith*, 3 McL., 131 (§§ 3609-14, *supra*), I am bound to hold that the petitioner is entitled to require of this court a writ of *habeas corpus*, to the end that an inquiry be had into the causes of the restraint of his liberty.

A further question presented by the petition has been discussed upon this motion and may here be decided. It arises out of the matter charged in the indictment, which accompanied the requisition of the governor of Arkansas and disclosed the judicial proceeding in Arkansas upon which the surrender of the fugitive was demanded. The contention upon the indictment is, that it is an indictment found by the grand jury of Ashley county, Arkansas, and undertakes to charge McDonald with a crime not cognizable by any court of the state of Arkansas, the charge being subornation of perjury, committed within such state, in procuring one Martin to commit wilful perjury within said state before a United States commissioner, in a deposition taken by such commis-

sioner to be used in an action then pending between said McDonald and the United States. This indictment, it is said, is void, because it charges no crime within the jurisdiction of a grand jury of the state of Arkansas, and renders all the proceedings taken in regard to the surrender of the fugitive void—whence it is concluded that the acts performed by the petitioner cannot be held to be acts done in pursuance of a law of the United States.

But I cannot accede to this view. If it be true that it is competent for this court to look into the indictment transmitted by the governor of Arkansas and authenticated by him, and if this court can be called upon to determine whether a crime has been charged therein in the manner required by the laws of the state of Arkansas, and whether, as matter of law, subornation of perjury committed within the state of Arkansas can by the laws of the state of Arkansas be made an offense against the laws of that state, when the perjury is committed before a United States commissioner in a deposition taken to be used in a court of the United States, still it cannot be that the petitioner, who is simply a messenger of the governor of the state of Arkansas, and who is not alleged to have done otherwise than is required by his commission, was bound to look into the indictment, and required at his peril to determine whether it charged a crime within the meaning of the laws of the United States. The petitioner did not arrest the fugitive nor demand his arrest. The arrest was made by direction of the governor of the state of New York, upon the demand of the governor of Arkansas. And if there can be said to have been anything done by the petitioner in respect to the arrest of the fugitive, which could render him liable in an action for malicious prosecution, his acts are plainly ministerial and he is justified therefor by the directions of the governor.

The jurisdiction of the executive of the state over the subject-matter is clear, and the petitioner has done no more than is prescribed to be done by the laws of the United States, acting under the directions of the executive, who, by the same law, was authorized to give such direction. No personal liability was therefore incurred. Nor is the case changed by the allegation that the motives actuating the petitioner were malicious. So long as the acts done were within the scope of the authority conferred upon him and justified by the laws of the United States, it matters not what feelings the petitioner entertained towards the fugitive, nor what result he hoped would follow from the action taken by the governor of the state. My determination therefore is, that the petitioner is entitled to his writ of *habeas corpus* as prayed for.

§ 3639. Arrest before demand.—It is held that a person who is charged with the commission of a murder in another state or territory may, upon proper evidence, be committed to custody, before a demand has been made by the executive of the state or territory where the crime is charged to have been committed, to await the action of such executive. *Ex parte Romanes*,* 1 Utah T'y, 23.

§ 3640. Facts necessary to authorize an arrest.—To justify the arrest and detention of a person on the charge of an offense committed in another state, the following facts must appear: 1. That there is a charge of crime against the prisoner in the state where the crime is alleged to have been committed. 2. A demand by the governor of that state for the arrest and detention. 3. The evidence on which the arrest is based must be an indictment found in the state from which the prisoner fled, or an affidavit made and certified by the governor of that state. 4. That the prisoner should have been in the state where the crime was committed, and had fled from it. *Ex parte McKean*,* 3 Hughes, 23. See § 3595.

§ 3641. So where a person from New York was arrested in Virginia, on suspicion of being a fugitive from justice from Kansas, all the requisites as above set forth being wanting in the warrant of commitment, the prisoner was discharged on *habeas corpus*. *Ibid*.

§ 3642. Inquiry on *habeas corpus*.—On a *habeas corpus* proceeding in an extradition case, it is competent for the court to look into the proceedings which took place before the com-

mitting magistrate, for the purpose of determining whether the requirements of the law of congress in respect to the arrest and detention of fugitives from justice from other states have been observed. *Ibid.*

§ 3643. It seems that where the committing magistrate is merely holding an alleged fugitive from day to day, for the purpose of awaiting such testimony as the law requires to authorize his extradition, the court will not interfere by *habeas corpus*; but where the action of the magistrate is final, and the prisoner has been committed without the requisite legal proceedings, the court will discharge on *habeas corpus*. *Ibid.*

§ 3644. May be held for another crime.—A fugitive from justice, extradited from one state of the Union to another on charge of the commission of a specific offense, can be held by the courts of the state to which he is sent for trial, for another and different crime. And such person may be detained by the authorities of the state for prosecution, notwithstanding it may appear that his arrest under the extradition proceedings was without legal authority. The prisoner has no right in such a case to be released on *habeas corpus* by a federal court, on the ground that his rights as a citizen were violated by the persons who secured his person in a foreign jurisdiction other than by due process of law. *In re Noyes*,* 7 Alb. L. J., 407.

§ 3645. Soldiers.—There being no existing law which provides for the case of original demands upon the president for the surrender of military officers and soldiers, or others under his exclusive authority, in order to answer the civil authorities of the states for alleged violations of their laws; and it resting in the discretion of the president in what cases he will exercise his military authority over the citizens composing the army, to constrain them to surrender themselves to the civil authority of the states,—the attorney-general suggests the propriety of adopting, by analogy, the principle of the constitution relative to the surrender of fugitives by the governors of the states, applying the details of the act of congress of February 12, 1793, so far as to require the demand to be made by the governor of the state or territory, on copy of an indictment found or on affidavit made specifying the particular offense, and authenticated as is required by that act. The thirty-third article of the rules and articles of war gives no authority to make such a demand. *Surrender of Military Officers*, etc.,* 2 Op. Att'y Gen'l, 10.

§ 3646. Midshipman.—Although there is no act of congress which authorizes the call by the governor of a state for the surrender of a midshipman for the purpose of taking his trial in such state for a breach of its peace, nor any law which authorizes the arrest of the midshipman by order of the navy department or of the president, with a view to his forcible surrender to the state authorities, yet it is important that he should surrender himself to the state authority for the purpose of taking his trial, and it is admissible that an order to that end should be given him by the navy department. *Surrender of a Midshipman*,* 1 Op. Att'y Gen'l, 244.

See the cross-reference at the beginning of the subject.

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See CRIMES.

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 design may be abandoned before act or attempt. Crimes, §§ 170, 192.
 how far an essential. Crimes, § 2303.
 the combination is the offense, but some act in furtherance essential. Crimes, §§ 199, 220. See §§ 180-182.
 demands of money, journeys and conferences to carry out the purpose. Crimes, § 183.
 may itself be a crime; conspiracy not merged. Crimes, §§ 176, 204. See § 205.
 of one, is the act of all. Crimes, §§ 223-228.
 time of its commission not necessary to be shown. Crimes, § 231.
 was unnecessary at common law. Crimes, §§ 2254, 2279-82.
 charging overt act, see *post*, 12, c.

CONSPIRACY — continued.

8. EVIDENCE.

the precise time alleged need not be proved. Crimes, § 185.
 indirect or circumstantial is sufficient. Crimes, §§ 184, 229, 247.
 what necessary to show. Crimes, §§ 194, 729.
 necessary to establish conspiracy. Crimes, § 197.
 weight due to testimony of co-conspirator. Crimes, §§ 198, 212. See *Accomplices*.
 of ownership of rectifying establishment, need not be strict. Crimes, §§ 179, 209, 210.
 bonded warehouse a part of distillery. Crimes, § 209.
 effect of, of defendant's good character. Crimes, § 212.
 dispatches to or from a defendant, to show combination. Crimes, § 230.

9. VARIANCE. See *supra*, 8; *Variance*.

county alleged need not be proved, if in same district. Crimes, § 208.

10. LIMITATIONS.

of five years, under revenue laws, apply when. Crimes, § 247.

11. INDICTMENT FOR CONSPIRACY. See *Indictment*.a. *Generally*.

revenue officer may be indicted as an individual. Crimes, § 2296.
 to plunder wrecked vessel, under section 5440. Crimes, § 2308.
 what sufficient charge of co-operation. Crimes, § 2309.
 must allege time and place. Crimes, § 2310.

b. *Joinder*.

the indictment of one of two persons is good. Crimes, §§ 2253, 2275-78.

c. *Certainty of statement*.

defendant must be informed of the nature and cause of the charge. Crimes, §§ 2255, 2279-82.

every material ingredient of the charge must be stated. Crimes, § 2302.
 circumstances of fraud unnecessary. Crimes, § 2303. See § 2313.

means need not appear. Crimes, §§ 2256, 2290-93. See § 2290 and note a.

otherwise in conspiracy to defraud the United States. Crimes, §§ 2257, 2279-82.
 need not be stated in full. Crimes, § 2283a.

indictment under act of March 2, 1867, held good. Crimes, § 2311.

should appear in charging conspiracy to defraud. Crimes, § 2313.

defrauding the government, means used must be alleged. Crimes, §§ 2253, 2283-84.

how overt act charged. Crimes, §§ 2260, 2283-84.

"distilled spirits" sufficient description of taxable property. Crimes, §§ 2270, 2294-98.

overt act, when not alleged, all the facts of the conspiracy must appear. Crimes, §§ 2259, 2283-84.

how charged. Crimes, § 2360.

"in pursuance" of combination, good. Crimes, §§ 2361, 2294-98.

need not be set out with the precision of an indictment for the act itself. Crimes, §§ 2272, 2305-2307.

any act carrying out the conspiracy, enough. Crimes, §§ 2274, 2308-9.

may be murder; conspiracy not merged. Crimes, § 2291.

need not be alleged at common law. Crimes, § 2301.

to hinder voting; actual hindrance unnecessary. Crimes, §§ 2262, 2285-89.

need not be charged whether election state or federal. Crimes, § 2263; *Id.*

conspiracy may be formed the day before election. Crimes, § 2264; *Id.*

must allege qualification of person deprived. Crimes, §§ 2265-66, 2268; *Id.*

equal protection of the laws; count held too indefinite. Crimes, §§ 2267, 2285-89.

to hinder support of candidate; acts of support unnecessary. Crimes, §§ 2269, 2290-93.

must show support to be of election of persons. Crimes, § 2312.

embezzlement; indictment held good. Crimes, §§ 2271, 2299-2304.

for destroying government papers; charging overt act. Crimes, §§ 2272, 2305-2307.

fraud on United States not necessary. Crimes, § 2273; *Id.*

d. *Names of defendants and other persons, etc.*

persons hindered from voting need not be named. Crimes, §§ 2262, 2285-89.

CONSTABLE. See *Offenses by Officers*.CONSTITUTION OF THE UNITED STATES. See *Accused*; *Extradition*, 2; *Jury*, 7; *Pardon*.1. POWERS OF CONGRESS. See *Piracy*.

enforcing laws by appropriate penalties; harbors, coin, pensions, Indians, forts, larceny, etc. Crimes, §§ 14-21.

to punish offenses on high seas and against international law. Crimes, § 423.

as to persons and property in the states. Crimes, § 845.

as to the postoffice, and protecting the mail. Crimes, § 988, and note a.

right to be secure in one's house not derived from. Crimes, § 2289.

free exercise of religion; polygamy may be prohibited as an act or practice, not as a religion. Crimes, §§ 852, 854-865.

CONSTITUTION OF THE UNITED STATES, POWERS OF CONGRESS—continued.
 making port of entry does not confer criminal jurisdiction. Crimes, § 15.
 relation of states to the government stated. Crimes, § 348.
 rights of accused, as to copy of indictment, punishment, etc., see *Accused*.

CONSTRUCTION OF THE CONSTITUTION.
 how grants of power by congress construed. Crimes, § 989.

CONSTRUCTION AND INTERPRETATION. See *Extradition*, 1, b; *Pardon*, 4.
 of statutes, see *Statutes*.
 of pardon. Crimes, § 8262. See *Pardon*.

CONSTRUCTIVE TREASON.
 See Crimes, § 1199.

CONSULS AND MINISTERS.

1. OFFENSES AGAINST.
2. PRIVILEGE.

1. OFFENSES AGAINST.
 jurisdiction of offenses by and against. Crimes, §§ 1726-28.
 on indictment for arresting need not be shown that offender knew him to be a minister. Crimes, §§ 1287, 1290, 1295.
 immaterial that he submitted to arrest. Crimes, § 1288.
 authority of the minister as such need not be strictly proved. Crimes, § 1291.
 a person may defend himself from assault of minister. Crimes, §§ 1292, 1293.
 assault by minister does not justify arrest. Crimes, § 1294.
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2. PRIVILEGE OF.
 unaccredited minister not privileged. Crimes, § 1286.
 property attached to his person also privileged. Crimes, § 1289.
 consul not privileged from prosecution for sending threatening letter. Crimes, § 1400.

CONTEMPT.

disobedience of order of register a. Crimes, § 87.
 refusal to answer proper question by grand jury. Crimes, § 128.
 disobeying order of federal court. Crimes, § 129.
 is a crime punishable by indictment. Crimes, § 130.
 of court, a crime at common law. Crimes, § 130.
 of court, removal of cases of; is a crime. Crimes, §§ 3200-3203.
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CONTINUANCE.

what ground for; what not. Crimes, §§ 2929-36.

COPY OF INDICTMENT. See *Accused*.

CORONER.

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CORPORATIONS.

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 offense of president of manufacturing, for passing its notes as money. Crimes, § 1413.

CORRUPTION.

in office, indictment for. Crimes, § 2575.

COSTS.

imprisonment for fine and. Crimes, §§ 2908-9.
 pardoning power may release. Crimes, § 3269.
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COUNTERFEITING AND FORGERY. See *Forgery*.

1. IN GENERAL.
2. WHAT IS COUNTERFEITING; WHAT NOT.
3. POSSESSION OF COUNTERFEITS.
4. PASSING, UTTERING AND PUBLISHING.
5. INDICTMENT.

1. IN GENERAL.

act of February 25, 1862, not void for repugnancy. Crimes, §§ 253, 258.
 counterfeiting coin not a felony. Crimes, § 1924.
 act of 1867 not repugnant to act of 1864. Crimes, § 265.
 a lessee of a house used in, may be guilty as an accomplice. Crimes, § 273.
 act of June 27, 1798, was repugnant and void. Crimes, § 275.
 exacting security for good behavior of defendant, not proper. Crimes, § 283.
 it is an offense to make small photographs of treasury notes. Crimes, § 305.
 what evidence admissible. Crimes, § 298. See *post*, 3.
 the act of June 30, 1864, relates to genuine plates of the currency. Crimes, § 304.
 what not a variance. Crimes, § 306.

COUNTERFEITING AND FORGERY — continued.

2. WHAT IS COUNTERFEITING; WHAT NOT.

the metal passed or made must so resemble genuine coin as to deceive. Crimes, §§ 254, 250-261. See § 295.

otherwise, if it be intended to pass by exhibiting only one side of coin. Crimes, § 270.

boring and filing, and adding base metal, is. Crimes, §§ 255, 262.

intent to pass as genuine, necessary under act of 1825. Crimes, §§ 266, 268.

need not be to defraud the United States or its officer. Crimes, § 267.

to aid maker in magical performance, not. Crimes, § 268.

circumstantial evidence of, is enough. Crimes, § 269.

it need not be shown that there are genuine coins like those uttered. Crimes, § 274.

counterfeiting the silver coin of Spain not punishable under act of 1825. Crimes, § 280.

national currency subject to. Crimes, § 308.

3. POSSESSION OF COUNTERFEITS.

of other counterfeit papers, is competent, on the question of guilty knowledge. Crimes, § 292.

inference from, rebutted by proof of good character. Crimes, § 293.

by lessee of room in which spurious coin, tools, etc., found, sufficient. Crimes, § 296.

by co-conspirator, evidence against all. Crimes, § 297.

4. PASSING, UTTERING AND PUBLISHING.

the uttering or passing need not be *as genuine*, if the purpose be to defraud. Crimes, §§ 256, 263-265.

furnishing notes to another as counterfeit, to be by him circulated, is indictable. *Id.*

otherwise under statute punishing the passing, etc., "in payment." Crimes § 282.

sale and delivery for ultimate circulation is a felonious "passing." Crimes, § 264.

is putting it out in payment or exchange, as good. Crimes, § 281.

in a conspiracy for, possession of one is that of all. Crimes, § 290.

attempt made out by showing attempt of authorized agent. Crimes, § 294.

5. INDICTMENT. See *Indictment*.

a. Generally.

under act of 1864, must charge passing with intent to defraud. Crimes, § 265.

of 1867, that the note will be passed *as true*. *Id.*

how coins described in. Crimes, § 272.

copy of forged instrument, how set out. Crimes, § 2333.

indictment good though corporate charter expired, when. Crimes, § 2361.

name of person to whom counterfeit passed unnecessary. Crimes, § 2367.

how fraudulent erasure charged. Crimes, § 2322.

b. What must be stated.

exact copy of thing forged. Crimes, §§ 2314, 2331-33.

number of forged notes in possession of accused. Crimes, §§ 2315, 2331-33.

variance as to number of counterfeit bill, fatal. Crimes, §§ 2316, 2334-36. See *Variance*.

description of counterfeit bill must correspond with proof. Crimes, §§ 2319, 2334-36.

evidence may sustain only one count. Crimes, §§ 2320, 2334-2336.

guilty knowledge, when. Crimes, §§ 2326, 2344.

intent to defraud United States, when. Crimes, §§ 2327, 2345-48.

"forged or counterfeited," when. Crimes, §§ 2359, 2371.

purport of note or bill, when. Crimes, § 2362.

intent essential, when. Crimes, §§ 2363-66.

damage or prejudice to another, when; when not. Crimes, §§ 2368-69.

instance of. Crimes, § 2370.

c. What need not be.

bank from which counterfeit bill issued. Crimes, §§ 2321, 2337-39.

"purport clause," when. Crimes, §§ 2322, 2337-39.

corporate existence of bank, when. Crimes, §§ 2323, 2337-39.

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that counterfeit currency resembles the genuine. Crimes, §§ 2325, 2340-2343.

means, circumstances, or methods of fraud. Crimes, §§ 2327, 2345-48.

in case of false affidavits, that officer taking them was qualified. Crimes, §§ 2328, 2345-48.

that notes of national bank were sealed. Crimes, §§ 2329-30, 2345-48.

name of instruments forged, when. Crimes, § 2342.

that drawer had a right to draw. Crimes, § 2356.

indorsements on bill. Crimes, § 2357.

paper writing, or printed paper, when. Crimes, § 2369.

d. In words of statute.

not sufficient, when. Crimes §§ 2326, 2344.

COUNTS. See *Joinder*.

COURT MARTIAL.

trial in, does not put in jeopardy. Crimes, §§ 1766, 1788-84.

COURTS.

minutes of, import verity. Crimes, § 1779.

territorial, are courts of the United States. Crimes, § 3191.

special sessions proper, when. Crimes, §§ 2747-48.

CRIMES. See *Constitution of the United States; Criminal Frauds; Criminal Procedure; District of Columbia; Jurisdiction; Repeal; Statutes. Also Offenses, etc.*

1. IN GENERAL.

2. CAPACITY AND RESPONSIBILITY.

3. MITIGATION AND EXCUSE.

4. THE LOCUS.

1. IN GENERAL.

what are felonies. Crimes, § 1921.

the same act may be a crime against the state and the nation; a state may punish a federal crime. Crimes, §§ 84-36.

there are no common law crimes against the United States. Crimes, §§ 2084, 2279.

an act to be made punishable by future legislation is not a crime. Crimes, § 134.

a conspiracy to recover a debt of the United States, which was a debt of Missouri, not a crime. Crimes, § 135.

construction of various acts relating to crimes. See *Statutes*, 2.

a single act may be separate and punished as a. Crimes, § 136.

congress may reduce felony to misdemeanor. Crimes, § 142.

an act authorized by a constitutional law cannot be criminal. Crimes, § 149.

the particular offense charged must be proved. Crimes, § 559.

difference between moral and legal guilt. Crimes, § 1008.

character of offense not tested by mode and measure of punishment. Crimes, § 2462.

what constitutes a crime. Crimes, §§ 6-8.

a. *The intent. See Homicide.*

must exist when act done. Crimes, §§ 1, 6-8.

"wilfully," what; intent must be evil, not ignorant. Crimes, §§ 61, 62.

malice, what; inferred when crime proved. Crimes, §§ 65, 66.

is essential; motive sought; presumed when; declarations of defendant. Crimes, §§ 67-74.

not essential when; what is; how rebutted. Crimes, §§ 75, 84.

as to counterfeiting, see *Counterfeiting*.

as to polygamy. Crimes, § 864.

as to perjury, see *Perjury*.

in cutting timber on public lands. Crimes, § 1457.

how charged, see *Indictment*, 5.

how not negatived. Crimes, § 2409.

b. *Constitutional law—Power of congress. See Constitution of the United States.* congress may enforce its laws by penalties. Crimes, §§ 7, 14-21.

c. *Reasonable doubt.*

defined, explained and described. Crimes, §§ 41-57, 58-60, 653, 656, 657, 685.

when burden on defendant to create a. Crimes, §§ 657, 713.

to prove some other cause of death than that charged. Crimes, § 684.

defined. Crimes, §§ 1115, 3127.

burden on prosecution to prove guilt beyond a. Crimes, § 3145.

d. *Presumption of innocence. See supra.*

continues until guilt proved. Crimes, §§ 58-60, 3124.

applied to case of receiving stolen property. Crimes, § 1114.

e. *Good character.*

entitled to consideration when conduct doubtful. Crimes, § 658.

2. CAPACITY AND RESPONSIBILITY. See *Insanity*.

defense of marital coercion not favored; should be pleaded in abatement, but admissible under plea in bar. Crimes, §§ 9-11.

ignorance as bearing on intent. Crimes, § 62.

need not be an intent to violate the law. Crimes, §§ 70, 72.

of fact and law considered. Crimes, § 2032.

3. MITIGATION AND EXCUSE. See *supra*, 2.

bad or low education or passion, none; fear as an excuse. Crimes, §§ 103-105.

religious belief or duty is no excuse for an act declared a crime. Crimes, § 860.

4. THE LOCUS. See *Jurisdiction*, 1.

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of fraud on government, committed in Washington and New York. Crimes, § 315.

where false claim actually made. Crimes, § 316.

what proof sufficient to show place of robbery of mail. Crimes, § 946.

CRIMINAL FRAUDS. See *False Pretenses; Insurance.*

offense by president of corporation, by circulating its notes as money. Crimes, § 1413.
 of giving fraudulent bond. Crimes, § 1412.
 when fraud not indictable. Crimes, § 1419.
 by false entries in bank books. Crimes, §§ 1420-21.
 indictment for. Crimes, §§ 2607, 2608.

CRIMINAL PLEADING. See *Amendment; Indictment.*

1. GENERALLY.
2. PLEAS IN ABATEMENT.
3. PLEAS IN BAR.
4. DEMURRER.

1. GENERALLY.

See *Indictment*, as to stating offenses.

2. PLEAS IN ABATEMENT. See *Grand Jury*, 2.

effect of failure to plead a misnomer; statute as to addition of estate, etc. Crimes, §§ 9, 10.
 as to qualifications of grand juror, see *Grand Jury*, 2.
 must be pleaded with strict exactness. Crimes, §§ 1826, 1833, 2823-24.
 after verdict against, defendant may plead in bar. Crimes, § 1831.
 conclusion of. Crimes, §§ 1833, 2331-22.
 bad, if praying impossible relief. Crimes, § 1839.
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3. PLEAS IN BAR.

civil action not a bar. Crimes, § 123.
 statute of limitations may be relied on under general issue. Crimes, § 2057.
 when acquittal may be pleaded in. Crimes, § 2479.
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 special pleas unnecessary; all defenses admissible. Crimes, §§ 2827-28.

4. DEMURRER.

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 what not admitted by. Crimes, § 2817.
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 decided on whole record, and against first fault. Crimes, §§ 2820, 2463.
 what not raised by. Crimes, § 2825.
 judgment on overruling. Crimes, § 2856.

CRIMINAL PROCEDURE. See *Accused; Arraignment; Arrest; Arrest of Judgment; Argument; Bail; Crimes; Criminal Pleading; Detectives; District Attorney; Extradition; Evidence; Grand Jury; Indictment; Information; Judgment; Jury; New Trials; Nolle Prosequi; Preliminary Examination; Punishment; Removal of Causes; Variance; Writ of Error.*

1. IN GENERAL.
2. MODE OF PROSECUTION.
3. EFFECT OF REPEAL OF LAW.
4. POWER OF EXECUTIVE AND OFFICERS.
5. POWER OF DISTRICT ATTORNEY.
6. POWER OF JUDGES.
7. POWER OF ATTORNEY-GENERAL.
8. RIGHTS OF ACCUSED.

1. IN GENERAL.

proceeding against railway for death by negligence is criminal. Crimes, § 131.
 so of proceeding to forfeit property and imprison the owner. Crimes, § 132.
 court may give time to prosecution to supply proof. Crimes, § 983.
 as to proof on joint indictment, see *Indictment*.
 common law governs in. Crimes, §§ 1832, 2695-96.
 in absence of statute. Crimes, § 3015.
 no state law made since 1789 can affect procedure or rules of evidence. Crimes, §§ 2676, 2696-99.
 state procedure adopted by sec. 1014, R. S. Crimes, §§ 2677, 2700-2707.

2. MODE OF PROSECUTION.

a. In general.

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b. By indictment. See *Indictment*.

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CRIMINAL PROCEDURE, MODE OF PROSECUTION—continued.

- c. *By information.* See *Information; Felonies and Infamous Crimes.*
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- d. *By either.*
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- e. *By neither.*
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- f. *As a contempt.* See *Contempt.*
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- g. *By civil action.*
penalty under revenue law. Crimes, § 92. See § 93.
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- 8. **EFFECT OF REPEAL OF LAW.** See *Repeal.*
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- 4. **POWER OF EXECUTIVE AND OFFICERS.** See *District Attorney; Pardon.*
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- 5. **POWER OF DISTRICT ATTORNEY.** See *District Attorney.*
may generally decline to prosecute; power of judges. Crimes, § 127. See § 145.
- 6. **POWER OF JUDGES.** See *Jury; Preliminary Examination.*
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- 7. **POWER OF ATTORNEY-GENERAL.**
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- 8. **RIGHTS OF ACCUSED.** See *Accused.*
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CRUEL PUNISHMENTS. See *Punishment.*

CRUELTY.

beating slave is, and a common law offense. Crimes, § 1271.

CRUELTY TO ANIMALS. See *Common Law Offenses.*

CURRENCY.

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D.

DANGEROUS WEAPON.

what is a. Crimes, §§ 1241, 1242, 1245-46, 1461.
a pistol is. Crimes, § 148.

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DEFINITIONS.

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 "dangerous weapon." Crimes, §§ 1245, 1246, 1461.
 "delivery" of letter, bill, paper, etc. Crimes, § 893, p. 253.
 "derelict." Crimes, § 799.
 "destroy." Crimes, § 799.
 "forfeiture." Crimes, § 2423.
 "gallons of proof spirit." Crimes, § 2417.
 "jeopardy." Crimes, § 927. See *Twice in Jeopardy.*
 "keeping" implies repetition. Crimes, § 1337.
 "knowingly." Crimes, § 2059.
 "liability." Crimes, § 2423.
 "lien." Crimes, § 889.
 "mail." Crimes, § 903.
 "malice," in act of 1835 protecting crew. Crimes, §§ 463, 463.
 "maliciously." Crimes, § 2059.
 "penalty." Crimes, § 2423.
 "person" includes corporation in criminal law, when. Crimes, § 123.
 "personal goods." Crimes, §§ 804, 805, 830, 1622.
 "place," in crimes act. Crimes, § 1619.
 "plunder." Crimes, § 799.
 "postoffice." Crimes, § 908.
 "publication." Crimes, § 1001.
 "ship of the United States." Crimes, § 2069.
 "smuggling." Crimes, § 2552.
 "steal." Crimes, § 799.
 "timber." Crimes, § 1451.
 "wilfully." Crimes, §§ 2050, 2054-58.

DEFAUDING THE GOVERNMENT. See *Conspiracy*, 5; *Forgery*.

1. IN GENERAL.

2. INDICTMENT.

1. IN GENERAL.

- by making false claim for bounty land, land or money. Crimes, §§ 808, 810.
- actual transmission of papers for, unnecessary; procuring for transmission enough. Crimes, § 811.
- "making a claim" under § 5438, what. Crimes, § 812.
- definitions of terms used in Revised Statutes. Crimes, § 813.
- by cutting timber on public lands. Crimes, §§ 1451-57.
- fraud of treasury officer is on the *public*, when. Crimes, § 814.
- doctrine of false tokens or pretenses does not apply. Crimes, §§ 817, 818, 820.
- act of March 3, 1823, confined to instruments designed to obtain government money. Crimes, § 820.
- forgery to obtain land, or to confirm a claim to land, excluded. Crimes, § 824.
- the instrument transmitted need not be forged or counterfeited. Crimes, § 826.
- forgery of owner's oath, importer's entry or bond. Crimes, § 821.
- claim need not be in favor of defendant himself. Crimes, § 822.
- act of 1823 not repealed by act of 1863. Crimes, § 834.
- fraud by false drafts on navy agent not sanctioned by allowing credit of the amount to the latter. Crimes, § 825.

2. INDICTMENT. See *Indictment*.

- for false claim for bounty land. Crimes, §§ 809, 810.
- felonious intent need not be charged. Crimes, §§ 2533, 2542-44.
- for sending false affidavit to pension office, held good. Crimes, §§ 2534, 2545-47.
- must describe particulars of falsity. Crimes, § 2535; *Id.*
- various indictments for different crimes against the government. Crimes, §§ 2582-87.

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- is insanity, when. Crimes, §§ 8120, 8151-52.

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- statute of limitations not taken advantage of on. Crimes, § 2057.
- especially when it contains an exception. *Id.*
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- of seamen or soldier, offense of enticing. Crimes, §§ 1820, 1821.

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- employment justifiable, when; unlawful means should not be used. Crimes, §§ 116, 117.

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- indictment for keeping. Crimes, § 2659.

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- illicit, killing of, when justifiable. Crimes, §§ 686, 706.

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- who is to give warehouse bond. Crimes, § 2421.

DISTRICT ATTORNEY. See *Criminal Procedure*, 5.

- duties before grand jury. Crimes, §§ 1876-77.
- power as to removal of cases. Crimes, § 3208.
- when may enter *nolle*. Crimes, §§ 2847-50.
- judgment not delayed for promise of immunity, when. Crimes, § 2867.
- authority of and control by. Crimes, §§ 2874-75.
- power over prosecution before trial, and after trial commences. Crimes, §§ 2668, 2680-82.
- may attend before examining commissioner, but only as counsel. Crimes, §§ 2670, 2680-82.
- cannot dismiss examination before commissioner. Crimes, § 2681.
- no power to contract with accessory for his testimony. Crimes, §§ 3329-30.
- failure of, to move for judgment, is an indirect pardon. Crimes, § 2810.

DISTRICT OF COLUMBIA.

- criminal procedure in. Crimes, §§ 2917-19.
- prisoner convicted may appeal to general term. Crimes, § 151.
- punishments in. Crimes, § 3101.
- law of libel in. Crimes, § 3183.
- jurisdiction of crimes in. Crimes, §§ 1740-48.
- crimes in, and their punishment. Crimes, §§ 1469-74.

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DRUNKENNESS.

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E.

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1. **GENERALLY.**

2. **SIMILAR BUT DISCONNECTED FACTS.**

3. **BURDEN OF PROOF.**

4. **CIRCUMSTANTIAL.**

5. **AMOUNT OF PROOF.**

6. **HEARSAY.**

7. **WRITINGS.**

1. **GENERALLY.**

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2. **SIMILAR BUT DISCONNECTED FACTS.**

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3. **BURDEN OF PROOF.** See *Crimes*.

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4. **CIRCUMSTANTIAL.**

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5. **AMOUNT OF PROOF.**

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6. **HEARSAY.**

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7. **WRITINGS.**

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EXTRADITION.

1. FOREIGN.

- a. *Generally*.
- b. *Construction of treaties*.
- c. *Requisition*.
- d. *Mandate*.
- e. *Warrant of arrest*.
- f. *Complaint*.
- g. *Proceedings before commissioner or magistrate*.
- h. *Review of proceedings*.
- i. *Final order of extradition*.

2. INTERSTATE EXTRADITION.

- a. *Generally*.
- b. *Requisition*.
- c. *Duty of executive*.
- d. *Review of proceedings*.

1. FOREIGN.

a. *Generally*.

course of proceeding explained. Crimes, § 3452.
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proceedings for do not secure immunity to the accused from other crimes. Crimes, §§ 3411, 3468-74.
so, under sections 5270-5277, R. S. Crimes, §§ 3412, 3468-74.
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British extradition act of 1870 does not bind federal courts. Crimes, § 3413.
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is effected through the agency of the courts; power and duty of the executor. Crimes, §§ 3489-93.
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b. *Construction of treaties*.

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EXTRADITION, FOREIGN, Construction of treaties — continued.

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c. Requisition.

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under English treaty of 1842. Crimes, § 3540.

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a *mandat d'arrêt* sufficient. Crimes, § 3542.

d. Mandate.

whether commissioner has jurisdiction until authority therefor granted by the executive — *quære*. Crimes, §§ 3366, 3417-24.

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e. Warrant of arrest.

the marshal in any district may execute. Crimes, §§ 3368, 3447-53.

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need not show special appointment of commissioner. Crimes, §§ 3379, 3425-37.

when must show commissioner's authority under act of 1848. Crimes, §§ 3380, 3438-42.

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cannot issue without requisition and mandate. Crimes, §§ 3384, 3454-56.

may be issued by secretary of state under seal. Crimes, *Id.*

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need not be issued by the president; what must show. Crimes, §§ 3551-54.

f. Complaint.

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nor describe the offense with technical precision. Crimes, §§ 3370, 3417-24.

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must often be made by a foreign representative; need only inform accused of charge. Crimes, §§ 3373, 3376, 3425-37, 3454-56.

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how commissioner described in. Crimes, §§ 3506, 3507.

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g. Proceedings before commissioner or magistrate.

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- EXTRADITION, FOREIGN, *Proceedings before commissioner or magistrate* — continued.**
 transmission of evidence to secretary of state, with certificate of its sufficiency. Crimes, §§ 3409, 3438-42.
 prisoner may examine but not cross-examine foreign consul, when. Crimes, §§ 3410, 3425-37.
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 accused may be a witness, when. Crimes, §§ 3435, 3446.
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 judge is to act when complaint made. Crimes, § 3443.
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- h. *Review of proceedings.***
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- l. *Final order of extradition.***
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- 2. INTERSTATE EXTRADITION.**
- a. *Generally.***
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- b. *Requisition.***
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- c. *Duty of executive.***
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EXTRADITION, INTERSTATE, Duty of executive — continued.

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 recitals, how far conclusive as to crime charged. Crimes, § 3634.
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FELONIES AND INFAMOUS CRIMES.

1. IN GENERAL.
2. WHAT ARE.
3. WHAT ARE NOT.
4. INFORMATION.

1. IN GENERAL.

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2. WHAT ARE.

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3. WHAT ARE NOT.

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4. INFORMATION.

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1. IN GENERAL.
2. SUBJECT OF.
3. INDICTMENT.

1. IN GENERAL.

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of naturalization paper, punishable when. Crimes, § 1900.
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2. SUBJECT OF.

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3. INDICTMENT. See *Counterfeiting and Forgery*, 5; *Indictment*.

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G.

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GRAND JURY. See *Arrest of Judgment*.

1. GENERALLY.
2. QUALIFICATIONS OF MEMBERS.
3. PROCEEDINGS AND POWERS.
4. MISCONDUCT OF.
5. CHALLENGES.

1. GENERALLY.

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GRAND JURY, GENERALLY — continued.

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 territorial statute held inapplicable, as to number. Crimes, § 1856.
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2. QUALIFICATIONS OF MEMBERS.

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 previous expression of guilt of accused not ground for plea. Crimes, § 1881.
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 want of, may be pleaded in abatement by accused. Crimes, §§ 1810, 1826-31.
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 disqualification, must be statutory, absolute, and not interest, bias, etc. Crimes, §§ 1810, 1826-31.
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3. PROCEEDINGS AND POWERS.

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4. MISCONDUCT OF. See *New Trials*.

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5. CHALLENGES. See *Jury*.

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GRAND JURY, CHALLENGES — continued.

- statute abolishing has abolished pleas to qualifications. Crimes, § 1889.
- but court will set proceedings aside for misconduct. Crimes, § 1899.
- accused may challenge; he need not be a prisoner or cognizor. Crimes, § 1890.
- must have been bound over. Crimes, § 1898.
- for want of oath as to taking part in the rebellion. Crimes, § 1892.
- how such challenge disposed of. Crimes, § 1893.
- go to qualifications; law of New York applicable to federal procedure. Crimes, §§ 1895-98.
- difference between, and motion to set aside panel. Crimes, § 1900.
- to the array, not permitted. Crimes, § 1845.
- causes of, see *supra*, 2.
- ground for does not necessarily vitiate indictment. Crimes, § 1853.

GUNPOWDER. See *Police Power*.**H.****HABEAS CORPUS.** See *Extradition*, 1, h; 2 d.

- in cases of exclusive federal jurisdiction. Crimes, § 1614.
- matters of defense not considered on. Crimes, § 2863.
- prisoner whose punishment is commuted by the president cannot prosecute. Crimes, §§ 3236, 3252-56.
- pardoned prisoner may be discharged on. Crimes, §§ 3237, 3257-62.
- cannot be prosecuted after unconditional pardon not accepted. Crimes, § 3299.
- no pleading required after traverse of return. Crimes, § 3626.
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- decisions of commissioner of extradition not reviewed on. Crimes, §§ 3404, 3457-61.

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- evidence of; proof of, by experts. Crimes, § 993.
- comparison of. Crimes, § 2922.

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- what are, see *Jurisdiction*, 2.
- Mango Bay, in Bermuda, being land-locked, is not in the. Crimes, § 1301.

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- not an offense to obstruct private road, when. Crimes, § 1392.

HOMICIDE.

1. IN GENERAL.
2. PROXIMATE AND REMOTE CAUSE.
3. MURDER.
- 3a. MURDER IN SECOND DEGREE.
4. MANSLAUGHTER.
5. PROVOCATION, ETC.
6. ACCESSORIES.
7. PRESUMPTION.
8. ATTEMPTS.
9. THREATS AND CONSPIRACIES.
10. CONFLICT OF LAWS.
1. IN GENERAL.
 - failure of captain to rescue drowning sailor. Crimes, §§ 618-622, 654-658.
 - much depends on character of weapon used. Crimes, § 714.
 - reasonable doubt, see *Crimes*, 1, d.
 - indictment for. Crimes, §§ 2612-2618. See *Indictment*.
 - ordering sick seaman aloft. Crimes, § 500.
2. PROXIMATE AND REMOTE CAUSE.
 - neglect to give signal, and ventilate mine, held proximate. Crimes, § 654.
 - whether falling overboard, or failure to rescue, is proximate. Crimes, § 655.
 - if two causes unite to cause death, the wrongful one is proximate. Crimes, § 687.
3. MURDER.
 - a. *Definition*.
 - a wilful or unlawful killing of a human being with malice aforethought, express or implied. Crimes, §§ 592, 623-635, 644, 645, 671-679.
 - using force far beyond the provocation. Crimes, § 693.
 - defined. Crimes, § 3125.
 - b. *Malice aforethought, what*. See *post*, 5.
 - may be an intent to kill or to do great bodily harm to any person; a bad or unjustifiable motive; want of provocation or slight provocation, or commit any felony. Crimes, §§ 592, 600, 623-635, 643, 653, 673, 682.
 - or an intent to oppose by force any officer of justice, or any person entitled to act as such. Crimes, §§ 683, 689, 703.

HOMICIDE, MURDER, Malice aforethought, what — continued.

implied, what. Crimes, §§ 628-635, 643-653, 683.

not presumed; how proved. Crimes, § 3146.

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indictment must be framed with great precision; statement in words of statute insufficient. Crimes, §§ 2226-27.

8a. MURDER IN SECOND DEGREE.

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4. MANSLAUGHTER.

a. Definition.

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voluntary, or killing in self-defense when the evident intent of deceased is only to commit a trespass and not a felony. Crimes, § 633.

involuntary when committed by accident without intent to kill, but unlawfully. Crimes, §§ 603, 633, 651.

killing after intent of deceased to commit a felony has evidently ceased, but excitement caused thereby continues. Crimes, §§ 612, 636-642.

distinguished from murder only by malice. Crimes, §§ 600, 643-653.

b. Instances.

it is, for captain not to stop and pick up a drowning seaman. Crimes, §§ 618, 654-658.

by omission of plain duty, resulting from law or contract, causing death. *Id.*; § 697. by captain's failure to give orders to open safety-valve, causing explosion. Crimes, §§ 623, 624, 659-664.

killing with intent only to commit civil trespass. Crimes, § 680.

resisting illegal arrest by killing. Crimes, §§ 688, 695, 696.

dueling, whether murder or manslaughter. Crimes, § 672.

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5. PROVOCATION; SELF-DEFENSE; JUSTIFICATION, ETC.

homicide in self-defense is justifiable, when the aggressor attempts, by surprise or violence, to commit a felony, and the danger thereof is imminent, and the resistance necessary. Crimes, §§ 632, 633, 667, 670, 681, 699-708.

when the danger is imminent and must be immediately met. Crimes, § 634.

when deceased resists arrest with a deadly weapon, with intent to use it. Crimes, §§ 612, 636-642.

when the provocation is not disproportionate to the homicidal act. Crimes, §§ 626, 665-669.

excusable, when. Crimes, §§ 699, 700.

how, when illicit distillers are shot by soldiers. Crimes, §§ 686, 706, 707, 782.

is not justifiable, when the evident intent is to commit only a trespass; words, insults or an assault not enough. Crimes, §§ 633, 635, 652, 699-708.

when the evident intent of deceased was to quell a broil. Crimes, § 702.

throwing persons overboard to save others in shipwreck. Crimes, §§ 709-712.

it is no extenuation that the prosecutor is very irritable and easily excited to ungovernable temper. Crimes, § 694.

it is not, that the deceased was a habitual violator of the penal law. Crimes, § 686. See § 708.

orders of superior army officer not *per se* sufficient, nor infraction of discipline, mutinous conduct, etc., unless. Crimes, §§ 647, 648.

provocation must be very great. Crimes, §§ 607, 667, 670.

recent threats of deceased against prisoner, not communicated to latter, are admissible. Crimes, § 670.

the killing officers in discharge of their duty. Crimes, §§ 688, 689.

how, when the person killed is not really an officer. Crimes, §§ 688, 695.

6. ACCESSORIES. See Principal and Accessory.

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7. PRESUMPTION. See Crimes.

when malice must be rebutted by defendant. Crimes, § 681.

of justifiable homicide, does not result from showing assault by deceased. Crimes, §§ 626, 665-669.

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8. ATTEMPTS.

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9. THREATS AND CONSPIRACIES.

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10. CONFLICT OF LAWS.

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HUSBAND AND WIFE. See Married Women.

I.

IGNORANCE. See *Crimes*.

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INDIAN AGENT.

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INDIAN COUNTRY. See *Offenses Relating to Indians*.

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2. CERTAINTY OF STATEMENT.
- 2a. NAME AND ADDITION OF DEFENDANT.
- 2b. NAMES OF PERSONS OTHER THAN DEFENDANT.
3. INDICTMENTS ON STATUTES.
4. SPOKEN AND WRITTEN WORDS.
5. CHARGING INTENT.
6. CHARGING KNOWLEDGE.
7. TIME.
8. PLACE.
9. TIME AND PLACE.
10. CONCLUSIONS AND PRESUMPTIONS.
11. AGGRAVATION.
12. REPUGNANCY.
13. DUPLICITY.
14. SURPLUSAGE.
15. CONCLUSION.
16. AIDED BY PLEADING OVER.
17. AIDED BY VERDICT.
18. JOINT INDICTMENTS.
19. MOTION TO QUASH.

1. IN GENERAL.

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2. CERTAINTY OF STATEMENT.

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- when bill of particulars ordered. Crimes, § 2077.
- when bad in part only. Crimes, § 2079.
- description in first may be adopted in subsequent count. Crimes, § 2082.
- demurrer for insufficiency. Crimes, § 2086.
- assault "on a person unknown," bad. Crimes, § 2107.
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- requisites under federal statutes. Crimes, § 2281.
- how misdemeanors stated. Crimes, § 2453.
- defendant may have bill of particulars. Crimes, § 2483.
- certainty required. Crimes, § 2547.
- the indictment must charge—
 - the means of fraud, and wherein it consisted. Crimes, §§ 2046, 2052–53.
 - the facts constituting the crime. Crimes, §§ 2071, 2073–75, 2078, 2087.
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 - the species; not enough to use generic terms, when. Crimes, § 2094.
- manner of statement must be positive; nothing material taken by inference. Crimes, §§ 2072, 2076.
- possibility of innocence must be excluded. Crimes, § 2078.
- matters of form immaterial unless prejudicial. Crimes, § 2097.
- cannot be in the alternative. Crimes, § 2109.

2a. NAME AND ADDITION OF DEFENDANT.

- by which generally known, sufficient. Crimes, § 2173.

2b. NAMES OF PERSONS OTHER THAN DEFENDANT.

- "upon a person unknown," leaving out "to the jurors," good. Crimes, § 2107.
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3. INDICTMENTS ON STATUTES.

- rules of pleading as to. Crimes, §§ 2054, 2038, 2146–52, 2455.
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- how to frame. Crimes, §§ 2287, 2542.
- must conform to statute. Crimes, § 2300.
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- in words of statute*, sufficient generally. Crimes, §§ 978, 2135, 2139, 2141, 2143.
- but accused must be apprised of nature of accusation. Crimes, §§ 2047, 2052–53, 2135, 2145, 2150.
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- instances of, not pleaded, and judgment arrested. Crimes, § 2057, p. 561.
- provisos* are part of description and must be alleged. Crimes, § 2055.
- but this rule is not a universal criterion. Crimes, § 2055.
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4. SPOKEN OR WRITTEN WORDS.

- necessary to be charged *in hæc verba*. Crimes, § 979.

5. CHARGING INTENT.

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7. **TIME.** See *Arrest of Judgment*.
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17. **AIDER BY VERDICT.**
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18. **JOINT INDICTMENT.** See *Joinder*.
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19. **MOTION TO QUASH.**
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2. BURDEN OF PROOF.

3. INSANE DELUSION.

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3. INSANE DELUSION, ETC.

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3. MISJOINDER.
4. HOW MISJOINDER CURED, ETC.

1. GENERALLY.

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2. EXCLUSIVE FEDERAL JURISDICTION.
3. EXCLUSIVE STATE JURISDICTION.
4. CONCURRENT FEDERAL AND STATE.
5. TERRITORIAL LIMITS.
6. OF PARTICULAR COURTS.
7. ADMIRALTY JURISDICTION.

1. GENERALLY.

under section 14 of the judiciary act. Crimes, § 1767.
 a crime must have some relation to federal law or power. Crimes, §§ 3, 6-8.
 federal criminal. Crimes, §§ 14-21.
 federal courts have none by the common law; the latter may furnish procedure, explanation, etc. Crimes, §§ 22-29, 32, 1642, 1645-46.
 except crimes on the high seas and at forts, etc., and except high treason. Crimes, §§ 80, 81.
 of robbery or running away with vessel, by *any* person on foreign vessel, though within a marine league of United States coast. Crimes, §§ 1611, 1637-39.
 except powers necessary to preserve order in court, etc. Crimes, § 1642.
 cannot be conferred after commission of offense. Crimes, § 1721.
 of offenses committed in a foreign country. Crimes, § 33.
 adoption of state laws. Crimes, § 34.
 receipt of stolen property must be in district where trial had. Crimes, §§ 1109-1117.
 indictment must show. Crimes, §§ 2121, 2171.
 as to crimes on *land* within exclusive federal jurisdiction. Crimes, § 1245.
 congress can provide for punishment of crime only as to federal subjects, territory, etc. Crimes, §§ 1607, 1625-27.
 cannot be delegated to state courts. Crimes, § 1700.
 none of crime on foreign vessel in high seas. Crimes, § 1692.
 civil jurisdiction on bays, etc. Crimes, § 1677.
 depends on what. Crimes, § 1678.
 cannot be limited by order of the president or attorney-general. Crimes, § 1644.
 none of offense of obstructing navigable river by a bridge, when. Crimes, § 1648.
 the court stops whenever its want of jurisdiction appears, or is suggested. Crimes, § 1649.
 limited to district in which court sits, having been previously ascertained. Crimes, §§ 1669-70.
 construction of provision as to ascertaining district. Crimes, §§ 1670-72.
 place of trial is the state and district where the offense occurred. Crimes, §§ 1656, 1652.
 see *Crimes*, 4.
 may be in either of two districts, when. Crimes, § 1651.
 of treason, is where overt act committed. Crimes, § 1653.
 of offenses committed out of a state. Crimes, §§ 1654-55.
 of offenses out of the United States. Crimes, §§ 1656-61.
 of larceny of goods in one state, brought to another, is the latter. Crimes, § 1661.
 of offense of uttering forged paper. Crimes, § 1663.
 stroke in one place, death in another. Crimes, § 1664.

2. EXCLUSIVE FEDERAL JURISDICTION. See 4, *post*.

of offense of passing counterfeit coin. Crimes, §§ 1598, 1618-14.
 offenses on places which are purchased by the United States, and not such as are merely rented. Crimes, §§ 1602, 1620, 1621.
 crimes on high seas. Crimes, §§ 1617, 1673, 1695.
 a foreign river, at a point thirty-five miles inland, not on high seas. Crimes, §§ 1633, 1636.
 high-seas what, in act of 1825. Crimes, §§ 1640, 1647.
 what are, in general. Crimes, §§ 1673, 1695.
 crime on American vessel in Humaco, Porto Rico. Crimes, § 1684.
 in a river, within the bar. Crimes, § 1695.
 no jurisdiction where death took place in foreign country. Crimes, § 1693.

JURISDICTION, EXCLUSIVE FEDERAL—continued.

- crimes on high seas, what are not. Crimes, § 1675.
- tide water in a county. Crimes, § 1675.
- harbor of Vera Cruz, Mexico. Crimes, §§ 1681, 1683.
- sea bottom, one hundred and fifty feet from shore of Mexico. Crimes, § 1682.
- vessel in American port. Crimes, § 1690.
- crimes in bays, rivers, havens, etc., out of the territorial jurisdiction of a state. Crimes, §§ 1617, 1694.
- foreign states not referred to. Crimes, § 1691.
- on American vessel in foreign waters. Crimes, § 1695.
- waters within jurisdiction of United States. Crimes, §§ 1668, 1699.
- murder by soldier in regular service. Crimes, § 1701.
- interference with state court by *habeas corpus*, when. Crimes, § 1704.
- of offenses in federal courts, as perjury. Crimes, § 1705.
- on places within sole and exclusive jurisdiction, by act of 1790. Crimes, §§ 1620-23.
- marine hospital, on ceded land, excluded. Crimes, § 1620.
- under embargo laws. Crimes, § 1757.
- under act of 1825. Crimes, §§ 1605, 1623.
- larceny in marine hospital on land of United States, punishable. Crimes, § 1623.
- offenses on vessel of United States. Crimes, § 1686.
- of crime of revolt, under act of 1835. Crimes, § 1687.
- treason in another state. Crimes, § 1666.
- though brought within district illegally. Crimes, § 1667.
- of offense of nuisance, local. Crimes, § 1663.
- state courts cannot interfere if exclusive federal jurisdiction. Crimes, § 1702.
- but application should be made to state court to release prisoner, when. Crimes, § 1703.
- consent of parties cannot give. Crimes, § 1724.
- complete after conviction and sentence. Crimes, § 1725.
- cases affecting ambassadors*. Crimes, §§ 1720-28.
- assault on public minister or his servant, not cognizable. Crimes, §§ 1726-37.
- of indictment against consul. Crimes, § 1728.
- of murder, larceny, robbery and assault, when. Crimes, §§ 1729-31.
- of manslaughter, when not. Crimes, § 1733.
- courts cannot remand prisoner to foreign government. Crimes, § 1734.
- of offenses in Alaska. Crimes, §§ 1735-36.
- whether attempting to bribe United States official. Crimes, § 1737.
- of territorial courts. Crimes, § 1733.
- on military reservations. Crimes, § 1739.
- in *District of Columbia*. Crimes, §§ 1740-49.
- of all common law offenses in Washington county by federal officer. Crimes, § 1740.
- of justices of the peace under corporate by-laws. Crimes, §§ 1741, 1743-47.
- obtaining money by fraud by auditor. Crimes, §§ 1742-43.
- of police court of. Crimes, § 1744.
- offenses committed before cession of, to United States. Crimes, § 1748.
- of offenses in army and navy. Crimes, § 1749.
- under civil rights bill. Crimes, § 1750.
- of justices of the peace in Wyoming. Crimes, § 1751.
- military commission none, when. Crimes, §§ 1752-54, 1756.
- plea of former conviction by, is bad. Crimes, § 1753.
- under embargo laws. Crimes, § 1757.
- review by supreme court. Crimes, § 1758.

8. EXCLUSIVE STATE JURISDICTION.

- murder of white by white on Indian reservation in states. Crimes, §§ 1599, 1608, 1615, 1625-27.
- offenses within its territory, including bays and land-locked parts of the sea. Crimes, §§ 1600, 1616.
- though committed on ship of war. Crimes, §§ 1601, 1616-19.
- the cession of admiralty and maritime jurisdiction does not divest the states of general and residuary jurisdiction. Crimes, § 1618.
- ship of war not a "place" in "crimes act." Crimes, §§ 1601, 1619.
- over offense in tract of land rented temporarily for a camp. Crimes, §§ 1602, 1620.
- over offense in marine hospital, a building of the United States, on land ceded to it. Crimes, §§ 1604, 1621-23.
- but larceny therein punishable in federal court, by act of 1825. Crimes, § 1623.
- of offenses in United States fort built on government land, but not ceded to United States on admission of state. Crimes, §§ 1603, 1624.
- crimes on Indian reservations in states, unless withdrawn by act of admission. Crimes, §§ 1603, 1625-27.
- offenses on rivers, inlets, creeks, etc., of the sea, so narrow that acts on one side can be seen on the other. Crimes, §§ 1612, 1640-41.
- assault on vessel near Lovell's Island, Mass. *Id.*
- larceny on land in Virginia owned by United States. Crimes, § 1706.
- murder in Fort Harker in Kansas. Crimes, §§ 1707, 1713-14.
- crimes in Indian country within a state. Crimes, §§ 1599, 1608, 1625-27, 1655, 1703.
- federal courts have no jurisdiction of. Crimes, §§ 1702-20.

JURISDICTION, EXCLUSIVE STATE — continued.

otherwise in Oregon. Crimes, §§ 1712-18.

and in military reservation in Kansas. Crimes, § 1716.

federal courts have no jurisdiction in Arkansas or Nevada. Crimes, §§ 1717-18.

4. CONCURRENT FEDERAL AND STATE.

of piracy, when. Crimes, §§ 560-61.

larceny of goods of distressed ship, above high water mark. Crimes, §§ 1609, 1628-32.

rule of comity. Crimes, §§ 1696-98.

offenses on tide water in body of county. Crimes, § 1698.

conspiracy to prevent voting. Crimes, § 1699.

5. TERRITORIAL LIMITS OF; AND IN PARTICULAR PLACES.

of the state and United States courts, see *supra*, 2, 3.

6. OF PARTICULAR COURTS.

of circuit courts. Crimes, §§ 1722-23.

original, of supreme court, may be exercised without previous legislation. Crimes, § 8615.

7. ADMIRALTY JURISDICTION.

does not extend to offenses committed above high water mark. Crimes, § 1630.

JURY. See *Twice in Jeopardy*.

1. GENERALLY.

2. INSTRUCTIONS TO.

3. CHALLENGE.

4. SELECTING AND IMPANELING.

5. QUALIFICATIONS.

6. PROVINCE OF.

7. RIGHT OF TRIAL BY.

8. DUTY AND POWER OF COURT.

9. DUTY OF COUNSEL.

10. RETURNING VERDICT.

1. GENERALLY.

discharge of. Crimes, §§ 2043-44.

not to consider amount of punishment. Crimes, § 115.

need not take indictment with them on retiring. Crimes, § 737.

accused has right to be heard before, on the law, when. Crimes, §§ 1915, 1927-31.

accused has no constitutional right to have whole law of case argued to. Crimes, §§ 1918, 1927-31.

sending indictment to jury room. Crimes, § 2920.

should not be separated in criminal case. Crimes, §§ 2033, 2831.

what oath necessary. Crimes, § 2043.

as to discharge of jury or withdrawing juror, see *Twice in Jeopardy*.

objection that juror asleep must be taken before verdict. Crimes, §§ 2298, 2898.

may bring in sealed verdict in trial for misdemeanor. Crimes, § 2489.

accused to have list of. Crimes, §§ 2708-18.

how far affidavits of, admitted to impeach verdict. Crimes, §§ 2875, 2894-99.

brought back to re-examine witness, held not error. Crimes, § 2901.

2. INSTRUCTIONS TO. See *post*, 8.

need not be given unless based on evidence and request. Crimes, § 852.

must be followed. Crimes, §§ 1910, 1927-31.

should cover whole law of case. Crimes, § 1930.

should be charged whether they must take the direction of the court as to the law.

Crimes, § 2011.

duty of court; instances of proper and improper. Crimes, §§ 2750-53.

as to sufficiency of proof; hypothetical; instances. Crimes, §§ 2759-63.

when refusal to instruct that jury cannot convict not error. Crimes, § 2772.

private, in answer to written inquiry, out of session, irregular, but not error if not prejudicial. Crimes, §§ 2773-74.

when written, required, reference to printed book insufficient. Crimes, § 3157.

3. CHALLENGE IN CRIMINAL PRACTICE. See *Grand Jury*.

examination on *voir dire*; for principal cause; incompetency, etc. Crimes, § 855.

one believing he has formed an opinion, unexpressed, is competent. Crimes, § 856.

polygamists incompetent, on trial for polygamy. Crimes, § 857.

juror in favor of enforcing laws against lotteries competent, when. Crimes, § 980.

accused has ten, when. Crimes, §§ 1912, 1920-24.

congress may adopt state laws in regard to. Crimes, §§ 1913, 1925-26.

the prosecution does not have, under act of 1790. Crimes, §§ 1914, 1925-26.

may be retracted, when panel exhausted. Crimes, § 1943.

to array, waived by individual challenges. Crimes, § 1945.

form of, immaterial if juror incompetent. Crimes, § 1951.

peremptory, right to, not a constitutional

unnecessary that fact of exercise of

§ 1953.

must be made alternately by government and accused. Crimes, § 1954.

One right of, should appear of record. Crimes

JURY, CHALLENGE IN CRIMINAL PRACTICE — continued.

peremptory, twenty in capital cases, thirty-five in treason. Crimes, § 1955.
 thirty-five in offenses made capital since 1790. *Id.*
 none in cases of misdemeanors. Crimes, § 1956.
 the government has no right of qualified challenge. Crimes, § 1957.
 but in murder cases may have juror stand aside, when. Crimes, § 1958.
 and in other criminal cases. Crimes, § 1959.
 accused has no right of, except in capital cases. Crimes, §§ 1960-61, 1964, 1969.
 thirty-five in trial for casting away a vessel. Crimes, § 1967.
 unless the crime be *charged* as a felony. Crimes, § 1962.
 allowed in manslaughter. Crimes, § 1963.
 none in larceny or arson. Crimes, §§ 1964, 1965, 1966.
 state law does not apply to federal courts. Crimes, § 1968.
 on joint trial each entitled to full number. Crimes, §§ 1970, 2692.
 is a right to reject merely, and not to select others. Crimes, §§ 1971, 2693.
 for cause, a constitutional right. Crimes, § 1944.
 in capital case, that juror has scruples against verdict of guilty. Crimes, §§ 1946, 1949.
 grounds of, though unknown, cannot be reasons for setting aside verdict. Crimes, § 1948.
 deafness. *Id.*
 to original panel after *tales* returned. Crimes, § 1950.
 court cannot excuse juror when, though cause for, disclosed. Crimes, § 1950.
 review of decision of trial court as to. Crimes, § 1953.
 occupation of accused or witness is expected to bear on his credibility. Crimes, § 1957.

4. SELECTING AND IMPANELING.

the act of 1879, as to drawing, does not repeal § 804, as to special venire. Crimes, § 1935.
 if juror leaves the court, another may be called. Crimes, § 1937.
 misnamed juror should not be sworn; mistrial. Crimes, § 1939.
 by the common law. Crimes, § 1940.
 order for summoning may be before bill found by grand jury. Crimes, § 1941.
 challenge may be retracted, so as to qualify challenged juror. Crimes, § 1943.
 trial may be continued to next term pending. Crimes, § 2889.
 state law to be followed by act of 1840; power of judges to change method. Crimes, §§ 1932, 1936.
 not adopted, but simply conformed to. Crimes, § 1933.
 requiring jurors to be selected by tax lists, not followed. Crimes, § 1934.
 state law adopted by act of 1739; relates only to method, and not to number. Crimes, § 1938.
 talesmen; special venire; § 840 requires marshal to summon bystanders, when; but talesmen may be summoned. Crimes, § 1942.

5. QUALIFICATIONS. See *supra*, 3.

time of summoning has nothing to do with. Crimes, § 1974.
 questions may be more searching when prejudice and feeling exist. Crimes, § 1930.
 when question of favor submitted to triers. Crimes, § 1938.
 evidence as to bias admissible, when. Crimes, § 1992.
 whether affidavit of juror admissible after verdict to show want of. Crimes, §§ 2675, 2694-99.
 a juror is not disqualified, by having served against accused. Crimes, § 1972.
 nor that he served against co-defendant. Crimes, § 1973.
 nor because other jurors not sworn were disqualified. Crimes, § 1975.
 nor for failure to pay taxes, when not assessed. Crimes, § 1977.
 nor by temporary residence in another state, *animo revertendi*. Crimes, § 1979.
 by listening to statements by detective concerning the case generally. Crimes, § 1982.
 or to conversations as to general wickedness of crime charged. Crimes, § 1988.
 for prejudice against the lottery business. Crimes, §§ 1989-90.
 opinion as to merits, but which he does not think would influence his verdict. Crimes, §§ 1996, 2004.
 reading newspaper account of case on which he forms no opinion. Crimes, § 1997.
 for an opinion that the law has been outraged, when. Crimes, §§ 2000, 2001.
 on motion for new trial, by conversations about the case, where accused does not object. Crimes, § 1981.
 decision of court as to qualification not reviewable. Crimes, § 1965.
 by expressions showing bias against accused. Crimes, § 1991.
 instance of juror not disqualified. Crimes, § 2639.
 reading newspaper report of trial while sitting, when. Crimes, § 2699.
 for being in doubt as to guilt of accused, when. Crimes, § 2002.
 how fact of unchangeable opinion elicited. Crimes, § 2003.
 a juror is disqualified, for having served in Confederate army, under § 830, R. S. Crimes, § 1976.
 when not a federal citizen when drawn, but naturalized before service. Crimes, § 1978.
 for religious notions by which the crime is justified. Crimes, § 1983.

JURY, QUALIFICATIONS — continued.

a juror is disqualified; polygamists on prosecutions for polygamy. Crimes, §§ 1983-84, 2005.

for bias against accused. Crimes, §§ 1993-94.

for opinion as to the crime, but not as to guilt of accused. Crimes, § 1998.

or opinion that the offense charged is a crime. Crimes, § 1999.

6. PROVINCE OF.

power to find special verdict does not imply power to decide the law. Crimes, §§ 1917, 1919, 1927-31.

court may set aside verdict as against law. *Id.*

are to presume that all pertinent evidence admitted. Crimes, § 2010.

respective powers of court and jury. Crimes, § 2686.

regard to be given by, to remarks of counsel. Crimes, § 3144.

the jury has nothing to do with the punishment, or consequences of a verdict. Crimes, §§ 2006, 2007, 2008, 2015, 3099, 3100.

or with jurisdiction, except facts supporting it. Crimes, § 2009.

or the validity of the law, when it has been decided valid. Crimes, § 2016.

whether one fact inferred from another, a question of law. Crimes, § 2017.

duty of, to accept the law from the court. Crimes, § 2019.

or with questions of law, generally. Crimes, §§ 2013, 2016, 2017, 2021-23.

the jury may consider both law and fact, since an acquittal cannot be reviewed. Crimes, §§ 2012-24.

credibility of witnesses and weight of evidence are for the jury. Crimes, §§ 2025-33, 2630.

how they should act. Crimes, §§ 2025, 2029.

may reject testimony of accused though uncontradicted. Crimes, § 2026.

circumstances and motives of witness considered. Crimes, §§ 2027, 2031.

whole testimony of witness may be rejected. Crimes, §§ 2029, 2030.

may give weight to reputed good character of accused. Crimes, § 2032.

effect of contradictions of witness. Crimes, § 2033.

7. RIGHT OF TRIAL BY.

in trial to forfeit property. Crimes, § 2037.

in trials before justices of the peace. Crimes, §§ 2038, 2744.

extent of right. Crimes, § 2039.

libel; police court must permit jury trial. Crimes, §§ 2040-41.

accused cannot waive. Crimes, § 2685.

territorial act held void. Crimes, § 2744.

8. DUTY AND POWER OF THE COURT. See *supra*, 2.

to decide all questions of law, and give the law to the jury. Crimes, §§ 2012-24.

when may take case from jury. Crimes, §§ 2034-35, 2769-70.

in case of woman voting. Crimes, § 2035.

has no power to direct verdict. Crimes, §§ 2672, 2684-86.

respective powers of court and jury. Crimes, § 2686.

9. DUTY OF COUNSEL. See *District Attorney*.

are not to argue questions of law to jury. Crimes, §§ 2032-24.

argument of counsel, how regulated. Crimes, §§ 2910-13.

10. RETURNING VERDICT.

must be before adjournment; sealed verdict, when. Crimes, §§ 2745-46.

moral certainty only required in verdict; instances of imperfect. Crimes, §§ 2775-2793.

if one count good, general verdict sufficient. Crimes, § 2779.

acquittal on one count and guilty on another, good. Crimes, §§ 2783-84.

on all counts but one, held good. Crimes, § 2785.

special verdict not finding place of offense, set aside. Crimes, § 2786.

effect of not guilty on one count and disagreement on another. Crimes, § 2787.

of guilty as to one offense or offender, disagreement as to another, good. Crimes, § 2788.

in assault and battery, held good. Crimes, § 2789.

must show that offenses committed before information filed. Crimes, § 2790.

each juror must agree to; agreement to find as majority does is void. Crimes, § 2791.

when general verdict of guilty too general; when good. Crimes, §§ 2792-93.

general, held not repugnant to indictment. Crimes, § 2794.

of involuntary homicide, held good. Crimes, § 2795.

argumentative, held bad. Crimes, §§ 2796-97.

need not find value, when. Crimes, § 2793.

JUSTICE OF THE PEACE. See *Offenses by Officers*.

when liable for obstructing federal justice. Crimes, §§ 831, 844, 845.

JUSTIFIABLE HOMICIDE. See *Homicide*, 5.

KIDNAPPING.

offense of, Italian children.

of free negro, indictment for.

KNOWLEDGE. See *Indictment*, 6.

K.

§§ 1393-95.

§ 2566.

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L.

LARCENY. See *Indictment*.

section 5358. R. S., defines only one offense, that of plundering shipwrecked goods. Crimes, §§ 791, 797, 803. See § 828.

this act does not import from the common law the element of larceny. Crimes, §§ 792, 797-803.

every intent is unlawful, except that of returning the goods to their owner. Crimes, §§ 792, 797-803.

but the presumption is that the intent was to return them. Crimes, §§ 795, 797-803.

indictment under need only show what. Crimes, §§ 801, 828.

destroying goods. what. Crimes, §§ 793, 797-803.

when goods derelict; when not. Crimes, § 798.

it is immaterial whether goods taken from wreck or water. Crimes, §§ 794, 797-803.

"steal," "plunder," and "destroy," defined. Crimes, §§ 799, 828.

value of goods immaterial. Crimes, §§ 794, 797-803.

stealing "personal goods" on the high seas; foreign and domestic coin and bank-notes are such goods. Crimes, §§ 793, 804, 805.

choses in action are not. Crimes, § 830.

indictment for, as at common law. Crimes, § 806.

may be joined with burglary. Crimes, § 2221.

what interest in property sufficient. Crimes, § 807.

not, to sever and carry away from soil. Crimes, § 803.

by possessor, impossible. Crimes, § 809.

by bailee. Crimes, § 810.

by one acting with owner's servant. Crimes, § 811.

of property of married woman. Crimes, § 812.

of goods left in prisoner's coach. Crimes, § 813.

fraudulently obtaining possession is not. Crimes, § 814.

of property of United States. Crimes, § 815.

of goods of separate owners, the offenses are separate. Crimes, § 816.

goods of deceased person. Crimes, § 817.

slave incapable of, at common law. Crimes, § 818.

by servant or employee. Crimes, §§ 819, 820.

when bank-notes are subject to. Crimes, §§ 821-827.

indictment for. Crimes, §§ 2619-27. See *Indictment*.

on high seas. Crimes, §§ 508, 510, 2633.

for second offense. Crimes, § 2660.

the essential element is the *lucri causa*. Crimes, § 562. See *Piracy*.

LAW OF NATIONS. See *Extradition; Neutrality*.

seizure of foreign property by force is an offense under the. Crimes, § 141.

relations of United States to insurgent portion of foreign nation are political only. Crimes, § 537.

LETTERS. See *Postoffice*.

whether envelope is part of letter. Crimes, § 2464.

LIBEL.

law of, in District of Columbia. Crimes, § 8183.

allegation of publication necessary in indictment. Crimes, § 8187.

indictment for. Crimes, §§ 2666-67.

LICENSE.

indictment for employing unlicensed captain, etc. Crimes, § 2664.

indictment for practicing medicine without. Crimes, § 2656.

LIEN.

defued. Crimes, § 889.

LIMITATIONS. See *Statutes of Limitations*.**LIQUORS.** See *Excise Laws; Violation of Revenue Laws*.

a crime to introduce into Alaska. Crimes, §§ 1233, 1243-44.

indictments for selling without license and to Indians. Crimes, §§ 2657-53.

LIST OF WITNESSES. See *Accused*.**LOTTERIES.** See *Postoffice*, 7, b.

Louisiana statute concerning, is a public act. Crimes, § 984.

M.

MAGISTRATE. See *Commissioner; Preliminary Examination*.**MAIL.** See *Postoffice*.

- MALICE.** See *Crimes; Homicide*, 3.
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- MALICIOUS PROSECUTION.**
habeas corpus in federal courts on arrest for, when. Crimes, §§ 3607, 3638.
state agent for extradition not liable for, if he keeps within his authority. Crimes, §§ 3608, 3638.
- MANDAMUS.**
who entitled to. Crimes, § 3616.
- MANDATE.** See *Extradition*.
- MANSLAUGHTER.** See *Homicide*, 4.
sending sick sailor aloft. Crimes, § 500.
when federal courts have no jurisdiction of. Crimes, § 1733.
- MANUFACTURING COMPANY.** See *Corporation*.
- MARINE INSURANCE.** See *Insurance*.
- MARRIAGE.**
offense of performing unlawful ceremony. Crimes, § 1372.
indictment for performing unlawful. Crimes, § 2663.
- MARRIED WOMEN.**
responsibility for crime. Crimes, §§ 9-12.
- MARSHALS.**
powers of, same as sheriffs. Crimes, § 2707.
- MAYHEM.**
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- MEDICINE.**
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- MERGER.**
conspiracy to commit misdemeanor not merged in the overt act. Crimes, § 250.
of conspiracy, when none. Crimes, § 2304.
none in crimes of equal rank. Crimes, § 2307.
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- MILITARY EXPEDITION.**
against foreign power, what; what not. Crimes, §§ 1275-1285.
- MILITARY PROPERTY.**
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- MILITARY RESERVATION.**
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- MILITARY SERVICE.**
foreign, when a crime to enter; who is a "soldier" within act of 1818. Crimes, § 1283.
not an offense to leave the country with intent to enter. Crimes, § 1285.
- MILITARY STORES.**
what not a transporting of, to Canada. Crimes, § 1274.
- MINISTERS.** See *Consuls and Ministers*.
- MISDEMEANOR.**
indictment for; instances of. Crimes, §§ 2153-60.
- MISJOINDER.** See *Joinder*.
- MISNOMER.**
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- MITTIMUS.**
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- MONEY.** See *Currency*.
- MONOMANIA.**
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- MONTANA.**
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- MUTINY.** See *Offenses on the High Seas*.

N.

NATIONAL BANK. See *Embezzlement*.

crime of "abstraction" from, what. Crimes, § 1252.
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NEGLIGENCE.

death by, of captain, engineer, etc. Crimes, § 8193.
criminal, of persons in charge of steamboats. Crimes, §§ 1307-1310.
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NEGROES. See *Civil Rights*.**NEUTRALITY.**

offenses of fitting out military expedition against foreign power, and entering foreign military service. Crimes, §§ 1275-1285.
augmenting force of belligerent, what. Crimes, § 1299.
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NEW TRIALS.

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OFFENSES UNDER ELECTION LAWS. See *Conspiracy*.

1. IN GENERAL.
2. WHO ARE OFFICERS.
3. LIABILITY OF OFFICERS.
4. POWER OF CONGRESS.
5. ILLEGAL VOTING OR REGISTRATION.
6. INDICTMENT.

1. IN GENERAL.

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b. *Liability of judges*.

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2. WHO ARE OFFICERS; WHO NOT.

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3. LIABILITY OF OFFICERS.

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4. POWER OF CONGRESS.

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1. IN GENERAL.
2. REVOLT OR MUTINY.
3. CONFINING THE CAPTAIN.
4. USING WEAPON BY MASTER.
5. PUNISHMENT OF SEAMEN.
6. LEAVING SEAMAN IN FOREIGN PORT.
7. CASTING AWAY VESSEL.

1. IN GENERAL.

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 power of congress to punish, upheld. Crimes, § 423.
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2. REVOLT OR MUTINY.

a. *In general.*

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b. *What is a revolt. See post, 3.*

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c. *What is not a revolt. See infra, e.*

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d. *Attempt to revolt, what.*

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 illegal combination of crew, disobedience and incitement thereto, so as to destroy master's authority. Crimes, § 391.
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 actual disobedience to some order not necessary. Crimes, § 402.
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OFFENSES ON THE HIGH SEAS, REVOLT OR MUTINY — continued.

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the pilot, who is an "officer." Crimes, § 430.

but not the crew of vessel not licensed and enrolled, under act of 1835. Crimes, § 433.

nor the crew of whaler, when. Crimes, § 434.

seamen need not be American citizens, if on American vessel. Crimes, §§ 493, 494.

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g. *High seas, what.* See *Piracy*.

ship in harbor, tied to the shore, is in. Crimes, §§ 374, 378.

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h. *Evidence.*

that ship is American property, sufficient. Crimes, §§ 373, 377.

i. *Jurisdiction.*

mutiny, etc., committed on American ship in foreign jurisdiction, are cognizable by federal courts. Crimes, §§ 375, 377-380.

so if committed on ship in a river. Crimes, § 446.

j. *Indictment.*

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4. USING WEAPON BY MASTER.

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5. PUNISHMENT OF SEAMEN.

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6. LEAVING SEAMAN IN FOREIGN PORT; FORCING HIM ASHORE.

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7. CASTING AWAY OR BURNING VESSEL.

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OFFENSES BY OFFICERS. See *Conspiracy; Postoffice*.

act of 1846.

clerk of assistant treasurer of the United States is an officer or person, etc. Crimes, §§ 831, 835-841. See § 846.

so of a postoffice clerk acting as a cashier. Crimes, § 848.

applies to subordinate as well as principal officers. Crimes, § 839.

act of 1866.

clerk of assistant treasurer not within the. Crimes, §§ 832, 835-841.

act of 1873.

surgeon is within the. Crimes, §§ 833, 842, 843.

a justice of the peace is liable for attempting to obstruct justice in a federal court. Crimes, §§ 834, 844, 845.

a clerk at currency counter in treasury department is an officer. Crimes, § 846.

proposal by defaulting officer to deposit sum to secure balance to be found against him, not a confession. Crimes, § 847.

criminal intent unnecessary; negligence enough. Crimes, § 849.

an officer acts fraudulently when. Crimes, § 850.

by justice of the peace for irregular discharge of prisoner, and taking money for bail. Crimes, § 1433.

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homicide in country of, tried on federal side of territorial court. Crimes, § 1254.

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crimes of Indians against Indians not punishable; white adopted into a tribe not an "Indian." Crimes, § 1256.

selling liquor to Indians is a crime without the reservation, when. Crimes, § 1257.

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exception, "an Indian in an Indian country," in § 2189, R. S., explained. Crimes, § 1259.

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Alaska not in (see *Alaska*). Crimes, §§ 1262, 1263.

OFFENSES UNDER PENSION LAWS.

- of withholding money from pensioner, complete when received and not paid over on demand. Crimes, §§ 1022, 1025-26, 1032.
- no defense that statute requires money to be paid to pensioner. Crimes, § 1035.
- new or increased pensions included. Crimes, § 1030.
- agent may retain his legal fees, and any sum lawfully agreed on, on independent consideration. Crimes, §§ 1023, 1027.
- cannot withhold either the check or the money. Crimes, §§ 1024, 1028.
- money protected by statute until paid over unconditionally. *Id.*
- power of congress. Crimes, § 1029.
- when check deposited in bank it is no longer protected by statute. Crimes, § 1031.
- false claim presented by pensioner punishable. Crimes, § 1033.
- statute of limitations runs on, but each claim on certificate a new offense. Crimes, § 1034.
- indictment* charging receipt of illegal fees, held bad. Crimes, § 1036. See § 1040.
- for various crimes under pension laws. Crimes, §§ 2638-40.
- legal fees, what. *Id.*
- claimant in act of 1864 means pension claimant. Crimes, § 1039.
- who are agents. Crimes, § 1041.
- a pension is "allowed" when commissioner directs its payment. Crimes, § 1042.

OFFENSES UNDER REVENUE LAWS. See *Violation of Revenue Laws*.

OFFICE.

- what is an; distinction between a government office and a government contract. Crimes, §§ 836, 837.

OFFICERS. See *Corruption; Offenses by Officers; Removal of Causes; Resisting an Officer*.OPENING LETTERS. See *Postoffice*.

P.

PARDON. See *District Attorney; Principal and Accessory*.

1. GENERALLY.
2. WHO MAY PARDON.
3. WHAT AMOUNTS TO.
4. CONSTRUCTION AND EFFECT.

1. GENERALLY.

- of accessory testifying for prosecution. Crimes, §§ 3028, 3029-30, 3053.
- must be pleaded, when. Crimes, §§ 3231, 3245-47.
- is a deed to which delivery is essential. Crimes, §§ 3232, 3245-47, 3291-92.
- what not a delivery. Crimes, § 3292.
- accused may be re-arrested after conditional. Crimes, §§ 3238, 3257-62.
- effect of agreements for immunity. Crimes, § 3474.
- proclamation of amnesty of December 8, 1863, embraced previous convictions. Crimes, §§ 3239, 3257-62.
- setting forth offense in. Crimes, § 3285.
- prisoner accepting conditional, is not under duress. Crimes, §§ 3241, 3257-62.
- judicial notice taken of proclamation of. Crimes, § 3242; *Id.*
- proceeds on theory of guilt of accused, in general. Crimes, §§ 3243, 3257-62.
- meaning of term appears from English authority. Crimes, § 3253.
- limitations on power of. Crimes, § 3254.
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- revocable until delivery. Crimes, §§ 3233-34.
- proper cases for. Crimes, §§ 3293-95.
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- when payment of fine condition precedent; sec. 1042, R. S. Crimes, § 3301.
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2. WHO MAY PARDON.

- the president; he may also commute death penalty to life imprisonment. Crimes, §§ 3208-3211, 3236, 3252-56.
- and may grant conditional pardon. Crimes, § 3255.
- power of the president; he may remit costs, fines (except when paid), forfeitures and judgment against sureties. Crimes, §§ 3264-80.
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- secretary of treasury may remit certain penalties. Crimes, § 3287.
- a part of sentence at one time and part at another may be remitted. Crimes, § 3339.
- president may restore civil rights. Crimes, §§ 3328-33.
- before conviction, when. Crimes, §§ 3302-3305.
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PARDON — continued.

4. CONSTRUCTION AND EFFECT.

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PAY AND BOUNTY. See *Bounty*.

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PERJURY.

1. IN GENERAL.

2. CRIMINAL INTENT.

3. MATERIALITY.

4. OATH.

5. WHO MAY ADMINISTER OATH.

6. JURISDICTION.

7. INDICTMENT.

1. IN GENERAL.

punishment for. Crimes, § 3080.

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false affidavit under Virginia claims act indictable. Crimes, §§ 1045, 1048-54.

affidavit to a fact does not necessarily imply more than belief. Crimes, § 1047.

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subornation, what. Crimes, § 2516.

under act of 1823 the oath need not be in a judicial proceeding. Crimes, § 1048.

in joint answer. Crimes, § 1037.

to cheat the government, a misdemeanor. Crimes, § 1058.

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whole testimony of witness need not be proved. Crimes, § 1070.

proceeding in orphans court judicial. Crimes, § 1078.

two witnesses no longer needed; proof may be by books, etc., when. Crimes, § 1064.

necessary to convict, or one with corroborating facts. Crimes, § 1065.

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promissory oath is not. Crimes, § 1088.

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2. CRIMINAL INTENT.

quære, whether mere rash or reckless statements can be criminal. Crimes, §§ 1044, 1046, 1047, 1060.

swearing on inducement of friends, and on statement that matter true, not indictable; must be wilful and corrupt. Crimes, §§ 1055, 1056, 1057, 1090.

rash statement on advice of counsel, indictable. Crimes, § 1058. See § 1080.

whether oath made on misconstruction of law, a question for jury. Crimes, § 1059.

so of question of intent. Crimes, § 1062.

false oath which deponent thinks he is not obliged to make, not indictable. Crimes, § 1061.

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PERJURY — continued.

3. MATERIALITY.
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4. OATH, WHAT.
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 - a. *Voluntary oaths.*
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 - b. *Case in which oath authorized.* See Crimes, § 1081.
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as to fishing bounty. Crimes, §§ 1090, 1091-1094.
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5. WHO MAY ADMINISTER OATHS.
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federal judge may, as to clerk's account. Crimes, § 1073.
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6. JURISDICTION.
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7. INDICTMENT. See *Indictment*.
 - a. *What must be stated.*
legal authority and jurisdiction of officer taking oath; indictment held bad. Crimes, §§ 2507, 2512-15.
that the proceeding was one in which oath required. Crimes, § 2508; *Id.*
the particular charge in such proceeding. *Id.*; §§ 2509, 2514-15.
that suborned testimony was false to knowledge of accused. Crimes, §§ 2510-11, 2516-19.
and that the persons suborned knowingly and wilfully swore falsely. Crimes, § 2532.
official title of officer taking oath. Crimes, § 2513.
that defendant knowingly and corruptly swore false. Crimes, § 2599.
the proceeding; that it was before a "judge sitting in bankruptcy," good. Crimes, § 2522.
time it took place. Crimes, § 2526.
forum or officer. Crimes, § 2531.
 - b. *What need not be.*
materiality, when it appears from face of charge. Crimes, §§ 2520-21.
act requiring the oath. Crimes, § 2530.
in bankruptcy; petition need not be set out, when. Crimes, § 2523.
nor the schedule, when. Crimes, § 2524.
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PILOT.

is an officer, when. Crimes, § 490.

PIRACY.

1. IN GENERAL.
2. WHAT IS.
3. WHAT IS NOT.
4. PUNISHMENT.
5. EVIDENCE.
1. IN GENERAL — POWER OF CONGRESS.
to define piracy. Crimes, §§ 511, 532-534.
cannot make that piracy which was not by the law of nations, so as to give jurisdiction to federal courts. Crimes, §§ 515, 535-541.
to punish piracy with death. Crimes, § 533.
confederating, combining, etc., is what. Crimes, §§ 536, 537.
indictment for. Crimes, § 2641. See *Indictment*.
2. WHAT IS PIRACY.
an offense against the law of nations. Crimes, §§ 533, 536.
is robbery on the sea, *animo furandi*. Crimes, §§ 533, 536, 504-506.
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PIRACY, WHAT IS—continued.

under act of 1790.

robbery, larceny or murder on high seas, or in a bay, harbor or basin, either by or against federal citizens only, for plunder, out of jurisdiction of any state of the Union, or on vessel having no national character. Crimes, §§ 530, 544, 552, 559, 563, 569.

or by persons of any nationality, upon any vessel (such vessel losing its national character by piracy). Crimes, §§ 542, 543, 554, 558.

or by persons not lawfully sailing under foreign flag. Crimes, § 558.

though under commission to cruise as a privateer if capture is for plunder.

Crimes, §§ 527, 551, 557, 558, 572-574.

or of unknown and unacknowledged power. Crimes, § 557.

unless on a vessel in fact and right the property of foreign subjects. Crimes, § 552.

either on board the vessel or in the sea. Crimes, § 555.

without any authority or commission. Crimes, § 553.

by commissioned Confederate privateer. Crimes, § 574.

by inferior officers of privateer, under orders, knowing their act to be criminal.

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under act of 1819.

robbery on the high seas, for plunder. Crimes, § 534.

under act of 1820.

robbery on high seas, *animo furandi*, on ship, vessel or ship's company, or its lading, by citizen or foreigner, with or without a foreign commission, with felonious intent. Crimes, §§ 567, 568, 577, 578, 580.

high seas, what. See *Offenses on the High Seas.*

a vessel is on the high seas, when in an open road. Crimes, § 549.

3. WHAT IS NOT. See *Offenses on High Seas.*

capture, in war, between belligerents, or by commissioned vessel of unacknowledged insurgent, or by mistake. Crimes, §§ 570, 571, 584.

or homicide on ship by kidnapped persons to regain their liberty. Crimes, § 581.

or foreign war ship augmenting force in federal port. Crimes, § 582.

or larceny, etc., from prize cargo. Crimes, § 588.

or by inferior officers of privateer, under orders, not knowing the act to be criminal. Crimes, §§ 589, 590.

under act of 1790.

robbery on high seas by foreigners or insurgents on foreign ships, not merely as a color for piracy. Crimes, §§ 520, 536, 540, 541.

or murder by foreigner on foreign ship. Crimes, § 545.

4. PUNISHMENT.

under act of 1790, by death. Crimes, §§ 535, 579, 588.

may be by power first capturing the offender. Crimes, §§ 575, 576.

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 - a. In General.
 - b. Lottery Circulars, etc.
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7. INDICTMENT.
 - a. Generally.
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4. ROBBERY THE MAIL.

act of 1825 does not punish embezzlement by an agent fully authorized to receive and open letters. Crimes, §§ 874, 894-897.

unless he receives it with intent to pry into another's business or secrets. Crimes, § 896.

under section 23 it must be shown that bank-notes stolen were of some value. Crimes, §§ 875, 898-904.

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letter from which theft made need not be taken out of the postoffice building. Crimes, §§ 876, 898-904.

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local mail agent and telegrapher liable, though receiving no compensation. Crimes, § 940.

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it is otherwise under § 5467. Crimes, § 935.

embezzlement by postmaster, what. Crimes, § 933.

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5. OPENING LETTERS, ETC.

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applies only to letters in transit, and not to those withheld by assistant from postmaster at office of destination. Crimes, §§ 878, 905-907.

and not to drop letters. Crimes, § 921.

cases reviewed as to. Crimes, § 892.

after mailing no one but writer or person addressed can open. Crimes, §§ 916, 918.

letters of prisoners protected. *Id.*

permission to sheriff to open letter does not extend to letter after its deposit in the postoffice. Crimes, § 917.

a state officer has certain power over correspondence of prisoner while it is out of postal control only. Crimes, § 919.

a person not addressed may open and read if the letter was written with that view. Crimes, § 920.

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6. NON-MAILABLE MATTER. See *post*, 7, c.a. *In general.*

it is no defense that the matter was sent in answer to a detective's decoy letter and under fictitious names. Crimes, §§ 973, 1010-14.

one causing matter to be sent, as well as the mailer, is within the act of 1876. Crimes, §§ 973, 1010-14.

b. *Letter or circular concerning lotteries; section 3934, R. S.*

the lottery need not be one established by law or incorporated. Crimes, §§ 956, 975-987.

the defendant's occupation and other extrinsic circumstances are material. Crimes, §§ 957, 975-987.

the law applies to sealed letters, and is constitutional and valid. Crimes, §§ 958, 988-990.

the same instrument may be both letter and circular. Crimes, § 975.

need not be charged to be a lottery "offering prizes." Crimes, § 976.

papers contained in same envelope with such circular are admissible. Crimes, § 981.

so of testimony of other persons who have visited place of business and seen lottery tickets sold there. Crimes, § 982.

POSTOFFICE, THE, NON-MAILABLE MATTER, *Letter or circular concerning lotteries* — con.
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congress may punish persons for sending lottery tickets in the mail. Crimes, §§ 971,
972, 1015.

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- c. *Mailing letters, etc., with intent to defraud; section 5480, R. S.*
using the mails to procure the circulation of counterfeit money is indictable.
Crimes, §§ 959, 991-993.

the gist of the offense is the abuse of the mail; defendant's admission that he sent
the letter, admissible. Crimes, §§ 960, 991-993.
what sufficient proof of this offense. Crimes, § 1017.

- d. *Articles, etc., relating to abortion; section 3893, R. S.*
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for knowingly sending it. Crimes, §§ 961, 994, 995.

the advertisement need not indicate the article to be used or its properties. *Id.*
mailing notice showing means of abortion; indictment in conjunctive, good.
Crimes, §§ 963, 994, 995.

the fact that the articles sent were actually harmless and ineffectual is immaterial.
Crimes, §§ 964, 965, 996-97, 1010-14.

also that they could not be actually obtained at the specified place. Crimes, § 997.
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Crimes, §§ 970, 1005-1009.

congress cannot directly prevent the use of such articles; it can simply prevent the
misuse of the mails. Crimes, §§ 970, 1005-1009.
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notice may be in sealed letter. Crimes, § 1018.

a written slip without signature is a "notice." Crimes, § 1019.

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- e. *Indecent, obscene, etc., matter; section 3893, R. S.* See post, 7, c.

"indecent" means immodest or impure; coarse or profane language not indictable.
Crimes, §§ 967, 998.

a private sealed letter, outwardly unobjectionable, not included. Crimes,
§§ 968, 969, 999-1004.

newspaper not included in act of 1873; but is in act of 1876. Crimes, § 1000.

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a principal may be indicted for acts of his agent. Crimes, § 1013.

what is the test of obscene matter, Crimes, §§ 1021, 2486, 2487.

on the trial, the object and use of, not considered. Crimes, §§ 2451, 2480-89.

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- a. *Generally.*

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- b. *What must be stated.*

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- c. *What need not be stated.*

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letter need not have come to his hands to be sent by post. Crimes, § 2446; *Id.*

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as to non-mailable matter; obscene matter need not be set out, when. Crimes,

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e. *Surplusage.*

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Crimes, § 1500.

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3. WHO ARE ACCESSORIES.

4. WHO ARE PRINCIPALS.

5. TRIAL OF ACCESSORY.

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2. WHAT CRIMES ADMIT ACCESSORIES.

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3. WHO ARE ACCESSORIES.

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PRINCIPAL AND ACCESSORY — continued.

4. WHO ARE PRINCIPALS.

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1. IN GENERAL.

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3. OPPOSING COLLECTOR, ETC.
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 all engaged are principals. Crimes, § 1136.
 by person in possession of lands by threats and violence. Crimes, §§ 1137, 1138.
 act of 1790 embraces all legal process whatever. Crimes, § 1140.
 writs issued by judge protected. Crimes, § 1142.
 so of *alias* writs. Crimes, § 1147.
 resistance may be before execution attempted. Crimes, § 1141.
 by words and acts, as by refusal to come, and not coming. Crimes, § 1143.
 conspiracy for; instance of. Crimes, §§ 1145, 1146.

3. OPPOSING COLLECTOR, ETC.

inspectors acting after death of collector appointing them may be opposed. Crimes, § 1149.
 justifiable when no probable cause to suspect illegality. Crimes, § 1150.
 probable cause for seizure must be shown to support indictment. Crimes, § 1151.
 question of, for jury under instructions. Crimes, § 1153.
 each one opposing liable for entire penalty. Crimes, § 1159.
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 inspector is "an officer of the customs," under act of 1799. Crimes, § 1153.
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 forcibly impeding, what; property seized need not be condemned. Crimes, §§ 1156, 1157.
 no defense that the intent was chastisement, and not detention. Crimes, § 1160.

4. OPPOSING ARREST OF DESERTER.

defendant aiding the assault, liable; resistance while officers returning for stronger force. Crimes, §§ 1161-62.
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5. OPPOSING ENROLLING OFFICERS.

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REVENUE. See *Internal Revenue*; *Violation of Revenue Laws*.**REVOLT.** See *Offenses on the High Seas*.**RIOT.**

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S.

SCIRE FACIAS. See *Bail*, 4.

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SELF-DEFENSE. See *Homicide*, 5.

SENTENCE.

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SLAVE TRADE.

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1. IN GENERAL.
2. CONSTRUCTION.
3. REPEAL BY IMPLICATION.
4. REPUGNANCY.
5. LEGISLATIVE INTENT.
6. DIRECTORY PROVISIONS.

1. IN GENERAL.

what an exception and what provisos. Crimes, § 2056.
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2. CONSTRUCTION.

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of crimes act of 1790. Crimes, §§ 1631-35.
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3. REPEAL BY IMPLICATION.

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4. REPUGNANCY. See *Counterfeiting and Forgery*.

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5. LEGISLATIVE INTENT.

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6. DIRECTORY PROVISIONS.

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STEALING. See *Larceny*.

STEAMBOATS. See *Vessels*.

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STOLEN PROPERTY. See *Receiving Stolen Property*.

SUBORNATION.

of perjury, what is; indictment. Crimes, §§ 2516-19.

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SURGEON.

an "officer" under act of 1873. Crimes, §§ 833, 842, 843.

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SURPLUSAGE. See *Indictment*, 14; *Statutes*, 1.

T.

TENNESSEE.

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TERRITORIAL COURTS.

are courts of United States. Crimes, § 3191.

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THREATENING LETTERS.

consul not privileged from prosecution for sending. Crimes, § 1400.

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TREASON.

1. IN GENERAL.

2. LEVYING WAR AGAINST UNITED STATES.

3. ADHERING TO THEIR ENEMIES.

4. PUNISHMENT.

5. INDICTMENT.

1. IN GENERAL.

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judgment of forfeiture for, where erroneous. Crimes, § 1228.

"enemies" does not embrace rebels or insurgents. Crimes, §§ 1170, 1186.

by taking government fort by state artillery company. Crimes, § 1237.

no accessories in; all principals. Crimes, §§ 1173, 1183-94. See §§ 1195, 1205-1207.

the rebellion was treasonable. Crimes, §§ 1235-36.

state of war proved by notoriety, proclamations, and acts of congress. Crimes, § 1190.

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TREASON, IN GENERAL—continued.

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 nature and definition. Crimes, §§ 1202, 1203.
 two witnesses; provision does not apply to grand jury. Crimes, § 1210.
 by armed resistance of the execution of the law. Crimes, § 1218.
 conspiracy for, may be formed how. Crimes, § 1219.
 by insurrection to prevent execution of excise law. Crimes, § 1221.
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2. LEVYING WAR AGAINST THE UNITED STATES.

must be assemblage of persons to overthrow the government, or coerce its conduct. Crimes, §§ 1171, 1183-94.
 either to wholly overthrow it, or in parts of the country, or to defeat one of its laws. *Id.*, § 1220. See § 1232.
 against a state, not treason. Crimes, § 1233.
 the rebellion was a. Crimes, §§ 1172, 1183-94.
 used in the constitution in the sense of the English statute. Crimes, § 1185.
 by fitting out cruiser against United States, with letter of marque from the Confederate president. Crimes, §§ 1175, 1178, 1192.
 not judged by number of persons alone; must be conspiracy, and armed resistance or intimidation by numbers. Crimes, §§ 1179, 1195-1201.
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 English rules as to; constructive treason. Crimes, §§ 1199, 1204.
 must be for a general or public purpose, and not for private ends. Crimes, § 1200.
 proof of; time, numbers; executive communications irrelevant. Crimes, §§ 1203, 1209.
 declarations of defendant best proof; but not essential. Crimes, §§ 1211-12.
 conspiracy for, is not treason; what amounts to. Crimes, §§ 1213-17.

3. ADHERING TO THEIR ENEMIES, ETC.

the enterprise to give aid, etc., need not be successful. Crimes, §§ 1176, 1193.
 aiding and abetting treason, what. Crimes, § 1195.
 by American citizens in French vessel. Crimes, § 1235.
 by delivering up prisoners and deserters to the enemy. Crimes, § 1226.
 aiding France in war against United States. Crimes, § 1234.
 by forcible seizure of raft from military guard. Crimes, § 1231.

4. PUNISHMENT.

construction of acts of 1862 and 1790. Crimes, §§ 1174, 1183-94.

5. INDICTMENT. See *Indictment*.

following language of act of 1862, good; need not use the term "levying war." Crimes, § 1189, 2665.

TREATIES. See *Extradition*, 1, a.

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separate, of joint offense, not matter of right. Crimes, §§ 2674, 2691-93. See § 1110.

TWICE IN JEOPARDY.

1. IN GENERAL.
2. DOUBLE PUNISHMENT.
3. DISCHARGE OF JURY.
4. WHAT IS JEOPARDY; WHAT NOT.

1. IN GENERAL.

must be pleaded. Crimes, §§ 1786-87.
 pleading and proof of. Crimes, § 1787.
 when a bar to a civil action. Crimes, §§ 1788-89.
 keeping disorderly house a single offense. Crimes, § 1800.
 and keeping faro bank, two offenses. Crimes, § 1801.
 defrauding two persons, two offenses. Crimes, § 1806.
 so of stealing pocket-book and contents. Crimes, § 1807.
 alleged perjury held to be single. Crimes, § 1804.
 possession of two counterfeit plates is one offense. Crimes, § 1803.
 offense against two jurisdictions, double. Crimes, § 1808.
 offenses are double when supported by different evidence. Crimes, § 1805.
 passing counterfeit money, when double. Crimes, § 1802.
 same act punishable by state and United States. Crimes, § 1809.

2. DOUBLE PUNISHMENT.

cannot be imposed, directly or indirectly. Crimes, §§ 1759, 1767-74.
 statute may provide double punishment. Crimes, §§ 1761, 1775-77.
 judgment inflicting, erroneous but not void. Crimes, § 1772.
 punishment by congress, no bar to prosecution for same act. Crimes, § 1809.

3. DISCHARGE OF JURY.

proper, by federal court, when necessity requires, without consent of accused. Crimes, §§ 1762, 1778-82, 1793-96.
 presumed that defendant did not consent, unless the record shows the contrary. Crimes, §§ 1763, 1780.

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TWICE IN JEOPARDY, DISCHARGE OF JURY—continued.

illness of district attorney and absence of witnesses do not create such necessity.

Crimes, § 1781.

operates as an acquittal if without consent. Crimes, § 1782.

when defendant estopped to allege discharge without necessity. Crimes, § 1795.

generally, court cannot discharge jury without consent of defendant. Crimes, §§ 2043, 2044.

for contumacy of witness, when. Crimes, § 2864.

4. WHAT IS JEOPARDY; WHAT NOT. See *supra*, 1.

trial and acquittal in court martial, not. Crimes, §§ 1766, 1782-84.

is acquittal or conviction and judgment thereon. Crimes, § 1785.

irregularity in trial, not. Crimes, § 1790.

nor new trial at request of accused. Crimes, §§ 1791, 1797, 2950.

nor if court without jurisdiction. Crimes, § 1792.

nor discharge of jury unable to agree. Crimes, § 1793.

nolle prosequi and discharge of jury an acquittal. Crimes, § 1793.

one convicted of assault and battery may be tried for riot. Crimes, § 1799.

proceedings in district court before removal, not. Crimes, §§ 3204, 3205.

U.

UNDERWRITERS. See *Insurance*.

UNITED STATES.

cannot be sued, nor can alien. Crimes, § 890.

UNITED STATES COURT COMMISSIONER. See *Extradition; Preliminary Examination*.

UTTERING. See *Counterfeiting and Forgery; Forgery*.

V.

VACATING JUDGMENT. See *Judgment*.

VARIANCE. See *Conspiracy*.

1. GENERALLY.

2. NOT FATAL.

3. FATAL.

1. GENERALLY.

from indictment on counterfeiting, what not a. Crimes, §§ 306, 307.

whether "Jna." same as "Jno.," and "Fayelville" same as "Fayetville," submitted to jury. Crimes, § 2870.

all material averments must be proved, though negative. Crimes, § 2872.

contract set up must be proved. Crimes, § 2896.

2. NOT FATAL.

that ship of Willard Nye charged to be that of William Nye. Crimes, §§ 2051, 2065-70.

killing a "gelding" is killing a "horse." Crimes, § 1873.

charge of act in one county, proof in another, when. Crimes, § 2123.

strict proof of instrument forged unnecessary. Crimes, § 2126.

"M. G., Esq.," on letter, same as "M. G., Esq., Cashier." Crimes, § 2127.

tons burden of boat immaterial, when. Crimes, § 2128.

grammar or verbiage. Crimes, § 2129.

"steers" and "working cattle" synonymous. Crimes, § 2174.

as to strength of liquors, when. Crimes, §§ 2387, 2415-18.

a "book" need not be bound; what is. Crimes, §§ 2449, 2480-82.

"to No. 22," etc., same as "No. 22," etc. Crimes, § 2499.

3. FATAL.

keeping a gaming room is not keeping a disorderly house. Crimes, § 1341.

property charged that of A. proved that of B. Crimes, § 2068.

A. charged to have been robbed, but proof showing B. Crimes, § 2068.

"one M. per cent." is not "one per cent." Crimes, § 2125.

number of counterfeit bill, and whether national or currency, essential. Crimes, §§ 2334-36.

description of, must be shown, though needlessly particular. *Id.*

certain held immaterial. Crimes, § 2336.

"W. Marbery" not same as "W. Marbury." Crimes, § 2358.

"Jos. Johnson" not same as "Joseph Johnson." Crimes, § 2490.

in perjury, as to what accused swore to. Crimes, § 2527.

or as to time of trial on which perjury occurred. Crimes, § 2528.

as to person from whom defendant received stolen goods. Crimes, § 1107.

VENUE. See *Change of Venue; Removal of Causes*.

where court may direct in criminal case. Crimes, §§ 2034-35, 2769-70.
when not set aside. Crimes, §§ 2804, 2805.
when not disturbed. Crimes, §§ 63, 64.

VESSELS.

offense of going aboard of, when about to arrive. Crimes, §§ 1812-1817.

VIOLATION OF REVENUE LAWS. See *Homicide*, 5.

1. IN GENERAL.
2. REMOVING SPIRITS.
3. STAMPS.
4. SALE WITHOUT LICENSE.
5. CONSPIRACIES.
6. INDICTMENT.
 - a. Generally.
 - b. What must be stated.
 - c. What need not be.
 - d. In words of statute.
 - e. Joinder or duplicity.

1. IN GENERAL

corporation may be indicted for. Crimes, § 756.
how late the tax may be paid. Crimes, § 777.
by affixing stamp like a revenue stamp to box of domestic cigars. Crimes, § 763.
what tobacco liable under act of 1868. Crimes, §§ 778, 779.
all concerned in carrying on distillery are liable. Crimes, §§ 766, 767.
what insufficient to convict. *Id.*
sale of tobacco at retail, what is. Crimes, § 780.
lottery dealer must pay special tax. Crimes, § 768.
unlawful distillery; what proof necessary. Crimes, § 769.
by not putting sign on distillery. Crimes, § 771.
mistake of law no defense. Crimes, § 772.
prosecution for, barred in five years. Crimes, § 773.
act of 1866 not repealed by that of 1868. Crimes, § 774.
neglect of officer to register license does not excuse defendant, when. Crimes, § 776.
proceedings may be either by indictment or *in rem*. Crimes, § 781.
act as to payment into treasury by collectors interpreted. Crimes, § 1462.
fraudulent entry of goods an offense. Crimes, § 1463.
by possessing cigars on which tax not paid. Crimes, § 783.
peddler held not indictable. Crimes, § 784.
rectification of spirits, how shown. Crimes, § 785.
deputy liable for receiving fraudulent bonds. Crimes, § 787.
what material fit for distillation. Crimes, § 788.
use of excess of material; place of distillation, what. Crimes, §§ 789, 790.
by forgery of owner's oath. Crimes, § 1464.
unloading without permit. Crimes, § 1465.
smuggling, what; act of 1842. Crimes, §§ 1466-67.
resisting customs officers. Crimes, § 1468.

2. REMOVING SPIRITS.

not necessary to prove precise quantity alleged, nor precise time, nor that defendant was personally present. Crimes, §§ 716-719.
fraudulent intent essential. Crimes, §§ 723-732, 743, 750.
what amounts to. Crimes, § 745.
what must be shown on indictment for. Crimes, §§ 723, 746.
need not be removed from registered distillery. Crimes, § 749.
not necessary to show concealment after removal. Crimes, § 726.
nor that bonded warehouse from which removed was sanctioned as such by proper officer. Crimes, § 747.
indictment for, from distillery, sustained by proof of removal from warehouse connected therewith. Crimes, § 751.
aiding and abetting, a distinct offense from removal. Crimes, § 742.
knowledge of, and consent for removal, are enough. Crimes, § 748.

3. STAMPS.

a. Canceling.

must be effaced when package is emptied. Crimes, § 752.
if cask only partially emptied, it is otherwise, when. Crimes, § 757.
omission of employee is defendant liable for his intent not material. Crimes, § 753.
See § 757.

b. When necessary.

not on receipt of carrier's bill of lading, which is in fact a bill of lading. Crimes, § 755.
necessary on due bills and on receipt for bond and horse hire. Crimes, § 763.
for payment of sums together more than \$20. Crimes, § 764.

VIOLATION OF REVENUE LAWS, STAMPS — continued.

- c. *Failure to affix.*
must be intentional. Crimes, § 759.
intent presumed from failure. Crimes, § 760.
- d. *Possessing previously used stamps.*
indictment for, not sustained by possession of parts of such stamps. Crimes, § 763.
- 4. **SALE WITHOUT LICENSE.**
the seller is liable under the revenue law though he afterwards pays the tax. Crimes, §§ 720, 733-737, 738, 775.
and for sale after license expires, though selling only liquors bought during life of license. *Id.*
for single act. Crimes, § 740.
and for selling only at retail to those with whose money he buys the liquor. Crimes, §§ 721, 733-737.
though he honestly intend to apply proceeds to sanitary commission. Crimes, § 739.
and without actual sale, but having means of sale. Crimes, § 741.
who is a retail dealer. Crimes, § 734; who not, § 770.
instruction defining retail dealer is proper. Crimes, §§ 722, 733-737.
- 5. **CONSPIRACIES.**
to remove spirits, defined. Crimes, §§ 728-732.
when repeal of act did not affect subsequent conviction for. Crimes, § 744.
- 6. **INDICTMENT.** See *Indictment.*
 - a. *Generally.*
allegation that tax unpaid shows it to be due and owing. Crimes, §§ 2374, 2394-99.
charge of illicit distilling held good. Crimes, §§ 2336, 2415-18.
how offense of illegal distilling charged. Crimes, §§ 2414, 2415.
count for removing spirits, held good; indictment. Crimes, § 2426.
how removal of spirits charged. Crimes, § 2432.
offense of making false entry, and aiding same, may be charged conjunctively. Crimes, § 2555.
 - b. *What must be stated.*
grounds of liability to pay tobacco-dealer's tax. Crimes, §§ 2378, 2402-6.
as to sales without license. Crimes, §§ 2388, 2415-18.
acts showing attempt to defraud United States. Crimes, §§ 2391, 2422-28.
accused must be advised of nature of offense. Crimes, § 2399.
accusation must be identified. Crimes, § 2403.
substance of accusation sufficient. Crimes, § 2413.
allegations must exclude innocence of accused. Crimes, § 2418.
intent of manufacturing and removing a still without notice. Crimes, § 2435.
in indictment for false entry of goods; all are principals. Crimes, §§ 2540-41, 2555-56.
sending writing not genuine and one simply false must be distinguished, when. Crimes, § 2546.
instance of bad charge of illegal importation. Crimes, § 2554.
charging offense of false entry by "fraudulent means," bad for not specifying them. Crimes, § 2556.
the facts constituting the illegality in smuggling. Crimes, § 2589.
 - c. *What need not be.*
means of fraud, when. Crimes, § 786.
time of distillation. Crimes, §§ 2375, 2394-99.
means by which accused became liquor dealer. Crimes, §§ 2377, 2402-2406.
that billiard table liable to pay tax, when. Crimes, §§ 2379-80, 2402-6.
that distilled spirits were alcoholic, when. Crimes, §§ 2382, 2410-14.
means of procuring distilling apparatus. Crimes, §§ 2383, 2410-14.
means of fraud or acts by which intent shown. Crimes, §§ 2384, 2410-14.
acts which amount to trading or keeping distillery. Crimes, §§ 2335, 2415-18.
precise time of keeping distillery. Crimes, *Id.*
manner of evading taxes or particulars of fraudulent bond. Crimes, §§ 2389, 2419-21.
when intent stated, the particulars thereof. Crimes, §§ 2390, 2422-28.
that failure to cancel stamps was wilful and intentional. Crimes, §§ 2392, 2422-28.
matters of evidence. Crimes, § 2412.
intent of offense relating to cigars. Crimes, § 2431.
particular facts of sale without license. Crimes, § 2433.
name of person delivering spirits to accused, when. Crimes, § 2434.
value of stamps. Crimes, § 2436.
particular description of property smuggled. Crimes, §§ 2536, 2548-54.
so on indictment for buying smuggled goods. Crimes, §§ 2537, 2548-54.
information need not state written instrument by which offense committed. Crimes, § 2588.

VIOLATION OF REVENUE LAWS, INDICTMENT — continued.

d. *In words of statute.*

act of July 20, 1868, contains no exception to be negatived. Crimes, §§ 2381, 2406, 2409.

precise words need not be used. Crimes, § 2393.

accused must be apprised of offense charged at all events. Crimes, §§ 2400, 2401, 2410.

exceptions must be negatived. Crimes, § 2407.

generally sufficient. Crimes, § 2419.

e. *Joinder or duplicity.*

removal and concealment of spirits a single offense. Crimes, §§ 2373, 2394-99.

separate sales not distinct offenses, when. Crimes, §§ 2376, 2403, 2401.

partners may be joined for false return made in firm name. Crimes, §§ 2393, 2429-30.

count charging two offenses, bad; the rule and its exceptions. Crimes, §§ 2394-96.

when objection not taken after verdict. Crimes, § 2416.

VIRGINIA.

duty of election judges. Crimes, §§ 341, 342.

VOTERS. See *Conspiracy*, 1, 5, 12, c.

congress does not prescribe qualifications of. Crimes, § 2288.

W.

WAREHOUSE BOND.

who is to give. Crimes, § 2421.

WARRANT. See *Arrest; Commitment; Extradition.*WASHINGTON. See *District of Columbia.*

city of, punishment of crimes in. Crimes, §§ 1469-74.

WAY.

not an offense to obstruct, when. Crimes, § 1892.

WITNESSES. See *Evidence.*

right of accused to have list of. Crimes, §§ 2703-18.

offense of corrupting; when case pending. Crimes, §§ 1406, 1408.

circumstances affecting credibility. Crimes, § 1116.

WORSHIP.

disturbance of public, an offense. Crimes, § 1405.

WRECK. See *Larceny; Shipwreck.*WRIT. See *Resisting an Officer.*

WRIT OF ERROR.

verdict sustained when it rests on any evidence. Crimes, §§ 63, 64.

overruling motion for new trial, not a *final* judgment. Crimes, § 2302.

quare, whether admission of testimony of witness on former trial, absent by procurement of prisoner, is reviewable. Crimes, § 859.

Ex. C. 113.

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